

August 2013

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Review was granted in the following cases during the month of August 2013:

Secretary of Labor, MSHA v. Trivett Trucking, Docket No. KENT 2011-1223. (Judge Tureck, June 28, 2013)

Secretary of Labor, MSHA v. Lewis-Goetz and Company, Docket No. WEVA 2012-1821. (Judge Rae, July 22, 2013)

Secretary of Labor, MSHA v. Nally and Hamilton Enterprises, Docket No. KENT 2011-434. (Judge Moran, July 24, 2013)

No case was filed in which review was denied during the month of August 2013.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 2, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEVA 2008-1825
	:	A.C. No. 46-08436-150504
PERFORMANCE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). At issue is whether the Administrative Law Judge failed to adequately explain his assessment of a civil penalty lower than the penalty proposed by the Secretary of Labor in his post-hearing brief. For the reasons that follow, we remand this matter to the Judge.

I.

Factual and Procedural Background

On February 11, 2008, Keith Sigmon, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), issued Citation No. 7279729 to Performance Coal Co. (“Performance”), alleging a significant and substantial (“S&S”) violation of 30 C.F.R. § 75.400. The citation indicated that he observed accumulations of float coal dust inside and on top of the No. 1 North Mains belt conveyor power center and on the mine floor, roof, and ribs surrounding the power center. Gov’t Ex. 3. The citation noted that one person would be affected by the violation, that injury was reasonably likely to be fatal, and that the operator’s negligence was moderate. *Id.* The Secretary subsequently proposed that Performance pay a civil penalty of \$4,329 for the violation.

The operator challenged the citation and proposed penalty, and the matter proceeded to hearing. At the hearing, the Judge ordered the parties to file post-hearing briefs 30 days after they received the hearing transcript. Tr. 196-97. The Secretary and Performance subsequently filed simultaneous post-hearing briefs.

In his post-hearing brief, the Secretary requested that the Judge make *de novo* findings of fact that there were seven people potentially affected by the violation, and that the violation resulted from high negligence. S. Post-Hr'g Br. at 17, 18, 20. The Secretary stated that because the evidence adduced at the hearing showed that the operator's negligence was high and seven miners were potentially affected, the penalty points set forth in 30 C.F.R. Part 100 increased, and a proposed increased penalty of \$34,653 was appropriate. *Id.* at 21. The operator did not reply to the Secretary's post-hearing brief.

In his decision, the Judge set forth his findings with respect to each of the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). 32 FMSHRC 1797, 1805-08 (Nov. 2010) (ALJ). The Judge considered the inspector's testimony that "numerous miners could be affected: the fire boss could be in the area conducting an inspection, maintenance shift personnel could be in the area servicing the belts, in addition, six miners were observed by Sigmon cleaning the south main belt." *Id.* at 1802. The Judge appeared to credit such evidence, stating in the S&S and gravity portion of his decision that miners at the power center and those who worked outby were subject to reasonably serious, or even fatal, injuries as a result of an accident. *Id.* at 1807. In addition, the Judge considered both parties' evidence regarding negligence, and accepted the inspector's designation of the level of negligence as moderate. *Id.* at 1807-08. The Judge concluded that "the Secretary's proposal is appropriate" and assessed a civil penalty of \$4,329. *Id.* at 1808.

The Secretary filed a petition for discretionary review, which the Commission granted. In his petition, the Secretary argues that the Judge assessed a lower penalty than that proposed by the Secretary in his post-hearing brief, and that the Judge erred by failing to acknowledge or explain the reduction.

II.

Disposition

As the Commission has frequently recognized, section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. *See, e.g., Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the Secretary's proposed penalties. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[Neither] the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission.").

Although there is no presumption of validity given to the Secretary's proposed assessments, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). The Judge "need not make

exhaustive findings but must provide an adequate explanation of how the findings contributed to his penalty assessments.” *Mining & Property Specialists*, 33 FMSHRC at 2964 (citations omitted).¹

Here, the Secretary proposed a significantly higher penalty in his post-hearing brief than that initially proposed, arguing that the increase was supported by evidence at trial showing a higher level of negligence and more miners potentially affected by the violation. The Judge did not expressly address the arguments made in the Secretary’s post-hearing brief. He did, however, discuss the negligence level. *See* 32 FMSHRC at 1802 (noting inspector had assessed the negligence level as “moderate” and supporting testimony); *id.* at 1807-08 (discussing “negligence” specifically for more than half a page and noting the factors he considered in deciding to “affirm Inspector Sigmon’s negligence finding”). He also noted that miners working out by the power center and travelling through the crosscut would have been injured in the event of a mine fire or explosion. *Id.* at 1807.

Although the Judge’s assessment of a civil penalty of \$4,329 may not have been in error, given his recitation of record evidence in support of his findings governing the operator’s negligence, the number of miners potentially affected, and the other relevant factors contained in section 110(i) of the Act, he should have considered directly the Secretary’s argument in favor of an increase in the penalty proposed. Accordingly, we remand this matter to the Judge so that he may expressly address the Secretary’s argument in favor of the increased proposed penalty.

¹ We need not decide whether the Secretary should have more formally pursued amendment or revision of the proposed penalty assessment. In this case, the operator has not challenged the penalty increase on grounds that it has suffered prejudice or surprise or that it did not have an adequate opportunity to rebut the Secretary’s argument. The operator did not respond to the Secretary’s post-hearing brief or request that it be allowed to do so. Under the circumstances, we conclude that Performance will not be prejudiced by a requirement that the Judge consider the Secretary’s argument in carrying out his independent duty to assess penalties under the Act.

III.

Conclusion

For the reasons set forth above, we hereby remand this matter to the Judge with instructions that he address the increased proposed penalty assessment set forth in the Secretary's post-hearing brief in a manner consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW
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August 14, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2009-371
	:	A.C. No. 46-01318-168124
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). At issue are five citations/orders issued against Consolidation Coal Company (“Consol”). Administrative Law Judge Margaret Miller affirmed the citations and orders. 32 FMSHRC 930 (July 2010) (ALJ). Consol filed a petition for discretionary review challenging the judge’s determinations, which the Commission granted. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background and Disposition

Consol operates the Robinson Run No. 95 Mine, an underground coal mine located in Marion County, West Virginia. The mine is subject to five-day spot inspections by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to Mine Act section 103(i) for liberation of excessive quantities of methane of more than one million cubic feet of methane or other explosive gases during a 24-hour period. 30 U.S.C. § 813(i). In August

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

and September 2008, MSHA Inspector Aaron Wilson conducted inspections at the mine. 32 FMSHRC at 931. A number of citations and orders were issued during the inspections, including the five at issue here. We set forth the factual and procedural backgrounds and the corresponding analytical dispositions for each of the citations and orders separately in the following sections.

A. Order No. 6608537; Accumulation Violation

On August 18, 2008, Inspector Wilson observed loose coal and coal fines accumulated underneath a coal conveyor belt from the tail roller outby for a distance of 17 feet. Gov't Ex. 1 (Order No. 6608537). According to the order, the accumulations were up to one foot deep and were in contact with the belt for a short distance. The accumulations were also piled up around the tail roller for a height of 20 inches across the 64-inch tail roller. The inspector's order stated that the accumulations were wet in nature but starting to dry out. The tail roller was warm to the touch. Accumulations were also present on top of the feeder in the form of fine and lump coal that was dry in nature. The inspector noted that the condition of the spillage of the tail piece was listed in the preshift record book with no corrective action for the five prior consecutive shifts since the midnight shift on August 17, 2008. *Id.*; 32 FMSHRC at 931.

The inspector issued an order under section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of 30 C.F.R. § 75.400, which requires that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate.” The inspector designated the violation as significant and substantial (“S&S”) and a result of the operator’s unwarrantable failure to comply.² The Secretary of Labor proposed a penalty of \$6,115. 32 FMSHRC at 931.

The judge found that the violation existed as cited in the order, and in fact, Consol’s witnesses did not dispute it. *Id.* at 932. The judge also determined that the violation was S&S and was the result of an unwarrantable failure. *Id.* at 935, 937. The judge assessed a penalty of \$7,500 based on the negligence and gravity of the accumulation violation and the fact that a fire at this location would affect everyone working in the mine. *Id.* at 949. The Commission granted review on the issues of S&S and unwarrantable failure.

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.” The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, 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.”

1. S&S Analysis

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Applying this analysis, we conclude that the first element is satisfied in that the judge found a violation. As to the second element, the judge determined that a discrete safety hazard existed as a result of the violation, consisting of “accumulations of coal rubbing against the belt and in the feeder [that] create a significant risk of smoke and fire in an underground mine environment.” 32 FMSHRC at 932. We examine this finding to determine if it is supported by substantial evidence.³ Inspector Wilson testified that the coal was dry around the edges of the tail piece, which was warm to the touch. Tr. 17-18, 20-22. He testified that additional coal accumulations were alongside and underneath the belt and were in some places in contact with the belt. Tr. 19-20. As the judge noted, “[f]rictional heat from the belt dries and heats the accumulations and, in turn, can cause a fire.” 32 FMSHRC at 933 (citing Tr. 18-20). Consol’s witness conceded that the coal was in contact with the bearing, Tr. 176, and in fact, one of the photos that Consol took of the condition shows accumulations in contact with the belt tailpiece. Gov’t Ex. 39(a); Tr. 41. The inspector also testified that additional accumulations were located

³ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

at the tail roller and that with continued operations, the coal would dry out, grind into smaller particles, and easily ignite. Tr. 21. The inspector noted that accumulations were also on top of the section feeder in the form of fine and lump coal, dry in nature, 55 inches in length, up to two feet high, and approximately one foot less than the width of the feeder. Tr. 18; Gov't Ex. 1.

The inspector's testimony, which was credited by the judge, 32 FMSHRC at 933, was corroborated by the testimony of Richard Sandy, a safety representative of the United Mineworkers of America ("UMWA"), who accompanied the inspector. Tr. 35, 108-09. Sandy testified that when the feeder was moved for cleaning, he could see that in addition to the coal observed by Wilson, there were further coal accumulations packed underneath the feeder. Tr. 111-12. Sandy also observed that coal was in contact with the belt and the tail roller where it was drying out. Tr. 110-11. He testified that this created a dangerous condition because, although the accumulations were wet in some areas, the accumulations were drying out in other areas, and the constant rubbing of coal touching moving parts would cause a fire given the high methane liberation at the mine. Tr. 110-13. Thus, substantial evidence supports the judge's finding that the cited accumulations contribute to a hazard of smoke and fire in the underground mine environment.

As to the third and fourth elements of *Mathies*, the judge found that it was reasonably likely that the hazard of smoke and fire would result in an injury that would have been of a serious or potentially fatal nature. 32 FMSHRC at 935. Both Wilson and Sandy testified that the accumulations created a dangerous condition which would result in thick black smoke, reducing visibility or the ability to breathe, or worse. Tr. 23-25, 111-12. As the Seventh Circuit explained in *Buck Creek*, 52 F.3d at 135-36, in affirming a judge's S&S determination, nothing more was necessary to support an inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation." *See also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners"); *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (holding that an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third element of *Mathies*).

We are not persuaded by Consol's argument that the accumulation violation should not be designated as S&S because the accumulations were in large part wet. The judge expressly credited the testimony of Inspector Wilson that the accumulations were drying out over the testimony of Larry Jones, the Consol safety personnel who accompanied the Inspector. 32 FMSHRC at 934. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). In addition, a number of photos taken by Consol depicting the accumulations show the coal beginning to dry out. Tr. 42-43, 46-47; Gov't Exs. 39C and 39M; C. Ex. 39M; 32 FMSHRC at 934. We also have long held that wet coal accumulations pose a significant danger in underground coal mines. *Black Diamond*, 7 FMSHRC at 1120-21 (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion); *Mid-*

Continent Res. Inc., 16 FMSHRC 1226, 1230, 1232 (June 1994) (affirming S&S determination and holding that “accumulations of damp or wet coal, if not cleaned up, can dry out and ignite”).

Likewise, we categorically reject Consol’s argument that its other safety measures, including rock dusting, carbon monoxide monitors, and fire fighting equipment reduced the degree of danger and rendered the violation non-S&S. In *Buck Creek*, 52 F.3d at 136, the Seventh Circuit rejected the operator’s contention that other fire prevention safety measures mitigated the S&S nature of an accumulation. It stated that the fact that the operator “has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners.” 52 F.3d at 136; *see also Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996) (rejecting operator’s contention that its redundant fire suppression system reduced the likelihood of serious injury); *Cumberland Coal Res. Inc.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (reasoning that adopting the position that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made), *aff’d sub nom., Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (stating “because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry”). We agree with the judge that “[w]hile extra precautions may help reduce some risks, they do not . . . make accumulations violations non-S&S.” 32 FMSHRC at 935.

For these reasons, we affirm the judge’s finding that the accumulation violation was properly designated S&S.

2. Unwarrantable Failure Analysis

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by “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*, 52 F.3d at 136 (approving Commission’s unwarrantable failure test). Whether the conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of a particular case. *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 operator’s conduct is aggravated or whether mitigating circumstances exist. *Id.*

The record demonstrates that the accumulations were obvious. When Inspector Wilson, UMW representative Sandy, and company representative Jones arrived at the area, Jones immediately shut down the belt. 32 FMSHRC at 935; *see also* Tr. 36 (inspector testimony that Jones acted like he knew he was going to get an order when he saw the condition). Sandy testified that the condition was “plain as day.” Tr. 111.

Regarding the extensiveness of the accumulations, the evidence demonstrated that they were extensive in nature in that it took five miners approximately two hours to clean up the condition. Tr. 21, 38. The accumulation underneath the belt was 17 feet long, approximately 30 inches wide and approximately one foot deep. Tr. 19; Gov’t Ex. 1. The accumulation around the tail roller was 64 inches wide and 20 inches in height. Tr. 19-20; Gov’t Ex. 1. On top of the feeder, the accumulation was 55 inches in length, up to two feet high and one foot less wide than the width of the feeder. Tr. 18; Gov’t Ex. 1. It has also been established that the violation posed a significant degree of danger, as the accumulations created a hazard which was reasonably likely to lead to, or propagate, a mine fire or explosion. Slip op. at 4; *see* 32 FMSHRC at 937.

As to the duration of the accumulations, the judge determined that the condition had appeared on the pre-shift examination reports as spillage at the tailpiece for the five previous shifts, without any notation of correction. 32 FMSHRC at 937; Gov’t Ex. 41. Substantial evidence supports the judge’s determination. On cross-examination, Consol’s witness Jones testified that he did not dispute that spillage at the tailpiece had been carried on the books for five shifts. Tr. 169. He also testified that the spillage notation had been carried over because it had not been cleared on the shift. Tr. 171. Jones conceded that the spillage should have been cleaned up the first time that it was reported. Tr. 169. The judge expressly discredited Jones’ testimony on direct examination that the spillage listed on the pre-shift reports did not refer to the same spillage observed by the inspector. 32 FMSHRC at 936; Tr. 151, 179. The judge noted Jones’ equivocation on this issue and Sandy’s testimony that the accumulations were packed around the rollers, indicating that the accumulations had been there a long time. 32 FMSHRC at 936; Tr. 112. It was well within the judge’s province to reject Consol’s argument that the notations on the pre-shift reports represented distinct spillage from that observed by the Inspector. 32 FMSHRC at 936. Consol has not provided any basis for us to take the extraordinary step of overturning the judge’s credibility determinations. *Farmer*, 14 FMSHRC at 1541. Therefore, we affirm the judge’s conclusion that the accumulations at issue were present for five shifts, which supports a finding of unwarrantable failure. *See Buck Creek*, 52 F.3d at 136 (holding that accumulations that were present for more than one shift, after a pre-shift examination had been performed, were properly designated unwarrantable).

Consol had direct knowledge of the accumulation at issue because, as noted above, its managers had signed five pre-shift reports that listed spillage at the tailpiece, without any notation of any clean-up efforts. Gov’t Ex. 41. Additionally, the judge found, and Consol does not dispute on appeal, that the mine experienced an extensive history of accumulation violations in the months preceding the violation at issue. 32 FMSHRC at 937; Gov’t Exs. 43A, 45, 46, 47. Thus, substantial evidence in the record supports the conclusion that Consol was on notice that it had an ongoing accumulation problem at the mine requiring greater efforts to assure compliance

with section 75.400 and that it had actual knowledge of the accumulation at issue here as shown by the pre-shift reports. 32 FMSHRC at 936-37; *Peabody Coal Co.*, 14 FMSHRC 1258, 1263-64 (Aug. 1992) (“[A] history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction.”); *Mid-Continent Res.*, 16 FMSHRC at 1232-33 (same).

We are not persuaded by Consol’s argument that the unwarrantable failure finding is mitigated by its clean-up plan (according to which its shuttle car workers were to clean up accumulations at the tail piece and feeder when they drove by them). Given that the condition was listed in the pre-shift books for five shifts, Consol’s plan was not even effective in cleaning up accumulations of which it had actual notice. We have held that an ineffective clean-up plan, which permits known, obvious, and extensive accumulations to continue to build up, cannot mitigate a determination of unwarrantable failure. *Jim Walter Res, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997).

In sum, we affirm as supported by substantial evidence the judge’s determination that Consol’s violation of section 75.400 was a result of an unwarrantable failure.⁴

B. Citation No. 6608551; Panic Bar Violation

On September 4, 2008, Inspector Wilson issued an S&S citation alleging a violation of 30 C.F.R. § 75.523-3(b)(3) because the emergency brake on a scoop, when applied using the panic bar, did not engage and bring the equipment to a complete stop.⁵ The inspector gave the operator several attempts to engage the emergency brake, all to no avail. The scoop had been used during the shift before to haul equipment and supplies to another area of the mine. The panic bar is within easy reach of the scoop operator, who can operate it by hand. The panic bar is intended to stop the scoop in an emergency but it also functions as a common way to shut down the scoop. 32 FMSHRC at 942-43.

The parties agreed that there was a violation, and thus the only issue before the judge was whether the violation was S&S. *Id.* Applying the *Mathies* analysis, the judge determined the panic bar violation to be S&S and assessed a penalty of \$1,203, the same amount proposed by the Secretary. *Id.* at 944, 949.

⁴ We note that the judge adequately explained her reasoning for increasing the penalty from \$6,115 to \$7,500 for Order No. 6608537. She determined that if a belt fire were to occur, the entire crew of 13 miners would be exposed to the fire and smoke hazard, whereas the Secretary’s original assessment only considered that two persons would be affected. The judge modified the penalty “to reflect the exposure of the entire crew.” 32 FMSHRC at 933-34.

⁵ Section 75.523-3(b)(3) provides that “[a]utomatic emergency-parking brakes shall – safely bring the equipment when fully loaded to a complete stop on the maximum grade on which it is operated.”

The judge found that the first element of the *Mathies* test was satisfied by her determination of a violation of section 75.523-3(b)(3). *Id.* at 943. Regarding the second element, the judge found that the hazard contributed to by the violation was “the danger of being unable to stop the equipment in an emergency.” *Id.* Similar to *Cumberland*, 33 FMSHRC at 2364, we conclude that this statement is an accurate description of the relevant hazard contributed to by the violation. In *Cumberland*, the Commission determined that the hazard contributed to by defectively placed lifelines, that are only used in emergency situations, necessarily involved consideration of an emergency. *Id.* In affirming the Commission’s decision in *Cumberland*, the D.C. Circuit held:

[A] violation of the lifeline standard could only contribute to the delayed evacuation from emergency hazard if there is an emergency, but the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard. Thus, if the decisionmaker does not assume the existence of the emergency, then his focus must necessarily shift away from the nature of the violation to the likelihood of the emergency.

717 F.3d at 1027. Just as the need for a lifeline would arise only in the context of a situation involving an emergency requiring evacuation from the mine, so the need for a panic bar (i.e., “emergency brake”) on a scoop would arise in the context of an emergency requiring the use of the emergency brake. Thus, as the judge concluded, the relevant hazard contributed to by the panic bar violation is the inability to stop the scoop in an emergency. *See also Maple Creek Mining Inc.*, 27 FMSHRC 555, 563 n.5 (Aug. 2005) (evaluating S&S with regard to emergency standard in the context of an emergency).

In addressing the third *Mathies* element, the judge determined that “the hazard created by the non-functioning panic bar would contribute to a [serious] injury in the event of an emergency.” 32 FMSHRC at 944. This analysis is consistent with our recent precedents on S&S. *See Cumberland*, 33 FMSHRC at 2365; *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“*PBS*”). Through the testimony of Inspector Wilson, which the judge credited, the Secretary provided ample evidence that a scoop which cannot be stopped because of a non-operational panic bar could lead to an injury. The inspector testified that in the event that the scoop cannot be stopped, a spotter – a pedestrian miner who directs the scoop operator – could be run over, or the scoop driver could slam into a rib or another piece of equipment such that the scoop operator as well as any person in the way could be severely injured. Tr. 55-57. The inspector testified that “miners expect the . . . emergency safety devices to operate when they’re needed, and in the event that they don’t work, you may not have too much time to come up with another way of getting the equipment to stop or shut down.” Tr. 57. Accordingly, we conclude that substantial evidence supports the judge’s determination that the hazard created by the non-functioning panic bar is reasonably likely to contribute to an injury.

Similarly, the record supports the judge's finding on the fourth element of *Mathies* that there is a reasonable likelihood that a nonfunctional panic bar in an emergency situation would result in serious injuries either to the scoop operator or another miner in the scoop's vicinity. 32 FMSHRC at 943-44.

Consol frames its appeal as "whether . . . the Secretary of Labor (the "Secretary") can simply presume that a hazardous condition was reasonably likely to occur." PDR at 7. Consol then argues that "the ALJ presumed the occurrence of an emergency, and proceeded to analyze the S&S nature of the condition based upon that faulty presumption." *Id.* at 10. Consol further argues that "the ALJ's approach ignores the long established requirements of *Mathies Coal* and its progeny." *Id.* at 10.

We reject Consol's arguments. The need to stop the scoop immediately to avoid a collision is an inherent element of the hazard which the braking standard, section 75.523-3, is intended to prevent. Thus, the judge's analysis was not inconsistent with *Mathies*. Furthermore, Consol's argument is inconsistent with the D.C. Circuit's recent decision in *Cumberland Coal*, quoted *supra*, slip op. at 8. Indeed, Consol's underlying argument – that the Secretary must establish a reasonable likelihood that the hazard will occur, PDR at 8 – has been rejected by the Commission. *Cumberland Coal*, 33 FMSHRC at 2364-65; *PBS*, 32 FMSHRC at 1280-81.

Nor are we persuaded by Consol's contention that the violation was not S&S because the scoop operator could have braked using the normal braking equipment. First, the record reveals that the panic bar was commonly the primary means for scoop operators to engage the braking system during everyday use. Tr. 55; 32 FMSHRC at 944. The inspector testified that the panic bar is the braking device that "a lot of scoop operators . . . [are] most comfortable with and . . . [is] going to be their first reaction, especially in the event of an emergency, and if [it is] not function[ing] properly and the scoop operator needs to immediately shut down . . . could lead to a person being crushed or worse." Tr. 55-56.

Second, in an emergency, "miners naturally panic and don't have enough time to stop or shut down the scoop in another way." 32 FMSHRC at 944 (citing Tr. 57). Thus, while Consol asserts that the violation is only S&S if all the normal brakes were non-functioning, the panic bar is an integral part of a fully functioning braking system. If the panic bar is not operational when a miner needs to stop the scoop at any time, substantial evidence establishes that miners may be seriously injured. Tr. 57. *See Steele Branch Mining*, 18 FMSHRC 6, 12-13 (Jan. 1996) (finding S&S violation when brakes only provided one brake application in the event of unexpected engine failure when all five brake applications should have been operational) (opinion of Chairman

Jordan and Commissioner Marks); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1144-47 (July 1996) (noting that violation for failure to have operational service brakes resulted in miner fatality, which parties stipulated was S&S).⁶

Accordingly, we affirm the judge's determination that the violation of section 75.523-3(b)(3) was S&S.

C. Citation No. 6608553; Bolter Permissibility Violation

On September 4, 2008, Inspector Wilson observed a roof bolter on the 13-A section not being maintained in permissible condition in that there was an opening greater than .008 inch in the step flange joint in the permissible cover for the area light. 32 FMSHRC at 944. The path must be no greater than .007 inch. *Id.* at 945. The inspector issued Citation No. 6608553 for a violation of 30 C.F.R. § 75.1002(a).⁷ Gov't Ex. 7.

Because the parties agreed that a violation occurred, the only issue before the judge was whether the violation was S&S. 32 FMSHRC at 945-46. She found it to be S&S and assessed a penalty of \$1,304, the same amount proposed by the Secretary. *Id.* at 946, 949.

Applying the *Mathies* analysis, the judge found the first element satisfied, as the violation was conceded. *Id.* at 945. She determined that the second element was also present in that the violation contributed to the hazard of "the danger of allowing an ignition source to be available in

⁶ Similarly, we disagree with Consol's contention that the scoop would have been inspected prior to its next use and therefore the violation should not have been designated as S&S. Accepting this argument would permit operators to claim as a defense that, sometime in the future, they were going to find and remedy the violation at issue. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (holding that it was "improper to rely on later circumstances to find that the violation was not S&S") (citation omitted). Thus, the judge correctly rejected the Consol witness' testimony that he "'hop[ed]' that the last operator . . . had checked the panic bar brake prior to use.") 32 FMSHRC at 944.

⁷ Section 75.1002(a) provides: "Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar work or longwall faces." "Permissible equipment" means "a completely assembled electrical machine or accessory for which a formal approval has been issued by [MSHA]." 30 C.F.R. § 18.2. At issue is whether the cover of a light on a roof bolter was maintained in permissible condition. In order to measure permissibility, the inspector measured the "step flange joint" or the gap between the cover and the actual light bulb. Tr. 62. If that gap is larger than the required .007 of an inch, a spark could escape to the surrounding atmosphere and the light is not considered permissible. Tr. 62-63. The judge noted that "permissibility is designed to limit the number of ignition sources" in a mine. 32 FMSHRC at 945.

this gassy mine.” *Id.* We conclude that this statement is an accurate description of the relevant hazard contributed to by the violation, in that the permissibility requirement is designed to prevent hot gases from escaping from an enclosure containing electrical connections, thus causing an ignition outside the enclosure. As Inspector Wilson testified, the purpose of the permissibility standard is to ensure that if methane enters an enclosure containing electrical connections, and ignites from a spark, the gap between the enclosure containing the electrical connection and its cover would be so small that the ignition would cool before it entered the mine atmosphere, Tr. 63, preventing an ignition of methane in the mine atmosphere. The judge’s conclusion that the violation contributed to the hazard – the second *Mathies* factor – is supported by substantial evidence.

In addressing the third factor of *Mathies*, the judge determined that there was a reasonable likelihood that this identified hazard would result in injury in view of the continued course of mining. 32 FMSHRC at 945. The judge relied on methane being emitted as the bolter drills into the roof, and on Inspector Wilson’s testimony that because the mine is a gassy mine and because of the location of the roof bolter at a point close to the gob and far from the bleeder fans, there was a reasonable likelihood of injury from an explosion despite no methane being detected at the time of the violation. Tr. 64-65; 32 FMSHRC at 945-46.

The judge’s conclusion as to the third *Mathies* factor is supported by substantial evidence, since the Robinson Run mine liberates more than a million cfm of methane during a 24-hour period and is subject to five-day methane spot inspections under Mine Act section 103(i), 30 U.S.C. § 813(i). Tr. 15-16; 324. Inspector Wilson testified that the roof bolter was in a location at the face at the farthest point from bleeder exhaust fans and in close proximity to the gob, such that gob air could migrate to where the roof bolter was operating, as opposed to the direction of the bleeder fans. Tr. 64-65. He testified that “it would only take a roof-fall” for the gob air to migrate where men are working and create “an explosive amount of methane” at that location. Tr. 64-65. The inspector testified that methane coming out of the gob could occur at any time. Tr. 68. According to the inspector, this danger of explosion was more likely because the mine is a gassy mine. Tr. 64-65.⁸ Thus, we reject Consol’s argument that the judge erred by “simply assum[ing] that methane will be present (despite the undisputed evidence that methane was not present).” PDR at 28.

Nor are we persuaded by Consol’s reliance on *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988), in which the Commission determined that certain permissibility violations were not S&S.

⁸ We note that the Secretary agrees with Consol that the judge misstated Inspector Wilson’s testimony about roof bolting and methane emission. Nonetheless, we conclude that this mischaracterization is irrelevant because the inspector’s testimony that the location of the roof bolter, close to the gob – and far from the bleeder fans – supports the finding that an explosive amount of methane could be released near the impermissible roof bolter, resulting in a reasonable likelihood of a methane explosion or fire. Tr. 64-68.

There is a significant distinction between *Texasgulf* and the case at bar. The mine in *Texasgulf* had never produced ignitable or explosive levels of methane and possessed unique geological features not conducive to virtually any methane liberation. 10 FMSHRC at 501-503. In contrast, the Robinson Run mine liberates large quantities of methane and is characterized as a gassy mine. Similar to the present case, in *U.S. Steel Mining Co.*, 6 FMSHRC 1866, 1869 (Aug. 1984), the Commission found that a permissibility violation was properly designated S&S because of the gassy nature of the mine.

We also reject Consol's argument that the violation was not S&S because the equipment was not in operation at the time of the inspection.⁹ The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector. *U.S. Steel*, 7 FMSHRC at 1130. Thus, in *U.S. Steel*, 6 FMSHRC at 1869, the Commission rejected an operator's contention that the violation was not S&S because mining was not taking place at the precise moment the citation was issued, reasoning that mining was scheduled to resume.

Additionally, as we noted earlier, slip op. at 10 n.6, Consol's assertion that the violation is not S&S because it would have been detected in the next equipment inspection is contrary to *Jim Walter*, 28 FMSHRC at 604. Consol's approach is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination.

As to the fourth element of *Mathies*, the inspector testified that the hazard of a methane gas ignition or explosion would result in burn-type injuries or worse. Tr. 65. Accordingly, we affirm the judge's determination that the lack of a permissible light on the roof bolter would contribute to a hazard which is reasonably likely to cause a permanently disabling or fatal injury. 32 FMSHRC at 946; *See Buck Creek*, 52 F.3d at 135 (holding that the S&S determination was adequately supported by the inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present.")

D. Order No. 6608544; August 26, 2008 Ventilation Violation

On August 26, 2008, Inspector Wilson was on a five-day spot methane inspection, checking air velocities. Tr. 322-24. At the idle face of an entry, the inspector detected only 2,160 cfm of air being maintained although the mine ventilation plan required that "a minimum of 3,000 cfm will be maintained at each working place." Tr. 325; Gov't Ex. 14, §14(D). The inspector issued Order No. 6608544 for a section 75.370(a)(1) violation, alleging that Consol was not following the approved

⁹ Requiring that mining equipment be in operation at the moment of the inspection would allow operators to evade citations merely by shutting down equipment as inspectors approached.

ventilation plan.¹⁰ Gov't Ex. 3. Inspector Wilson designated the violation as S&S and a result of unwarrantable failure. He believed that the violation was unwarrantable because he had specifically communicated to mine management that he would take harsher action if non-compliance with the relevant section of the ventilation plan continued. Tr. 402. The order itself states: "Management was put on notice on the date of 7/30/2008 after the issuance of citation 6608359 that the next time this condition was observed by this inspector stronger enforcement actions would be taken." Gov't Ex. 3; *see also* Gov't Ex. 33 (7/30/08 Citation and inspector notes about conference with Consol). The inspector also based his order on the mine's previous violation history and that management had instituted nothing to prevent this condition from recurring. Tr. 337-38, 402.

The violation was admitted by Consol, and the judge found that the violation occurred as stated.

1. S&S Analysis

In determining that the violation was S&S, the judge found the discrete safety hazard as a result of the violation to be the danger of methane accumulation resulting in explosion. She then concluded that the hazard would result in an injury of a serious or fatal nature. 32 FMSHRC at 938.

The violation as set forth in Order No. 6608544 was admitted by Consol, which satisfies the first element of *Mathies*. 32 FMSHRC at 938. With respect to the second element, the judge's determination that the danger of methane accumulation resulting in explosion constituted a discrete safety hazard is an accurate description of the relevant hazard contributed to by the violation.

Substantial evidence supports the judge's conclusion that the violation contributes to this hazard. MSHA ventilation supervisor John Hayes testified that Robinson Run is a gassy mine, that idle places are important to ventilate, and that failure to keep adequate air movement will result in a build-up of methane and a potentially fatal explosion. Tr. 254-57.¹¹ Supervisor Hayes and

¹⁰ 30 C.F.R. § 75.370(a)(1) provides in pertinent part: "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."

¹¹ An idle place is a working place where the continuous miner is not operating. Tr. 252. (If the continuous miner is in the area, a greater quantity of air is required. *Id.*) Supervisor Hayes testified that the requirement of 3,000 cfm of air in idle places was added to the ventilation plan at section 14(D) when Consol decided that it wanted to take longer cuts in its development sections in order to put the longwall in place more quickly. Gov't Ex. 14; Tr. 249-56. The revision to the ventilation plan enabled Consol to extend each entry from 200 to 300

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Inspector John Mehaulic testified that the mine was having methane problems in the summer of 2008, the time of the order. Tr. 269; 417-422. Mehaulic testified that in June 2008, he issued an imminent danger order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), for an accumulation of methane in the explosive range in the idle places of the section, in violation of the ventilation plan. Tr. 417-22. Similarly, Ann Martin, chairman of the UMWA safety committee at Robinson Run, described higher than normal methane liberation in the summer of 2008 on this section. Tr. 302-09.

Against this backdrop of high methane emissions, Inspector Wilson and Supervisor Hayes both testified that ignition sources were present on the section. Inspector Wilson testified that there was roof bolting equipment in the entry, that Robinson Run has a history of impermissible equipment, that equipment regularly operates near or passes by this area, and that a belt was being moved resulting in equipment being powered up and moved throughout the shift. Tr. 343-44. Wilson testified that a person could easily take a piece of equipment into the idle place where methane had accumulated and, if the equipment created a spark from frictional movement of a machine or non-permissible condition, it could ignite the methane and cause an explosion. Tr. 343. Similarly, Supervisor Hayes testified about a prior Consol violation of not maintaining a loader in a permissible condition, stating that it is “not uncommon . . . for that loading machine to end up in an idle working place [with] a permissibility issue.” Tr. 266-67. Hayes stated that there is a tendency to park equipment such as roof bolters, scoops, and loaders in idle places and “so maintaining the minimal flow” is “extremely important” to avert “disasters.” Tr. 297.

Additionally, Inspector Wilson determined that the methane level was rising at the time of the order. When he arrived on the section, his methane reading was 0.45 percent, although an hour earlier it was at 0.2 percent. Tr. 336, 344. Given the mine’s gassy nature and this rising methane trend, assuming continued mining operations, methane levels could be expected to increase. Although Consol argues that 2,160 cfm was sufficient to ventilate the area, this represents nearly a 30 percent reduction in airflow from what is established as the minimum required to safely ventilate the idle places in the operator’s own plan. Tr. 254-57. On balance, our review of the record indicates that substantial evidence supports the judge’s determination that the violation contributed to a discrete safety hazard of the danger of methane accumulation resulting in explosion.

As to the third and fourth elements of *Mathies*, the record supports the judge’s finding that this hazard of methane accumulation would be reasonably likely to result in serious or fatal injuries. Inspector Wilson testified that a methane gas explosion would result in fatal types of injuries. Tr. 346; see *Buck Creek*, 52 F.3d at 135.

¹¹(...continued)

feet. Tr. 249-51; Gov’t Ex. 14. The method of taking longer cuts means mining faster, which equates to greater levels of methane liberation. Tr. 254-55.

Consol argues that the judge's decision amounts to a presumption of S&S for all violations concerning permissible equipment, and that the decision failed to meet the requirement of a confluence of factors in a case involving the threat of a possible explosion, in violation of the Commission's decisions in cases such as *Texasgulf*. However, Consol's argument misrepresents the judge's decision. Rather than applying a presumption (actual or implied), the judge carefully analyzed the evidence and concluded, pursuant to *Mathies*, that the facts established the existence of a hazard, contributed to by the violation, which was reasonably likely to result in a serious injury. In finding the existence of this discrete safety hazard, the judge recognized the need for the Secretary to show a confluence of factors – methane and ignition sources under continued normal mining operations – as required by *Texasgulf*.

Additionally, Consol takes issue with the judge's failure to credit its witnesses, who believed that the violation was not S&S because of the absence of ignition sources and the presence of some air movement. However, Consol has not presented us with sufficient reason to overturn the judge's credibility determination. *See Farmer*, 14 FMSHRC at 1541. In deciding not to credit the testimony of Consol's witnesses, the judge evaluated their demeanor and noted that most of their testimony was in response to leading questions. 32 FMSHRC at 939. Moreover, as the judge noted, Consol's witnesses Jones and Nestor "require, in essence, an imminent danger to exist in order for the violation to be significant and substantial." *Id.* The judge observed – quite accurately – that if there was no air movement and energized equipment was immediately present – as Consol's witnesses seemed to require for a finding of S&S – it would have constituted an imminent danger requiring the withdrawal of miners under section 107(a) of the Mine Act. *Id.* Conditions justifying a finding of S&S are very distinct from, and far less dangerous than, those requiring withdrawal of miners under section 107(a).

Thus, while the record does not (and need not) establish the existence of an imminent danger, it does contain substantial evidence supporting the judge's conclusion that the violation was S&S. The 30 percent reduction in air velocity was not sufficient to dilute the methane in the idle places, which was rising. *See Tr. 297* (Hayes testimony that 3,000 cfm needed to adequately ventilate the idle places). The judge also was entitled to give substantial weight to the testimony of the inspectors as to the presence of ignition sources in the form of the roof bolter, equipment involved in the belt move and other energized equipment or vehicles driving past or brought into the section. *Tr. 255-56, 343-345; see Buck Creek*, 52 F.3d at 135-36. As the judge noted, Inspector Wilson "ably explained the many ignition sources available." 32 FMSHRC at 940.¹²

¹² Commissioner Young would not hold that all of the alleged ignition sources cited by the inspectors are supported by substantial evidence. He believes that testimony as to most of the sources was general, vague and speculative. *See, e.g., Tr. 343* ("A person could easily take a piece of energized equipment into that place.") However, the roof bolter that was actually in the idle place is a different matter. Although the inspector testified that he did not know whether the roof bolter was energized or not, *Tr. 344*, the roof bolter would eventually either be energized or
(continued...)

In sum, we affirm as supported by substantial evidence the judge's determination that the ventilation violation of August 26, 2008 was S&S.¹³

2. Unwarrantable Failure Analysis

This is a classic case of unwarrantable failure where an operator has neglected to remedy a condition "because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." *Emery*, 9 FMSHRC at 2002 (citation omitted). In determining that the violation was a result of an unwarrantable failure, the judge relied on Consol's "many previous citations for ventilation plan violations and, specifically, for violations of the particular provision in the ventilation plan that is at issue in this matter," i.e., not maintaining 3,000 cfm in idle places. 32 FMSHRC at 940, 942. Accordingly, she concluded that Consol was on notice that it needed to do more to ensure adequate ventilation in idle places. *Id.* at 941. Against a backdrop of unusually high levels of methane in the mine, the judge found that Consol "ignor[ed]" the ventilation plan requirement of maintaining the 3,000 cfm air flow in idle places, which made the violation obvious

¹²(...continued)

be moved by another piece of powered equipment, either of which would introduce an ignition source to the area.

We are precluded from assuming that the rising methane level would have been discovered and abated before an explosion hazard could develop. *See U.S. Steel*, 7 FMSHRC at 1130 (noting that while methane levels at the time of the violation were low, "[i]f normal mining operations were to continue, a rapid buildup of methane could reasonably be expected"); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984) (rejecting the operator's argument that absent some future additional aggravating condition, the violation would not likely result in injury and holding that it was proper to evaluate the cited violation in terms of "continued normal mining operations"). Similarly, we cannot assume that miners would test for methane before energizing the equipment. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) (in concluding that injury was reasonably likely to result from violation, the Commission explained that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior'" (citation omitted); *see also Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether violation is S&S); *Crimson Stone v. FMSHRC*, 198 Fed. Appx. 846, 851 (11th Cir. 2006) (unpublished opinion) ("[a]ny assumptions about how and when [the equipment] would have been repaired do not alter the significant and substantial nature of the violation") (citations omitted). Therefore, Commissioner Young would affirm the judge based on a reasonable likelihood that the increase in methane levels and the presence of powered equipment placed the methane and ignition source on a path toward convergence under normal mining conditions and represented the confluence of factors the law requires.

¹³ For the reasons set forth, *supra*, slip op. at 5, we again reject Consol's argument that redundant safety measures, such as methane monitoring equipment and required methane checks, may mitigate against an S&S designation.

and highly dangerous because it created a “risk of methane explosion.” *Id.* As discussed below, her findings are supported by substantial evidence.

We first address whether the operator was placed on notice that greater efforts were necessary for compliance. *IO*, 31 FMSHRC at 1353. Inspector Wilson issued multiple violations for exactly the same condition of not maintaining 3,000 cfm in idle places. Tr. 337. Supervisor Hayes introduced six citations that had been issued to Consol for violating this same section of its ventilation plan and not maintaining 3,000 cfm in idle places from January 2008 to August 2008. Tr. 264-69; Gov’t Exs. 20, 21, 23, 24, 27, 30.

Additionally, the Commission has recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (quoting *Consolidation Coal*, 23 FMSHRC at 595). The record reflects that Wilson met with upper management and put them “on notice that the next time these conditions were found, stronger enforcement action would be taken.” Tr. 337; Gov’t Ex. 3. Similarly, the inspector’s notes from July 30, 2008, reported that “in conference with Mike Nester, Mike Jacques and Todd McNair, this inspector put the operator on notice that this type of violation seems to be occurring on a somewhat regular basis and if future instances occur, stronger enforcement actions will be taken.” Gov’t Ex. 33.

Although Consol denied that the MSHA meeting occurred and that it received a warning from Inspector Wilson, the judge did not credit the Consol managers. Tr. 525; 32 FMSHRC at 941-42. Instead, she credited the memory of the inspector as his notes clearly evidenced the meeting. 32 FMSHRC at 942. She stated that the mine “gave little credence to what [the MSHA inspectors] had to say about . . . ventilation in the idle faces,” *Id.*, and reasonably inferred that the Consol managers’ lack of memory as to MSHA’s July 30 meeting may suggest a lack of attention to MSHA’s safety concerns. She found the attitude of Consol towards ventilation “troubling” and dismissive of the importance of following its ventilation plan in idle places. *Id.*; *See also Buck Creek*, 52 F.3d at 136 (holding that operator’s failure to remedy the situation was egregious and unwarrantable in light of the fact that it had already received repeated warnings regarding this very problem).

Consol’s claim that the judge was biased against its witnesses does nothing more than ask us to overturn credibility determinations, which we decline to do. Moreover, we are not troubled by the judge’s statement that the testimony of the mine superintendent and the safety supervisor did not “demonstrate any serious concern about the ventilation issues raised by MSHA.” 32 FMSHRC at 942. This view is amply supported by the superintendent’s testimony that his job was to keep methane levels low rather than focus on the ventilation plan requirements. Tr. 509-10.

An operator’s effort in abating the violative condition is another factor established by the Commission as determinative of whether a violation is unwarrantable. *IO*, 31 FMSHRC at 1356. The focus on the operator’s abatement efforts is on those efforts prior to the citation or order. *New*

Warwick Mining Co., 18 FMSHRC 1568, 1574 (Sept. 1996). The judge found, and the record demonstrates, that Consol did not take any additional steps to remedy or enhance its ventilation of idle places pursuant to its ventilation plan. As the section foreman reported to Inspector Wilson, “management had not put anything into place after the issuance of the previous violations and [the inspector’s] conversation with management to keep this condition from recurring.” Tr. 337-38. Similarly, the judge noted, Consol “admitted that its efforts . . . did not address this portion of the ventilation plan.” 32 FMSHRC at 942.

Considering the obviousness or knowledge of the violation, the judge found that the violation was obvious. *Id.* Consol asserts that the air velocity was not obvious, as it fell only 840 cfm short of the required volume. However, the section foreman had not taken an air reading when he did his on-shift examination approximately an hour before the inspector arrived, because he had not received any instructions from management to do so. Tr. 335-38. Similarly, the mine superintendent testified that at the time of the inspection Consol did not take air readings to determine whether 3,000 cfm was being maintained in idle places as required in its ventilation plan. Tr. 512. Mine Superintendent McNair even asserted that it was “debatable” whether the mine was required to maintain 3000 cfm of air in an idle entry under the ventilation plan. Tr. 509-10. In *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010) (citing *Coal River Mining, LLC*, 32 FMSHRC 82, 94 (Feb. 2010)), we recognized that “[w]hen the operator’s actions have caused a condition not to be obvious, the Commission has not been persuaded that [a claim of] the lack of obviousness is a mitigating factor in the determining whether a violation is attributable to the operator’s unwarrantable failure.” Accordingly, we affirm that, on these facts, where the operator deliberately ignored a known problem, it cannot assert ignorance of the condition as a defense.

With respect to danger, the judge determined, and we affirm, that the violation is S&S. Slip op. at 13-16. In addition, ignoring a chronic problem increases the level of danger. As MSHA Ventilation Supervisor Hayes testified: “[W]henever you have a pattern or practice . . . to do something that is considered unsafe, which a violation of the ventilation plan [is considered to] be an unsafe condition, you increase the likelihood of — the more times you do something wrong, you increase the likelihood of something bad happening because of you doing something wrong.” Tr. 344-45. In addition, as the judge recognized, the mine was experiencing high levels of methane, which made the ventilation violations even more dangerous. 32 FMSHRC at 941. Hence, we agree that the level of danger supports an unwarrantable failure finding.

As to duration, the judge noted that it was unknown how long the condition existed, but that methane levels were rising. *Id.* The judge did not discuss extensiveness in her analysis of unwarrantable failure. In her S&S analysis, however, the judge rejected Consol’s argument that 2,160 cfm was sufficient to dilute methane. *Id.* at 939. Likewise, we take issue with Consol’s attempt to minimize the significance of the violation by asserting that only 840 cfm was lacking. The 3,000 cfm provision is contained in Consol’s own ventilation plan and if it believed the requirement to be too high, it should have taken steps to modify that requirement.

Additionally, the judge addressed all the alleged mitigating factors subsequently raised by Consol on appeal and found them insufficient. *IO*, 31 FMSHRC at 1351 (noting that judge should examine whether mitigating factors exist) (citations omitted). She made determinations rejecting Consol's testimony asserting the absence of ignition sources in the area, which we discussed above in the context of the S&S issue. By Consol's own admission, its efforts to improve ventilation did not attempt to remedy the lack of sufficient air in idle places as required by its ventilation plan. Tr. 368-69, 536.

Nor are we convinced by Consol's attempt to distinguish its prior ventilation violations as not based on the same facts as presented here. Courts and the Commission have held that prior violations do not have to involve precisely the same activity to put an operator on notice that greater compliance efforts are necessary. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012) (rejecting argument that past violations need to be similar to support unwarrantable failure finding); *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *San Juan*, 29 FMSHRC at 131. Consol was on notice that it needed to remedy and rectify the chronic problem of insufficient ventilation in its idle places. When it did not do so, the inspector appropriately used his authority under the Mine Act to increase the sanction by issuing an unwarrantable failure violation.

Accordingly, we affirm the judge's determination that Consol's violation of its ventilation plan on August 26, 2008 resulted from unwarrantable failure.

E. Citation No. 8014053; Ventilation Violation of September 17, 2008

On September 17, 2008, as Inspector Wilson walked to the face of a section, he observed two miners struggling while attempting to hook a "baloney skin"¹⁴ to the back of an auxiliary fan in the crosscut between the No. 1 and No. 2 entries in order to direct air. Tr. 355-56; Gov't Ex. 9. When they could not successfully adjust the skin, they dropped it and returned to other jobs. Tr. 356. Their actions caused a short circuit of air, which in turn blew down the ventilating curtain in the No. 2 entry. *Id.* The inspector checked the air velocity. There was not enough air flow at the end of the line canvas to spin the wheel of the inspector's anemometer, the instrument that measures air velocity. Tr. 373-74; Gov't Ex. 9. Wilson detected one percent methane and testified that, if left unabated, the methane would continue to accumulate and reach explosive levels. Tr. 361-63, 374. As a result, he issued Citation No. 8014053, alleging an S&S violation for failing to maintain 3,000 cfm of air flow pursuant to Consol's ventilation plan. Gov't Ex. 9. The inspector assessed low negligence on the part of the operator, and MSHA proposed a civil penalty of \$7,578.

¹⁴ "Baloney skin" or "bologna skin" is soft tubing attached to a fan exhaust to route air. See www.msha.gov/S&HINFO/BlackLung/ControlDust2007/Vent3.pdf at 27.

Tr. 362; 32 FMSHRC at 946. Because the violation was admitted by Consol, the judge determined that the violation occurred as stated in the citation. 32 FMSHRC at 947.

In addressing the S&S issue, the judge determined that a discrete safety hazard existed as a result of the violation – the danger of respirable dust in the air as well as methane accumulation resulting in explosion. *Id.* She found that the hazards described would result in an injury of a serious or fatal nature, thus satisfying the *Mathies* elements. *Id.* The judge also raised the negligence determination from low to moderate. *Id.* at 948. She reasoned that not only had the mine disregarded the MSHA inspector’s warning regarding section 14(D) of its ventilation plan, when the mine was experiencing high levels of methane, but it had failed to ensure that miners were aware of the ventilation plan requirements. *Id.* Based on raising the negligence level from low to moderate, the judge raised the penalty to \$10,000. *Id.* at 950.

As to the S&S designation, we conclude that the judge properly determined that a safety hazard in the form of methane accumulation potentially leading to an explosion resulted from no discernible air flow in the No. 2 entry. Wilson testified that the level of methane was one percent and if left unabated methane would continue to accumulate and reach explosive levels. Tr. 361-63, 374. The judge was not persuaded by Consol’s arguments that the methane levels were too low to pose an explosion hazard. 32 FMSHRC at 947-48. Similarly, we are not persuaded by Consol’s assertion that the inspector merely guessed that methane levels would continue to rise. The record showed that the condition was created in a few minutes and that the methane level had already risen to one percent. Tr. 362. Additionally, Consol’s witness Michael Jacquez conceded, and the record showed, that methane levels on this section were “generally high.” Tr. 443. Assuming continued mining operations, we conclude that substantial evidence supports the judge’s finding that a lack of any discernible air flow on the section, if left unabated, would allow an explosive level of methane to accumulate. *U.S. Steel*, 6 FMSHRC at 1869. Quick abatement occurred only because of the fortuitous circumstance of an MSHA inspection.

Moreover, the inspector testified that the area contained ignition sources – such as an auxiliary fan, with fast-moving metal parts spinning against each other, and a roof bolter – and that the mine had a history of permissibility violations. Tr. 364-65. The judge credited Inspector “Wilson’s testimony that the condition created by the violation, i.e., the accumulation of methane in an area with ignition sources easily accessible, would result in an injury-causing event.” 32 FMSHRC at 947. The judge considered the contrary views of Consol witness Michael Nestor, and discredited them. *Id.* at 947-48. Regarding the seriousness of the injury, the inspector testified that, given the stagnant air, any methane explosion on this section would be “very violent” and would result in fatal injuries to ten affected miners on the section. Tr. 363-66. Hence, we affirm the judge’s determination that Consol’s ventilation violation on September 17, 2008 was S&S.

With respect to the judge’s finding of moderate negligence, Consol had repeatedly violated this section of its ventilation plan. It had been specifically warned that greater compliance efforts were necessary and that the gassy mine was experiencing higher methane liberation than usual.

Consol conceded that it had made no changes to improve ventilation in idle areas. Tr. 368-69, 536. Inspector Wilson testified that management should have made miners aware of the ventilation problems in idle areas. Tr. 411-13. Similarly, Ventilation Supervisor Hayes also testified that if the baloney skin falls off of a fan, miners should have known to inform their supervisor. Tr. 293. As the Commission has held, an operator's supervision and training of rank-and-file miners is relevant in determining negligence. *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (Aug. 1982) (holding that “*the operator’s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.”) (emphasis in original; citation omitted); *see also Black Beauty*, 703 F.3d at 561 (finding of high negligence was supported in part by mine’s failure to train miners, when a miner failed to seek help when he encountered a danger that had been the subject of numerous prior violations).¹⁵

We conclude that the judge’s finding of moderate negligence was reasonable and amply supported, given Consol’s admission that it took no steps to remedy its ventilation problems in idle areas of the mine when it had clear notice that it needed to do so, and its failure to train its miners to notify management upon discovery of a dangerous ventilation situation in those areas. Accordingly, we affirm the judge’s moderate negligence finding as well as her determination to assess a penalty of \$10,000 rather than the proposed amount of \$7,578.

¹⁵ We note that negligence of rank-and-file miners may not be *directly* imputed to the operator for purposes of penalty assessment. *Southern Ohio*, 4 FMSHRC at 1464. The judge here stated that “negligence on the part of the miners who changed the ventilation by moving the fan, is attributed to the operator.” 32 FMSHRC at 948. We disagree with the judge’s statement to the extent that the judge suggests that direct negligence of the miners is imputed to the operator in evaluating negligence. Nonetheless, the judge’s statement is harmless error as she ultimately raised the level of negligence because Consol had a “responsibility to ensure that all miners are aware of the plan and how to comply with such.” *Id.*

II.

Conclusion

For the reasons set forth herein, we affirm, in their entirety, Order No. 6608537, Citation No. 6608551, Citation No. 6608553, Order No. 6608544, and Citation No. 8014053.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 22, 2013

MARK GRAY	:	
	:	
v.	:	Docket No. KENT 2010-430-D
	:	
NORTH FORK COAL CORPORATION	:	

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

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

This proceeding involves a discrimination complaint filed against North Fork Coal Corporation (“North Fork”) by miner Mark Gray under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2006) (“Mine Act” or “Act”).² Administrative Law Judge Priscilla Rae concluded that North Fork did not discriminate against Gray when it discharged him in May 2009. 33 FMSHRC 2495, 2509-10 (Oct. 2011) (ALJ). Gray petitioned for review of the judge’s decision, which the Commission granted. For the

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

² Section 105(c)(1) provides in pertinent part:

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 of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1). Section 105(c)(3) permits a miner to file a discrimination claim on his own once the Secretary of Labor decides that he will not pursue a case on the miner’s behalf (*see* 30 U.S.C. § 815(c)(3)), which is what occurred here.

reasons that follow, we reverse the judge's order excluding expert evidence and remand the case for further proceedings.

I.

Factual and Procedural Background

In late 2007, Mark Gray was hired as a roof bolter by North Fork at its mine in Letcher County, Kentucky. He started on a night maintenance shift before moving to a day production shift after approximately six months. 33 FMSHRC at 2496-97; Tr. I 171-73.³ Gray had worked as a miner in many mines over the preceding three decades, a majority of that time as a roof bolter. 33 FMSHRC at 2496.

At the North Fork mine, after a continuous miner operator had made a cut into coal, a two-man team operating a roof bolting machine would install bolts in the newly cut area to protect against the roof's collapse. *Id.* at 2497. Under the mine's roof control plan then in effect, coal cuts were limited to 40 feet, due to local geologic conditions that resulted in instability in the mine's roof. It was also the job of the roof-bolting team to hang curtains behind the bolting machine to ensure proper air flow and ventilation to the face. On the day shift, Gray's roof bolting partner was Chris Sheeks. They operated a double-headed bolting machine, which the two men could use to install bolts simultaneously. Gray had the primary responsibility for hanging curtains. *Id.*

On May 15, 2009, North Fork terminated Gray's employment, alleging poor performance on his part. *Id.* at 2496. A month later, Gray filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). He stated that he believed his dismissal was due to his having made safety complaints to his immediate supervisor, day shift foreman Thomas Cornett, in the weeks prior to his dismissal. *Id.* at 2495, 2499.⁴

³ The hearing was conducted on two days, December 15 and 16, 2010. The transcript of the hearing is paginated separately, with the proceedings on December 15 going from page 1 to page 275 and the proceedings on December 16 going from page 1 to page 124. For purposes of citation to the hearing transcript in this Decision, we shall indicate the proceedings on December 15 as "Tr. I" followed by the page number(s) and the proceedings on December 16 as "Tr. II" followed by the page number(s). Thus, the citation to "Tr. I 171-72" is to pages 171 and 172 of the transcript for December 15.

⁴ In addition to Cornett, management at the mine at the time Gray was discharged included day shift outby foreman Steve Countiss and superintendent Anthony Estevez. 33 FMSHRC at 2497. Estevez had succeeded Russell Ison as mine superintendent in mid-to-late March 2009. *Id.*

Gray told MSHA that on May 5, 2009, a 50-to-60 foot deep cut of coal was made, which he and his partner then had to bolt. *Id.* at 2499. This not only was in violation of the mine's roof control plan, but it was well beyond the 18-to-20-foot cuts normally taken at the mine as a precaution given the unstable roof. *Id.* Gray later testified that after bolting the deep cut, he complained to Cornett that it was illegal and told Cornett that he would not bolt any more deep cuts. Tr. I 182-83. Gray alleges that three days later a second cut of 50 or more feet was made, which he refused to bolt because of the danger of working under such large expanse of unsupported roof. 33 FMSHRC at 2499.

Gray cited as further evidence of North Fork's discrimination an instance that occurred shortly before his discharge. According to Gray, when he stopped roof bolting to hang curtains, Cornett became angry at him and mumbled something under his breath; Cornett thereafter was not friendly towards him and acted differently. *Id.*; Tr. I 178-79, 203-06.

Pursuant to section 105(c)(2) of the Act, the Secretary of Labor obtained an order from a Commission judge temporarily reinstating Gray while MSHA investigated Gray's discrimination complaint further. 31 FMSHRC 1143 (Sept. 2009) (ALJ). The parties then agreed to economic reinstatement in lieu of Gray returning to work at the mine. *See* 31 FMSHRC 1167 (Sept. 2009) (ALJ).⁵

During the MSHA investigation, North Fork showed the agency two disciplinary letters directed at Gray. The first was dated February 27, 2009, and the supervisor's signature was that of Russell Ison. The second was dated April 28, 2009, had a supervisor's signature of Anthony Estevez, and included a witness signature from Steve Countiss. Tr. 37. Each letter contained a paragraph detailing the dissatisfaction of North Fork supervisors with Gray's job performance and included a signature for Gray. Gray Exs. A & B. Gray, however, denied to MSHA, and continues to deny, that the signatures acknowledging his receipt of the warnings were his or that he had ever received written or even oral warnings regarding his work performance at North Fork. Tr. I 194-97.

The Secretary eventually decided not to pursue a discrimination case under section 105(c)(2). *See* 31 FMSHRC 1420 (Dec. 2009) (ALJ). Consequently, Gray initiated his own action under section 105(c)(3) on December 30, 2009. 33 FMSHRC at 2496.

The first prehearing order in this case established a 45-day deadline for the parties to initiate a conference call with the judge to discuss whether they would be settling the case or, if they were not going to settle, to discuss potential trial dates with her. The order also addressed discovery matters. *See* Amended Prehearing Order at 1 (June 7, 2010) (ALJ).

⁵ Gray's temporary reinstatement has been the subject of protracted litigation before the Commission and court of appeals. *See Sec'y on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), *rev'd* 691 F.3d 735 (6th Cir. 2012); *see also Sec'y on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011).

Despite MSHA no longer being involved in Gray's discrimination case, the possibility that Gray's signatures had been forged on the two disciplinary letters continued to be an issue for the agency. MSHA, along with the local United States Attorney, apparently investigated the creation of the two documents during much of 2010, while this case was in discovery. During that time, the originals of the two letters remained under the control of federal investigators, which prevented the documents from being examined by either party. *See Gray Br., Ex. E.*

During the conference call contemplated by the judge's June 7 order, Gray's counsel requested additional time to develop evidence.⁶ In an order dated July 19, 2010, the judge scheduled another such call for a month later, at which time the hearing would be scheduled. In a later order, the judge explained that the additional time was granted to allow Gray to obtain "the document" containing his allegedly forged signatures and have an expert examine it. Amended Order at 1 (Dec. 8, 2010) (ALJ).

The conference call did not actually take place until September 8, 2010, at which time a hearing date of December 15, 2010, was set. *Id.* The hearing date was memorialized in a Notice of Hearing dated September 9, 2010. That notice also included a discovery cutoff date of December 3, 2010. None of the judge's orders or the Notice of Hearing addressed identification of expert witnesses as part of discovery.⁷

On November 2, North Fork served interrogatories on Gray, requesting that, among other things, he identify the witnesses he expected to call at trial and provide a summary of each witness's expected testimony. NF's 2nd Set of Interrog. to Gray at 1. On November 24, Gray served as-of-then unverified answers that provided the requested names and summaries, including informing North Fork that Estevez, Ison, and Countiss could potentially be called to discuss the two disciplinary letters. Answers of Gray to NF's 2nd Set of Interrog. at 1-2 (attached to NF's 1st Mot. in Limine). Gray explained, however, that while he also expected to call a handwriting expert, that expert had not yet been determined. *Id.* at 2.

On December 1, North Fork filed a motion in limine, requesting that the judge prohibit Gray from calling the three North Fork supervisors on the ground that Gray was simply calling them as witnesses to impeach them. NF 1st Mot. in Limine at 1-2. North Fork also urged the

⁶ No record was made of this conference call or other conference calls discussed herein. The Commission's description of what occurred during these calls is taken from subsequent orders issued by the judge.

⁷ The judge's December 8 Order and Amended Order are not clear regarding what was discussed regarding the forgery issue in the September 8 conference call, as both versions state that Gray's counsel "discussed, at that time, the need for a handwriting expert. He indicated that he copies of the allegedly forged documents [sic]." Order at 1 (Dec. 8, 2010) (ALJ); Dec. 8 Amended Order at 1. As mentioned, the important issue was Gray's access to the originals of the documents.

judge to prohibit Gray from calling a handwriting expert on the ground that Gray's failure to name the expert constituted an inadequate response to the interrogatory. *Id.* at 2. North Fork also stated that it doubted that Gray had access to the originals of the disciplinary letters, and that it would be unfair to it to be confronted by an unidentified expert at such a late stage of the case.⁸ *Id.*

On December 3, Gray supplemented his interrogatory answers to identify the expert he intended to call at trial: Doctor Larry S. Miller, a Professor of Criminal Justice and Criminology at East Tennessee State University. Suppl. Answers of Gray to NF's 2nd Set of Interrog. at 1. Three days later Gray identified Peter J. Belcastro, Jr., of the Federal Bureau of Investigation, as the second handwriting expert he expected to call. 2nd Suppl. Answers of Gray to NF's 2nd Set of Interrog. at 1.

North Fork immediately filed a second motion in limine, addressing the recent identification of the handwriting experts, among other issues. North Fork requested that the judge prohibit Gray from calling either expert as a witness at trial, because Miller had been named only 12 days before trial and seven days after interrogatory answers were due, while Belcastro was named nine days before trial, ten days after the interrogatory answers were due, and three days after the discovery cut-off date. NF's 2nd Mot. in Limine at 2-3.

Before Gray filed written responses to the motions in limine, a conference call with the judge was held on December 7. Dec. 8 Amended Order at 2. In his written response to the first motion in limine, filed the next day, Gray explained that the delay in obtaining MSHA's permission for an expert to examine the originals of the documents in question prevented him from retaining an expert,⁹ but that once that permission had been received, Dr. Miller was retained, and the interrogatory answer was supplemented. Gray Resp. to NF's 1st Mot. in Limine at 3. Gray argued that the supplementation occurred only one day after the original answer was due and before the discovery cutoff date, and in any event did not prejudice North Fork. *Id.* Gray maintained that the issue had arisen so close to trial because North Fork had waited until only a month before the discovery cutoff to serve the interrogatories. *Id.*

⁸ Despite Gray's prior explanation that a verification of the answers would be forthcoming within five days, North Fork also argued that Gray's answers were inadequate because they had not been verified within the 25 days which Commission Procedural Rule 58 provides to answer interrogatories. NF's 1st Mot. in Limine at 1. However, the verification was e-mailed to North Fork on November 29, which, as will be discussed later herein, was the earliest date that the answers could have been considered due.

⁹ Gray's counsel states that he did not obtain permission to examine the original documents from Assistant United States Attorney Davis Sledd until "on or about November 22nd." Gray Pet. For Interlocutory Review at 7.

Gray made similar arguments that same day in opposition to the second motion in limine's request that Belcastro not be permitted to testify, but added that he had yet to obtain the requisite governmental permission for Belcastro to testify at trial. Gray Resp. to NF's 2nd Mot. in Limine at 2 n.2. According to the judge, Gray stated at the conference call that he had a written expert's report from Belcastro, but had yet to receive one from Miller. Dec. 8 Amended Order at 2.

The judge denied North Fork's request that Gray be prohibited from calling North Fork supervisors Estevez, Ison, and Countiss as witnesses. Dec. 8 Amended Order at 2-3. However, she granted the operator's request that the expert reports and testimony of both Miller and Belcastro be excluded. *Id.* The judge held that, given the importance of the timing of the identification of expert witnesses during discovery, good cause had not been shown in this case for the disclosure of the identity of the two experts beyond the time that the interrogatory answers on the issue were due or beyond the December 3 discovery cut-off date. *Id.* The judge rejected the contention that the lack of a specific date in her earlier orders for the disclosure of expert witnesses excused the timing of the identification in this instance. *Id.*

Gray immediately moved for reconsideration of the judge's order because, among other grounds, she had ignored the fact that Gray had alerted North Fork on November 24 that he intended to call an expert handwriting witness and had explained why he was unable to identify the witness at that time. Mot. for Reconsideration at 2. Gray also argued that a continuance could be granted to permit North Fork to depose the two experts and retain its own expert. *Id.* at 5. Gray additionally filed a motion requesting that the judge certify her order for interlocutory review by the Commission and that she suspend the hearing pending the Commission's interlocutory review.

In a single order, the judge denied all of Gray's requests. *See* Order dated Dec. 9, 2010. The Commission subsequently denied Gray's petition for interlocutory review (Order dated Dec. 13, 2010), and the judge held the hearing as scheduled later that week. At the close of Gray's case, copies of the expert witness reports of Miller and Belcastro were provided to the judge as part of Gray's proffer on the evidence of forgery, but were not admitted into the record. Tr. II 110-19.

In her subsequent decision on the merits of Gray's discrimination complaint, the judge ruled that Gray had failed to establish that he had engaged in protected activity, and thus had failed to carry his burden of proving a prima facie case of discrimination under the Mine Act. 33 FMSHRC at 2509. In doing so, the judge refused to credit Gray's account of the deep cuts that he alleged had occurred and Cornett's treatment of him with respect to the hanging of curtains. *Id.* at 2503-04, 2505-07. The judge instead credited the company's witnesses, with respect to their testimony denying that deep cuts had been made as well as their testimony and Cornett's daily log as to Gray's poor and unsafe work performance as a roof bolter. *Id.* at 2499-2503, 2504, 2507-09. The judge concluded that, even if Gray had established that he had engaged in protected activity, the company had demonstrated that Gray's work performance sufficiently established an affirmative defense to the charge of discrimination. *Id.* at 2509.

II.

Disposition

On review, Gray contends that evidence of the forgery of Gray's signatures on the disciplinary warning letters undermines the credibility of North Fork's witnesses, and that he should have been permitted by the judge to pursue the issue by presenting the expert testimony at the hearing. Gray argues that the judge abused her discretion in her pretrial rulings with respect to the expert evidence. Gray maintains that there was no basis for the judge to invoke the ultimate sanction of excluding evidence in this instance, where she had not established a deadline for parties to identify expert witnesses, and where North Fork had waited for months to serve interrogatories regarding the identity of witnesses, despite knowing that Gray was planning to retain handwriting experts.

North Fork responds that the judge did not abuse her discretion in excluding the proffered expert reports and testimony. North Fork contends that the proffered expert evidence would not have established forgery in any event and that there is insufficient evidence that the experts were prepared to testify at trial regarding their reports. North Fork also argues that the prior warnings are only relevant as to whether North Fork established the affirmative defense of Gray's poor work performance, and would not affect the primary issue the judge decided, which was that Gray had failed to establish that he had engaged in protected activity.¹⁰

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting 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. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend

¹⁰ On January 23, 2012, North Fork filed a motion requesting that the Commission exclude from the record on review certain attachments to Gray's brief. In an order dated February 7, 2012, the Commission denied North Fork's request as to some of the attachments (marked as Exhibits E and F) and deferred acting upon it as to the remainder of the attachments at issue until this time. Having considered the motion with regard to those attachments (marked as Exhibits A, D, H, and I) and Gray's response to the motion, we deny the motion as to those attachments as well. As Gray explains in his response, the documents in question were either previously provided to the judge and North Fork, or contain information that was previously provided in earlier pleadings in the case. Where it has been necessary to rely upon that information, the Commission has done so with regard to the earlier version provided.

affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. The Judge's Exclusion of the Handwriting Experts' Reports and Testimony

1.

Although it resulted from a discovery dispute, the judge's decision to exclude witness testimony at trial is subject to the Commission's review of evidentiary rulings. "When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. . . Abuse of discretion may be found when 'there is no evidence to support the decision *or if the decision is based on an improper understanding of the law.*'" *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (emphasis in original) (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)). Here we conclude that the judge's decision was based on an improper understanding of the law, specifically the Commission's Rules of Procedure addressing discovery requests and sanctions. Moreover, we conclude that there is insufficient evidence in the record to support the severity of the sanctions ordered by the judge.

2.

In this case, the event which triggered the exclusion of the expert witnesses was Gray's response to the interrogatory that North Fork served on November 2 requiring him to identify witnesses he expected to call at trial and provide a summary of the intended testimony of each witness. Rule 58(a) provides in pertinent part that "[a] party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25 days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding." 29 C.F.R. § 2700.58(a).

Here, North Fork had not requested, nor had the judge ordered, that a shorter time be provided for Gray to answer the November 2 interrogatories. Thus, the initial answers that Gray filed on November 24 were clearly timely relative to the 25 days permitted by Rule 58(a) to submit a response. However, it is undisputed that the answers – although accurate – were incomplete at that time, because Gray did not provide the information North Fork requested as to the expert witnesses he hoped to call. Moreover, while Gray eventually supplemented his answer to cure that inadequacy, the supplemental answers were filed more than 25 days after the interrogatory had been served by North Fork.¹¹

¹¹ There is a dispute over how untimely Gray's supplemental answers were under Rule 58, but we need not decide that question, given that North Fork did not file a required motion to
(continued...)

In her December 8 Order and Amended Order, the judge noted that in its motions in limine, North Fork sought to exclude the testimony of Gray's expert witness pursuant to Commission Rule 59.¹² Dec. 8 Order and Amended Order at 3. Similarly, in her December 9 Order Denying Reconsideration, the judge invoked Commission Rule 59. Dec. 9 Order at 2. Rule 59 provides in pertinent part:

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery.

29 C.F.R. § 2700.59.

Thus, Rule 59 requires that if a party fails to adequately respond to a discovery request, the next step is for the opposing party to file a motion to compel which requests the judge to issue an order compelling the delinquent party to comply with the discovery request. Only after

¹¹(...continued)

compel. Gray has contended throughout that he had until December 2 to answer the November 2 interrogatories, because they were mailed and he received them four days later. *See, e.g.*, Gray Br. at 8. Rule 8(b) adds five additional days when a document is served by means of other than same-day service. *See* 29 C.F.R. § 2700.8(b). North Fork takes the position that Gray's answers were due exactly 25 days later, on November 27, because the interrogatories were served not only by regular mail but also by e-mail, thus effectuating same-day service. NF Br. at 5 & n.3. The judge, in granting the motions in limine, appeared to have agreed with North Fork. *See* Dec. 8 Amended Order at 3 ("the answer to the interrogatory was due seven days prior to" its December 3 supplementation). However, even if we ignore the fact that the certificate of service for the interrogatories did not include the e-mail address for Gray's counsel that was used by North Fork and assume that same-day service of them was effective in this instance, November 27, 2010, was a Saturday. Consequently, the earliest that the answers were due was Monday, November 29, under Commission Rule 8(c). *See* 29 C.F.R. § 2700.8(c) (providing that submissions falling due on a weekend are consequently due the following business day).

¹² The judge's December 8 order addressed North Fork's outstanding motion to compel in conjunction with its motions in limine and discussed a previous motion to compel that North Fork had filed in the case. However, there is no clear indication that the order granting the motions in limine was in response to Gray's failure to comply with a previous or pending order to compel.

the judge has issued an order compelling compliance and the delinquent party has failed to comply may the judge take the further step of imposing “just and appropriate” sanctions. In other words, a judge may only impose sanctions for the failure to comply with *an order to compel discovery* – not the failure to comply with the opposing party’s interrogatories or other discovery requests.¹³

Despite the clear terms of Rule 59, in this instance North Fork filed no motion to compel with respect to any failure on the part of Gray to adequately identify his expert witnesses or to do so on a timely basis. Nor did North Fork supplement its pending motion to compel, filed on November 23, 2010, and relating to its document production requests, to alert the judge to Gray’s incomplete interrogatory answer regarding his expert witnesses. Consequently, the prerequisites to justify the exclusion of evidence as a sanction pursuant to Rule 59 were lacking, and the judge’s order invoking Rule 59 as a sanction thus constitutes an abuse of discretion.

We note that the interrogatory in question was not served by North Fork until November 2. That was only a month before the discovery cut-off date established nearly two months earlier.¹⁴ At least as of the prehearing telephone conference on July 20, 2010, North Fork was on notice that Gray alleged that his signature on the two Disciplinary Letters was forged, that he needed to obtain the documents, and that he intended to have an expert examine them. Dec. 8 Order and Amended Order, at 1.

¹³ It is clear that Rule 59 is modeled after Rule 37 of the Federal Rules of Civil Procedure. Rule 37(b)(2) provides for sanctions in the event a party fails to comply with a court’s discovery order. A court order granting a motion to compel submitted pursuant to Rule 37(a) is a prerequisite to such sanction. “The absence of a prior order or direction compelling discovery precludes Rule 37(b) sanctions.” 7 Jm. Wm. Moore, et al., *Moore’s Federal Practice* § 37.42[1] (3d ed. 2012); see, e.g., *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (“[f]ederal court decisions . . . unanimously agree that sanctions pursuant to Rule 37 may not be awarded absent violation of a court order”); *R.W. Int’l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991) (“The taxonomy of Rule 37 is progressive. If an order to answer is issued under Rule 37(a), and then disobeyed, Rule 37(b)(2) comes into play”).

¹⁴ North Fork’s delay in attempting to discover the identity of expert witnesses is particularly curious, given that it had been alerted early in the proceeding to Gray’s intention to provide expert evidence regarding whether it was in fact his signature on the disciplinary letters that North Fork had given MSHA.

In granting the requested sanction and prohibiting the expert testimony, the judge also cited in support her earlier discovery scheduling orders, which identified the applicable Commission discovery rules and established a discovery cut-off date.¹⁵ Because she found that Gray's identification of his expert witnesses was not timely under those orders, the judge concluded that the sanction of exclusion of expert evidence was appropriate.

We recognize that under Federal Rule of Civil Procedure 37(c), a party who fails to identify a witness as required by Rule 26(a) may be precluded from calling that witness at trial.¹⁶ *See* Fed. R. Civ. P. 37(c)(1). However, Commission Rule 59 does not have a comparable provision to Fed. R. Civ. P. 37(c). This does not mean that Commission judges are powerless to exclude witnesses identified after the expiration of a deadline for the disclosure of witnesses. Commission Rule 55, 29 C.F.R. § 2700.55, grants judges broad power to regulate the conduct of parties in proceedings before them. *In re: Contests of Respirable Dust Sample Alteration*

¹⁵ Although the judge's December 8 Order and Amended Order states that "Complainant's position disregards entirely my earlier [Amended Prehearing] Order directing the parties to comply with Commission Rule 58 which directs the parties to respond to interrogatories and requests for documents within 25 days of being served upon them" (Dec. 8 Orders at 2), her Amended Prehearing Order issued on June 7, 2010 actually only stated the following regarding Commission Rule 58:

Discovery requests made pursuant to Commission Rules 56, 57 and 58, 30 [sic] C.F.R. §§ 2700.56, 2700.57, 2700.58, responses to discovery requests, and deposition transcripts **shall not** be filed with the Commission. The originals of such responses or transcripts shall be retained by the party initiating the discovery. No motion to compel discovery shall be filed until the party seeking discovery has exhausted **all** other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by a statement of the representative setting forth the efforts that have been made to resolve the differences. Alternatively, all unresolved discovery matters may be dealt with during the assigned conference call.

Amended Prehearing Order, at 1 (emphasis in original).

¹⁶ Rule 26(a) operates separately from the provision of Rule 37(a) that a party must make a motion to compel discovery before seeking sanctions and includes a requirement for the disclosure of expert witnesses "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

Citations, 14 FMSHRC 987, 1003-04 (June 1992) (“when analyzing the manner, content, and effect of a judge’s discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred”). However, “the exclusion of critical evidence is an ‘extreme’ sanction, not normally to be imposed absent a showing of willful deception or ‘flagrant disregard’ of a court order by the proponent of the evidence.” *In re Paoli Railroad Yards PCB Litigation*, 35 F.3d 717, 791-92 (3rd Cir. 1994), citing *Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894, 905 (3rd Cir. 1977).¹⁷

In the present case, the judge did not set any deadlines for the identification of witnesses, expert or otherwise. Gray’s identification of Miller on December 3, 2010 was on the date set by the judge for the completion of discovery, and his identification of Belcastro on December 6 was three days after the date set for completion of discovery. To the extent that Gray’s identification of these witnesses was beyond the deadline set by the judge, we conclude that the judge abused her discretion in excluding the witnesses in light of the lack of surprise to North Fork, the importance of the evidence to be offered by the witnesses, the absence of bad faith or wilfulness on Gray’s part, and the ability to cure the prejudice.

The documents which North Fork provided to MSHA with Gray’s allegedly-forged signatures are critical evidence in Gray’s case. As stated above, North Fork knew that Gray challenged the authenticity of the signatures, and was seeking to obtain the original documents from the government for inspection by a handwriting evidence. The judge did not cite bad faith or other improper motivation with regard to Gray’s actions in responding to discovery requests, and we do not see anything in the record that would justify such a finding.¹⁸

¹⁷ The Third Circuit considers the following four factors in determining whether a trial court properly exercised its discretion in excluding evidence for failure to adhere to a pretrial order:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court’s order.

Paoli Railroad Yards, 35 F.3d at 791; *Meyers*, 559 F.2d at 904-05.

¹⁸ According to Gray’s counsel, he had sent a letter to Gary Harris, the senior Special Investigator for MSHA’s District 7 Office on July 1, 2010, asking for permission to have an independent handwriting expert view the “written warnings.” Gray’s counsel received a

(continued...)

Moreover, the judge did not explore alternative lesser sanctions that would have been more appropriate for supplementing discovery answers six and nine days beyond their due date. *See Betzel v. State Farm Lloyds*, 480 F.3d 704, 709 (5th Cir. 2007) (trial judge erred dismissing case instead of considering continuance in conjunction with possible lesser restrictions and financial sanctions).

The premature sanction for Gray's failure to fully and timely answer the interrogatory on the expert evidence was especially unwarranted in this case because of the unusual impediment to discovery that was present. This case was intertwined with a federal criminal investigation, but unlike most proceedings before the Commission, the Secretary was not a party before us and thus could not be relied upon to supply the judge with necessary updates as to the status of the criminal proceedings. Nor was the Secretary able to supply a necessary informational conduit for the parties. Consequently, the resulting lack of coordination may have impeded the efficiency of the Commission's proceedings.¹⁹ But a concern for efficiency and courtesy alone, absent bad faith or unfair advantage, cannot justify the exclusion of vital evidence.

¹⁸(...continued)

response to this letter in a letter dated September 7, 2010 – the day before the conference call setting the case for hearing, and more than two months after the request. The response from Carolyn T. Jones, the Assistant Director of MSHA's Technical Compliance and Investigation Office, notified counsel that the documents in question were "part of an ongoing law enforcement action," and that further inquiries should be directed to H. Davis Sledd, Assistant U.S. Attorney ("AUSA") for the Eastern District of Kentucky. PDR at 5. Gray's counsel sent a copy of Ms. Jones' letter to the judge and to counsel for North Fork. *Id.* It was not until on or about November 22, 2010, that Gray's counsel received permission from AUSA Sledd to have the documents examined by a handwriting expert. *Id.* at 7 n.9. Gray's counsel then retained Dr. Miller as a handwriting expert, arranged for him to review the original documents, and supplemented the answers to North Fork's Second Interrogatories on December 3, 2010, identifying Dr. Miller as an expert witness. *Id.* at 9. Belcastro was the government's handwriting expert in its investigation concerning the allegedly forged documents. Gray's counsel state that they did not receive a copy of Belcastro's report from the government until on or about December 6, 2010. *Oppegard Aff.* at 6 (Jan. 16, 2012) (Gray Br. Ex. A). Gray's counsel submitted a Second Supplemental Answer to North Fork's Second Interrogatories on December 6, identifying Belcastro as an expert witness although permission had not been received from the United States Attorney, pursuant to 28 C.F.R. § 16.22, to call Belcastro as an expert witness. PDR at 10. That the pending criminal investigation cast a shadow over the proceedings in this case is further reflected in the fact that, at the hearing, witness Russell Ison, the company mine superintendent at the time of the first alleged warning notice, invoked his Fifth Amendment right against self-incrimination when questioned about the notice. Tr. I 99.

¹⁹ The parties ideally should have communicated with the judge more frequently on the status of necessary evidence being delayed by the pendency of the criminal investigation. That Gray may have failed to do so, however, does not warrant the sanction ultimately imposed.

The importance of Gray's proffered evidence of forgery lies not only in its importance to his case, but in the nature of the evidence and its relationship to the integrity of our proceedings. The ultimate purpose of litigation is to determine the truth. Equally obvious, the truth-finding process is undermined if the court or agency is confronted with forged or fraudulent documents. As the Supreme Court stated in a case involving a fraudulent patent application, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944):

tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

In this case, the principal documentary evidence supporting North Fork's claim of Gray's poor work performance was a pair of disciplinary letters which Gray asserts were fraudulent.²⁰ The evidence of fraud should have been considered by the judge.

B. The Effect of the Evidentiary Exclusion on the Judge's Protected Activity Analysis

North Fork contends that whatever error the judge made in excluding the expert evidence was harmless in this instance, because the judge ultimately concluded that Gray had failed to establish that he had engaged in protected activity. According to North Fork, the introduction of the expert evidence would not have altered the judge's conclusion, because it was based on credibility determinations against Gray and in favor of North Fork's witnesses. However, we cannot agree that those determinations were unaffected by the judge's refusal to consider the expert evidence on the issue of whether Gray's signatures on the disciplinary letters were forgeries.

The witnesses relied on by the judge included both management and non-management employees. Specifically, the judge credited the testimony of management employees Anthony Estevez, Thomas Cornett, and Marty Bates, and non-management employees Chris Sheeks, William McFarland, William Peak, and Jerry Lynn Hall. 33 FMSHRC at 2507-09. These witnesses testified that there were no deep cuts beyond 20 feet taken in the North Fork mine, and that Gray was a poor and lazy employee who had been admonished and disciplined for his poor roof bolting on numerous occasions. The judge credited these witnesses largely because they

²⁰ The reports of Gray's excluded expert witnesses, which Gray included in his proffer at trial, tend to support this contention. Tr. II 110-17; OP Exs. 1, 2.

corroborated each other. *Id.* The judge also consistently discredited Gray's testimony, though her rationale in doing so does not entirely withstand scrutiny. *See id.* at 2499-2507.²¹

The only documentary evidence that Gray was ever disciplined for poor performance were the two alleged written warnings dated February 27, 2009 and April 28, 2009. Gray Exs. A & B. The disciplinary letter dated April 28, 2009, stated on its face that it was a "Final Warning." Gray Ex. A.

If these documents were forged by North Fork, as Gray contends, the testimony of mine superintendent Estevez would be directly and significantly impeached.²² Estevez testified that he prepared and signed the April 28, 2009 disciplinary letter (Gray Ex. A), and that Gray signed it in his presence and the presence of Countiss. Then Countiss and he signed the document, all in each other's presence. Tr. I 36-43.²³ If it were determined that Gray's signature was forged, Estevez's credibility as a general matter would be called into question. Estevez also testified that when he wrote the April 28 disciplinary letter and when he, Countiss, and Gray signed it, the alleged Disciplinary Letter dated February 27, 2009, was not underneath it. Tr. I 44-45, 51. However, the proffer of the testimony and reports of Miller and Belcastro was to the effect that

²¹ For instance, the decision states that Gray testified at trial "that he told no one" about bolting the deep cut, contrary to his testimony at the temporary reinstatement hearing. 33 FMSHRC at 2504. However, Gray's testimony at trial was that after bolting the deep cut, Gray did indeed complain to Cornett that it was illegal and told Cornett that he would not bolt any more deep cuts. Tr. I 182-83.

Regarding Gray's testimony about Cornett's adverse reaction to Gray's stopping roof bolting to hang curtains, the judge concluded that Gray "could not articulate at either hearing what complaint he had concerning the curtains." 33 FMSHRC at 2506-07. It is possible, however, that Gray was using the term "complaint" in the Mine Act discrimination context, in that he thought he had engaged in protected activity by stopping roof bolting to take the safety precaution of hanging curtains, and then was subject to Cornett's animus towards him for doing so. Tr. I 203-08.

²² The testimony of day shift outby foreman Steve Countiss, who signed the later of the two documents as a "witness," would also be impeached. However, the judge did not indicate in her decision that she relied on the testimony of Countiss in making her findings. 33 FMSHRC at 2507-09. As mentioned earlier, former mine superintendent Russell Ison, who allegedly authored and signed the disciplinary letter dated February 27, 2009 (Gray Ex. B), refused to answer questions about the document on the basis of his Fifth Amendment privilege against self-incrimination. Tr. I 99.

²³ However, Countiss testified that Gray signed the document and then left the room. Thus, according to Countiss, when Countiss signed the document, Estevez was the only person in the room. Tr. I 109-11. Countiss testified that he did not recall whether or not he saw Estevez sign the document. Tr. I 114.

there were indentations on the February 27 disciplinary letter indicating that the April 28 disciplinary letter was on top of it when the April 28 Letter was prepared. Tr. II 113-16; OP Exs. 1 & 2. This evidence, if admitted, could have impeached Estevez because it could be argued that the two letters, bearing dates two months apart, were actually prepared at the same time.

While day shift foreman Cornett was not present at the signing of the two letters, a finding that the letters had been forged would also undercut the credibility of his testimony. Cornett became Gray's immediate supervisor in April 2009 and remained his supervisor until Gray was fired on May 15, 2009. Tr. I 227. Cornett stated that for virtually that entire period, Gray's work was "real poor." Tr. I 229. Cornett testified that he kept a personal notebook in which he recorded Gray's poor work on nine separate occasions. Tr. I 233-45; NF Ex. 3. According to Cornett, he had admonished Gray on three of those occasions (April 23 and 28 and May 11) and had also given Gray verbal warnings on two occasions (April 28 and 29). Tr. I 238-44; NF Ex. 3. However, North Fork did not produce Cornett's original notebook but only pages which had been copied from it, and Cornett testified that he did not know where the original notebook was. Tr. I 233-35, 253. Cornett acknowledged that at the temporary reinstatement hearing on September 2, 2009, Administrative Law Judge Gary Melick had directed him to keep his original notes. Tr. I 253.

Cornett also testified that on May 15, the date Gray was fired, he gave Gray's roof bolting partner Chris Sheeks a verbal warning and recorded it in his notebook. Tr. I 259-60. However, the notes which North Fork submitted in evidence do not contain any mention of a verbal warning to Sheeks. NF Ex. 3. This fact suggests that the notes admitted in evidence were, at best, incomplete. If the two disciplinary letters were forgeries, it would mean that North Fork has no authoritative documents to support its contention that Gray had received warnings before being fired for alleged poor performance.²⁴ It would eliminate the "Final Warning" contained in the April 28 letter. Cornett agreed with counsel that on April 14, 2009, Gray's work was so bad that he was "intentionally . . . sabotaging production." Tr. I 265. But if the two disciplinary letters were forgeries, Gray was never disciplined in writing by North Fork until May 15, 2009, which was a month later – and just a week after Gray claims he refused to bolt a deep cut.

The authenticity of the disciplinary letters also affects consideration of the testimony of the non-management employees who testified. Gray's bolting partner, Chris Sheeks, was the most important non-management witness for North Fork, and was the non-management witness on whom the judge relied most heavily. 33 FMSHRC at 2500-01, 2504-05, 2507-08. Sheeks

²⁴ Gray's attorney questioned the authenticity of Cornett's notes and objected to their introduction on grounds that the absence of the original documents and the use of incomplete copies prevented an evaluation of whether they were, in fact, prepared contemporaneously, or whether they were produced after Gray's discharge and discrimination claim. *See* Tr. I 233-35; Gray's Post-Hearing Br. at 18 n.17 (citing also the failure to tell MSHA investigator about notes maintained on Gray's performance).

testified on both direct and cross-examination that Gray told him that he had been “written up” four times by North Fork management – three times by Ison and once by Estevez – for poor performance. Tr. II 69-70, 90. Sheeks made clear that he understood being “written up” to mean that “[t]hat a piece of paper that has what you’ve done wrong, and you sign it.” Tr. II 70. Gray, however, denied that he had ever been written up by North Fork. Tr. I 194-97. If the only two disciplinary letters in Gray’s personnel file were actually forgeries, it would corroborate Gray’s testimony that he had never been written up, and it would follow that Gray had never told Sheeks that he had been written up. Thus, a significant portion of Sheeks’ testimony would be shown to be false.²⁵ Any assessment of the credibility of the rest of Sheeks’ testimony – including the testimony that Cornett had never directed him and Gray to bolt a 50-foot deep cut and that Gray had never refused to bolt a 50-foot deep cut, Tr. II 75-76, as well as the testimony that Gray had threatened to sue North Fork if he was fired and denied unemployment benefits, Tr. II 74-75 – would have to account for this discrepancy.

Similarly, continuous miner operator Jerry Hall testified that he had heard talk among other miners that North Fork had “written [Gray] up.” Tr. II 15. But if Gray had not, in fact, been written up, then Hall’s testimony, like Sheeks’, would be called into question.

The Commission has recognized that a judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here it cannot be said that the judge’s error in excluding Gray’s expert evidence was harmless because the judge found that Gray failed to establish that he engaged in protected activity. Although the judge made credibility determinations in concluding that Gray had not engaged in protected activity, the credibility of these witnesses would have to be re-evaluated if it is found that the two disciplinary letters were forgeries.

²⁵ Additionally, Sheeks testified that he actually saw one of the written warnings being given by Estevez. Tr. II 91-92. Then Sheeks qualified this testimony by saying that he was not actually present when the written warning was given by Estevez to Gray, but that he had been in Estevez’s office with Gray “right before” Gray was written up. Tr. II 93. But this testimony was inconsistent with the testimony of Estevez, who stated that he had brought Gray and Sheeks into his office to admonish them together on a “prior occasion,” and later gave Gray the disciplinary letter because he “hadn’t seen any improvement on Mark’s part.” Tr. I 41. Thus, neither of the accounts that Sheeks gave – that he saw the written warning being given or that he had been in Estevez’s office with Gray just before the written warning was given – is consistent with any other witness’ account.

III.

Conclusion

For the foregoing reasons, we reverse the judge's order excluding the expert evidence and vacate and remand her decision for further proceedings, including any necessary discovery.

/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

Chairman Jordan, dissenting:

The majority concludes that the judge erred in excluding expert evidence proffered by Mark Gray, which would purport to show that Gray's signatures on two disciplinary letters were forged. I find that, even assuming *arguendo* the judge incorrectly excluded the evidence, this error would not in all likelihood have affected the outcome of the case. Accordingly, I would affirm the judge's decision.

Section 105(c) of the Mine Act prohibits discrimination against a miner because of the exercise by such miner of any statutory right afforded by the Act. 30 U.S.C. § 815(c). In order to establish a *prima facie* case of prohibited discrimination, a 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. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981).

In this case, Gray contends that his discharge was motivated at least in part by certain complaints he had voiced regarding practices he believed violated the mine's roof control plan. Specifically, Gray contends that North Fork was taking 50-to-60 foot cuts of coal, which exposed more roof than was allowed under the roof control plan, and departed from the usual 18-to-20 foot cuts taken at the mine. Gray maintains that after complaining about the legality of the practice, he refused to bolt the dangerously large expanse of unsupported roof. Gray also contends that he provoked his foreman's anger when he temporarily stopped roof bolting to hang the ventilation curtains. Gray submits that his discharge, occurring shortly after these events, was motivated by this protected activity.

In her October 20, 2011, decision, the judge concluded that Gray failed to produce a single credible witness or tangible evidence in support of his *prima facie* case, and that there was no support for his allegations of protected activity. 33 FMSHRC 2495, 2499 (Oct. 2011) (ALJ). Although Gray testified that he had been forced to bolt a deep cut and then refused to bolt a second one, the judge credited the numerous witnesses who testified consistently that, due to extremely adverse roof conditions, there had never been a cut in excess of 20 feet made in the mine. *Id.* at 2499-2504. These witnesses encompassed both management and hourly employees and included Gray's bolting partner, the crew that would have had to bolt the cut Gray allegedly refused to bolt, and the continuous miner operator who would have made the two alleged deep cuts. *Id.* at 2499-502.

The judge's credibility findings were also influenced by Gray's failure to complain about the deep cuts to an MSHA inspector, a fact the judge found "defies common sense" particularly since "Inspector Doan . . . was in Gray's section to inspect his bolter twice on the day Gray was terminated." *Id.* at 2504. The judge also relied on the testimony of Gray's bolting partner Chris Sheeks, who maintained that Gray told him that if Gray were fired and denied unemployment he would then file a discrimination claim. *Id.* at 2500-01, 2504. Although Gray disputed making

these comments, the judge found that this provided “the motive behind Gray’s alleging discrimination and falsely reporting illegal deep cuts being taken in the mine.” *Id.* at 2504.

Besides the alleged protected activity of refusing to make a deep cut, Gray also claimed that his insistence on taking the time to hang the ventilation curtains provoked management’s ire and was a factor in its decision to discharge him. Although there appears to be some confusion by the judge as to whether Gray was asserting, or needed to assert, that he had “complained” about the ventilation curtain, slip op. at 14-15 n.21, what is clear is that the judge was not persuaded by Gray’s testimony and was persuaded instead by Supervisor Thomas Cornett’s testimony (reflected also in his notes, NF Ex. 3) that he (Cornett) had reprimanded Gray on numerous occasions for not hanging the curtains as required. 33 FMSHRC at 2500.

Gray argues that the excluded evidence is the “centerpiece of his case,” PDR at 15, and my colleagues appear to agree. Slip op. at 14-17. Like a loose thread in a sweater that when pulled unravels the entire item, my colleagues envision a scenario wherein the admission of the expert witness testimony will result in a finding that Gray’s signature on the disciplinary letters was forged, which will in turn inexorably lead the judge to reconsider and reverse key credibility determinations. This anticipated result is highly speculative at best.

Climbing the first rung of the ladder requires the judge to find that, based on Gray’s experts’ testimony, his signatures on the two warning letters were forged. Such a finding is far from inevitable as, according to Gray’s proffer, one of his experts (Belcastro) appeared equivocal about whether the documents were forged. Although he would have indicated that one discharge letter was prepared on top of another, the proffer regarding Belcastro’s report stated that “a definite determination could not be reached concerning the authorship of the questioned, ‘Mark Gray’s’ signatures. . . . Mark Gray . . . may not have prepared the . . . Mark Gray . . . signatures.” Tr. II 115. Gray’s counsel acknowledged during his proffer that he did not have the federal government’s approval to use Belcastro (a federal government employee) as a trial witness. Tr. II 120-21.

My colleagues anticipate that a finding of forgery will necessarily call most, if not all, of the judge’s prior credibility determinations into question. In particular, they suggest it will lead to the impeachment of one witness (Superintendent Anthony Estevez) and undercut the credibility of another management witness (Cornett) and two hourly employee witnesses (Sheeks and Hall). Slip op. at 15-17. We have made it plain, however, that a judge is not required to subscribe to a “false in one, false in everything” rule of testimonial evidence. *See, e.g., Nelson Quarries, Inc.*, 31 FMSHRC 318, 327 (Mar. 2009) (citing *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981)). Therefore, even a witness who was involved with the letters, and whose credibility on certain issues might be impeached by a finding of forgery, could still be credited on other aspects of his testimony.

Moreover, the judge credited the testimonies of witnesses who had nothing whatsoever to do with the letters. As the majority acknowledges, the judge credited the testimony of management employee Marty Bates and three other non-management employees (William

McFarland, William Peak, and Jerry Lynn Hall), who were not linked to the disciplinary letters in any manner. No possible finding that the disciplinary letters contained a forged signature logically affects their consistent statements that there were no deep cuts at the mine, 33 FMSHRC at 2499, and that Gray was a poor performer. *Id.* at 2509.

The majority also fails to demonstrate how a finding of forgery on remand will impact the credibility determination the judge made regarding Cornett, the section foreman; they simply state that if the letters were forged, there was no support for the operator's contention that Gray had received written warnings before being fired. Even if this is true, it in no way undermines Cornett's testimony that "Gray never refused to bolt a cut or complained to him about having to bolt a cut." *Id.* at 2500.¹

I believe my colleagues also overstate the importance a finding of forgery might have on the judge's decision to credit Sheeks, Gray's bolting partner. Sheeks stated explicitly that Cornett never told him to bolt a cut of 50 feet or deeper, that he never saw a cut of 50 feet or deeper in the mine, that he never bolted a cut of 50 feet or deeper in that mine, and that he never heard Gray refuse to bolt a cut of 50 feet or deeper or to refuse to bolt any cut. Tr. II 75-76.

Focusing on a comment by Sheeks that Gray told him he had been written up four times, the majority opines that if the only two disciplinary letters in Gray's file were forgeries, it would follow that Gray never told Sheeks that he had been written up. This may not be the case, however, particularly because one of the written disciplinary actions about which Sheeks testified did not concern the content of the two disciplinary letters at issue. Rather, he testified that Gray told him he received a written warning "for not having enough cable to reach Number One entry." Tr. II 70.

¹ Cornett's testimony was supported by detailed notes in a journal. NF Ex. 3. Although my colleagues appear to challenge the completeness and perhaps the authenticity of the notes Cornett produced at trial, slip op. at 16 & n.24, the notes were admitted by the judge and the correctness of that ruling is not before us.

In sum, even if the judge erred in excluding the expert testimony, for the reasons outlined above I decline to vacate her ruling based on the highly speculative scenario suggested by the majority. The evidence regarding the allegedly forged warning letters was not relevant probative evidence regarding the issue of whether Gray engaged in protected activity. Consequently, the judge's ruling did not infringe on the "substantial rights" of Gray. *See Law v. Camp*, 15 Fed. Appx. 24, 26 (2d Cir. 2001) (holding that the district court did not abuse its discretion in precluding testimony of plaintiff's expert witnesses, and citing *Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994) (stating that a court abuses its discretion when a discovery ruling is improvident and effects the substantial rights of the parties)).

For the foregoing reasons, I would affirm the judge's decision and thus, respectfully dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 6, 2013

UNITED MINE WORKERS OF AMERICA :
on behalf of MARK A. FRANKS :
 : Docket No. PENN 2012-250-D
v. :
 :
EMERALD COAL RESOURCES, LP :
 :
UNITED MINE WORKERS OF AMERICA :
on behalf of RONALD M. HOY :
 : Docket No. PENN 2012-251-D
v. :
 :
EMERALD COAL RESOURCES, LP :

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER DENYING APPLICATION FOR STAY PENDING REVIEW

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2006) (“Mine Act” or “Act”). On June 3, 2013, a Commission Administrative Law Judge issued a decision holding that Emerald Coal Resources, LP (“Emerald”) had discriminated against the two complaining miners, Mark Franks and Ronald Hoy, when it had suspended each for seven days. Three days later the judge issued an amended decision, extending the time period for the operator to take certain remedial measures, including the remittance of back pay to the miners, from the 10 days specified in the original decision to 30 days. *See slip op.* at 1 n.1, 12 (June 6, 2013).

On June 25, pursuant to section 113(d) of the Act, 30 U.S.C. § 823(d), Emerald filed a timely petition for discretionary review (“PDR”) of the judge’s decision as amended. On July 9, the Commission directed the case for review.

With its PDR, Emerald also filed a motion to stay enforcement of the judge's order on the ground that the 30-day time period specified for compliance conflicted with Emerald's right to seek Commission review of the judge's decision. In an order dated June 28, we granted that motion in part. We extended the period the judge provided for compliance to July 16.

In our order, we noted that Emerald had asked that the Commission grant a stay of enforcement of the judge's amended decision and order until such time as there is a final Commission determination in this matter. We stated that should we grant Emerald's petition for review, we would then decide whether a further stay was appropriate under the applicable standard for a stay pending review. By July 15, six days after we directed the case for review, Emerald had not yet submitted a request for a stay that addressed the factors that we consider in deciding whether to grant a stay pending appeal. Consequently, we issued an order that day stating that a stay beyond July 16 would not be granted at that time. On July 16, Emerald submitted an application for a stay pending review. On July 31, the United Mine Workers of America, on behalf of the two miners, filed a response in opposition to the application.

Emerald is obligated to do the following under the judge's decision. (1) Emerald must pay Franks \$1,168.68 plus interest, and Hoy \$1,963.93 plus interest. (2) Emerald must post the judge's decision, along with a notice explaining that the company had been found to have discriminated, is required to remedy that discrimination, and is not to discriminate again. The notice is also to explain what miners should do in the event they feel they have been discriminated against. (3) Emerald is also required to remove from the personnel records of the two miners the reprimands they received in connection with their suspensions. Slip op. at 12.

In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958): (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Id.* at 925. The court also made clear that a stay constitutes "extraordinary relief." *Id.*; see also *W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

We need not discuss the likelihood that Emerald will prevail on appeal to dispose of the application for stay, for we see no irreparable harm to Emerald should it prevail. "[E]conomic loss does not, in and of itself, constitute irreparable harm" (*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); see also *Virginia Petroleum*, 259 F.2d at 925), and in any event Emerald can seek reimbursement from the two miners in the event the Commission overturns the judge's decision. In addition, if the Commission reverses the judge's decision, Emerald can notify employees by posting the Commission decision just as prominently as it did the judge's decision. As for the miners' personnel records, those can be easily updated if the judge's decision is overturned. In the interim, it would adversely affect the miners to leave those reprimands in their files.

We can discern no public interest in issuing a stay in this case. To the contrary, the remedial measures ordered by the judge are fully consistent with the public interest, expressed in the Mine Act, in minimizing the harm to miners from actions which may have been discriminatory. Consequently, the stay application is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-956
Petitioner,	:	A.C. No. 15-19114-213966-01
	:	
	:	Docket No. KENT 2010-990
v.	:	A.C. No. 15-19114-215039
	:	
	:	Docket No. KENT 2010-1087
	:	A.C. No. 15-19114-216579
REX COAL COMPANY, INC.,	:	
Respondent.	:	Mine: C-5

DECISION

Appearances: Kent Hendrickson Esq., Rice & Hendrickson, Harlan, KY for Respondent

 Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of
 Labor, Nashville, TN for the Secretary

Before: Judge Andrews

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns Citation Nos. 8401220 and 8401221 and Order No. 8355742. Citation No. 8401221 was issued under §104(a) of the Act while Citation No. 8401220 and Order No. 8355742 were issued under §104(d)(1). The Citations and Order were served on Rex Coal Company, Inc. (“Rex Coal” or “Respondent”) following an investigation of an accident that occurred on November 26, 2009. The Secretary assessed a total penalty of \$81,142.00 in this matter. A hearing was held in Middlesboro, Kentucky on March 7, 2013.

STIPULATIONS

The parties have entered into several stipulations, introduced as Government Exhibit 1.¹ Those stipulations include the following:

1. Respondent is subject to the Act.
2. Respondent has an affect upon interstate commerce within the meaning of the Act.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Respondent operated the C-5 Mine, I.D. No. 15-19114, in 2009.
5. The C-5 Mine produced approximately 123,000 tons of coal in 2009.

CITATION NO. 8401221

On February 11, 2010 at 10:00 a.m. Inspector Arthur Dale Jackson (“Jackson”) issued Respondent Citation No. 8401221 for an alleged violation of 30 C.F.R. §50.10. That standard states:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:

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

30 C.F.R. §50.10. In this citation, Taylor observed the following condition or practice:

The operator failed to notify MSHA immediately of a conveyor belt fire that occurred on 11-26-2009, lasting longer than 30 minutes on the No. 3 belt tailpiece as evidenced by charred conveyor belt, excessive amounts of soot on the mine roof, fire damage to the No. 3 tailpiece and testimony from mine management of times exiting the mine and re-entry into the mine when the smoke was encountered.

¹ Hereinafter, Government Exhibits will be referred to as “GX” followed by the number. Respondent’s Exhibits will be referred to as “RX” followed by the number.

(GX-12).

Jackson found that this violation was highly likely to lead to an injury and that such an injury could reasonably be expected to be fatal. *Id.* He determined that the violation was Significant and Substantial (“S&S”) and affected two persons. *Id.* Jackson found Respondent’s actions exhibited high negligence. *Id.*

A subsequent Action was filed the same day at 12:52 p.m. stating:

The operator has instituted a company policy explaining procedures for “Immediately Reportable” accident and the policy, along with the 12 guidelines for reportable accidents and the MSHA National Call Center phone number, are posted on the wall in the mine office. The operator has explained the procedure to the foreman.

Id. at p. 2

Summary of the Testimony

I. Arthur Dale Jackson’s Testimony:

Jackson was familiar with a fire that occurred at the C-5 mine on November 26, 2009. (Tr. 12-13).² Jackson received a call at home from his ventilation supervisor, Scott Whittaker, at around 12:40 telling him that his wife had heard of a fire on the news. (Tr. 13). Jackson called Eddie Sparks (“Sparks”), the Mine Emergency Unit (“MEU”) team leader, who then called Sam Creasy (“Creasy”), the supervisor at MSHA’s Harlan office. (Tr. 13). Sparks called back minutes later and said that there had been a fire and requested Jackson go to the office and prepare to check on it. (Tr. 13).

Jackson arrived at the mine at 2:05 but did not go underground until later; instead Sparks told him to sample the atmosphere at the return fan. (Tr. 14, 68-69). When they arrived, two state inspectors and company officials were underground. (Tr. 14).

² He had twenty-five years in mining before joining MSHA. (Tr. 10). He operated equipment underground, had safety jobs, and worked as a foreman for six or seven years. (Tr. 11). He started in mine rescue in 1976 and has worked as a captain, a briefing officer, and a gas man. (Tr. 11). A captain leads the team into the mine in case of an emergency or disaster and makes sure that the commands are followed. (Tr. 12). He has been employed by MSHA in Harlan as a ventilation specialist for five and a half years and been with MSHA for almost thirteen years. (Tr. 10). He received twenty-six weeks of training at the Academy. (Tr. 10). He has also worked as an inspector and a member and trainer on the MSHA Mine Emergency Unit for almost six years. (Tr. 10, 12). Jackson has helped in six or seven underground mine fires and three explosions. (Tr. 12).

Jackson reviewed his notes, GX-13. (Tr. 55). On page 9, the notes indicated that he interviewed Anthony Coots (“Coots”). (Tr. 55). According to the notes, Coots arrived at the mine site at 4:40 a.m., traveled underground to do examinations, and then went to the surface and met Billy Joe Clem, Jr. (“Clem”).³ (Tr. 55-56). They then traveled underground. (Tr. 56). In an interview, Jackson learned Coots went to burn holes into the metal tailpiece to insert bolts. (Tr. 18-19, 21). The belt was not running at the time. (Tr. 21). The only other person in the mine was Clem. (Tr. 21). Coots left Clem at the 001 MMU and traveled back to the #3 tailpiece with tanks and torches to work on the skirt. (Tr. 56). At around 8:30 a.m., a carbon monoxide (“CO”) alarm went off and he called to surface to get the security guard to silence it. (Tr. 56). This was also likely the time he turned off his Solaris detector. (Tr. 56). The alarm possibly went off after detecting CO from the smoke caused by the hole he burnt in the tailpiece. (Tr. 57-59). When the guard could not silence it, he went outside, turned it off, and at around 9:30 went back underground. (Tr. 59). When Coots got to crosscut 26 his spotter went off showing 35 ppm CO; a significant amount. (Tr. 59). Ordinarily, it is zero. (Tr. 59).

Coots then said he went to the tailpiece and found 90 ppm CO, an orange glow, and heavy smoke at around 9:30-9:45 a.m. (Tr. 59, 62). Coots got two fire extinguishers, took them to the area and discharged them, but the fire did not go out. (Tr. 60). After that, he traveled thousands of feet across all six entries looking for Clem. (Tr. 60). Eventually Coots reached the surface and called his father and then Respondent’s bookkeeper. (Tr. 60). Terry Loving (“Loving”) and Matthew Coots went underground later and put the fire out with water. (Tr. 70-71). Jackson went in later, after the state inspectors left, after the fire was out. (Tr. 71). Loving and Matthew Coots went back in later that day and put more water on the tailpiece to make sure the area did not ignite. (Tr. 71-72). Loving said he put water on the area for about one hour. (Tr. 72).

After conducting interviews, Jackson, Sparks, Superintendent Tim Johnson (“Johnson”), Loving and Coots went down.⁴ (Tr. 14). They traveled to the site of the fire, the #3 tailpiece. (Tr. 14). Jackson never saw any flames. (Tr. 69). At the fire site, the entry was 6.5 feet tall and about 20 feet wide. (Tr. 16). The belt was 30 inches high and he approximated that it was a 42 inch belt conveyor. (Tr. 16). The area damaged was about 20 feet long and 9 feet at the widest spot. (Tr. 16-17). There was soot on the roof from smoldering belts. (Tr. 16, 89). When they arrived, the roof had started “spiderwebbing” and was hot to the touch. (Tr. 15).

Jackson reviewed a side-view illustration of the area of the #3 belt conveyor tailpiece and the #4 belt conveyor head drive, GX-2. (Tr. 14-15). It was prepared by Kevin Doan (“Doan”), a roof control specialist. (Tr. 15). The illustration accurately shows the condition of the #3 belt conveyor tailpiece and the #4 belt conveyor drive prior to the fire. (Tr.15). It shows the

³ Clem testified at the hearing. He works for Rex Coal Company at the D-5 mine (though he worked at C-5 on November 26, 2009). (Tr. 198-199). He has worked in the mines approximately 26.5 years. (Tr. 200).

⁴ Coots testified at the hearing. He worked at the C-5 Mine as a foreman. (Tr. 202). He had been a foreman since 2007 and also had electrician, MET, and dust sampling certifications. (Tr. 202). Coots has been in the coal industry for ten years. (Tr. 203).

tailpiece, the belt threaded through the tailpiece, the #4 belt conveyor, and the belt threaded through the head roller, down through the take-up rollers, and back underneath the boom. (Tr. 15). The illustration shows damage to the roof, which was not present before the fire. (Tr. 15).

Jackson reviewed another illustration by Doan of the same area looking down from the top, GX-3. (Tr. 17, 21-22). It accurately reflects what he saw on the day of the fire. (Tr. 21-22). The area where the belt was still intact is dark and the shaded area is where it burned. (Tr. 17). It also showed where about five feet of the #4 belt roller head was burned in two. (Tr. 17). The illustration also shows coal pillars and a mandoor marked "D." (Tr. 18). There is information written above and below the #3 belt. (Tr. 18). Above, it states that Coots had been preparing to put a rubber skirt in the tailpiece to prevent spillage while the coal moves from one belt to another. (Tr. 18-19). The writing below the belt shows where the fire began. (Tr. 19). Hot slag can fall from the burning metal to coal fines that fall from the tailpiece. (Tr. 19-20). Hot material can cause smoldering or a fire. (Tr. 20).

The fire went to the back of the #3 tailpiece. Tr. 20. The #4 head drive extended over the #3 tailpiece two or three feet. (Tr. 20). The fire went to the tailpiece and burned the belt in two across the head roller. (Tr. 20). The investigation team measured forty-five to forty-eight feet of damage to the #4 conveyor. (Tr. 20-21).

Sparks took photographs of the area. (Tr. 23). Jackson reviewed a photograph of the #3 tailpiece, GX-4. (Tr. 23-24). It showed a place where the belt was missing after being burned. (Tr. 24). The belt was under the tailpiece. (Tr. 24). A bucket was on top of the tailpiece because Coots used it to put water on the holes he was drilling. (Tr. 24).

He reviewed a photograph of a hole burnt in the tailpiece to install the rubber skirt, GX-5. (Tr. 25). It also shows where the belt is missing from being burned. (Tr. 26).

He reviewed a photograph of a plug for the land line that was burned, GX-6. (Tr. 26-27).

He reviewed a photograph of the three wires used to run the heat sensor, GX-7. (Tr. 27). It shows melted insulation from the fire. (Tr. 27-28). The heat sensors were part of deluge system, which activated. (Tr. 28, 70). A deluge system squirts water over the belt when the temperature reaches 190 degrees. (Tr. 28, 70).

He reviewed a photograph of the back of the #3 tailpiece where the belt was burned in two, GX-8. (Tr. 28-29). It showed where the #4 head drive extended over the area and where it burned the #4 belt also. (Tr. 29). There were also burned pieces of belt. (Tr. 29).

After Sparks took the pictures, Loving sprayed water on the area for an hour to ensure it did not rekindle. (Tr. 29). Then, they went back to the surface. (Tr. 29-30).

Jackson reviewed Citation No. 8401221, issued on February 11, 2010 under §50.10, GX-12. (Tr. 53). That regulation requires operators to notify MSHA, via an 800-number, within

fifteen minutes if a belt fire occurs that lasts longer than ten minutes without being extinguished.⁵ (Tr. 53, 77, 94). If someone calls the number, the accident is recorded and the appropriate MSHA field office will be notified to help and investigate. (Tr. 87). Respondent never reported the accident; MSHA learned about it on the news. (Tr. 54-55). The purpose of the regulation is to allow adequate personnel and equipment to arrive to fight the fire and rescue miners. (Tr. 63). If a fire is out within 10 minutes is still must be reported to MSHA, just not to the hotline. (Tr. 78).

Citation No. 8401221 was marked as high negligence because after Coots found the fire he went looking for Clem instead of contacting MSHA. (Tr. 64). MSHA did not become aware of the fire until around 12:20 when Whittaker's wife saw it on the news. (Tr. 64). On cross examination, Jackson admitted he was aware that Lewis Blevins ("Blevins") said he attempted to call MSHA.⁶ (Tr. 69). However, when MSHA officials asked Blevins about whether Respondent had tried to contact MSHA, he said he would only tell Joe Bennett ("Bennett"), the owner. (Tr. 65). Jackson conceded that he never spoke to Blevins. (Tr. 90).

This citation was marked as highly likely because more than 10 minutes elapsed and it was not reported. (Tr. 65-66). Coots did not call out to the security guard to make sure there were proper notifications. (Tr. 90). There were two people underground and no one knew what was occurring, which could have resulted in the situation getting out of hand. (Tr. 66). Jackson has extensive experience in collecting body parts of people in just these kinds of accidents. (Tr. 66). Jackson marked the violation as fatal because both men could have been killed by CO. (Tr. 63, 66, 92). Also, only one person knew about the fire and the surface was not notified. (Tr. 91-92). Further, there was no Responsible Person.⁷ (Tr. 66). The situation may have changed if MSHA was called.⁸ (Tr. 92). Jackson marked two people affected because there were two people underground and no one knew where they were. (Tr. 67, 90). However, Coots was a foreman and knew the mine lay-out. (Tr. 91). Jackson marked the citation as S&S because it was a mandatory standard and a great deal of hazard was created for both miners. (Tr. 67).

⁵ The notation to thirty minutes in the citation was an error. (Tr. 54). The regulation used to be thirty minutes, now it is fifteen. (Tr. 78).

⁶ Blevins testified at the hearing. He is a superintendent at Harland Cumberland Coal (Respondent's sister company). (Tr. 185-186). He has been in the mining industry since 1981, a foreman since 1998, and has foreman's papers. (Tr. 186-187). He is familiar with pre-shift examinations. (Tr. 187).

⁷ This issue will be explored in full during the discussion of Order No. 8401220.

⁸ It took Jackson forty minutes to get there. (Tr. 92). Jackson does not know how long someone would last in CO, it would depend on the rescuer and if someone was barricaded. (Tr. 92).

II. Charles Douglas Ramsey's Testimony

Charles Ramsey ("Ramsey") received a call about the fire on November 26, 2009 and was told to begin an investigation the next day.⁹ (Tr. 143). To investigate, he reviewed the site of the accident, took pictures, and reviewed records. (Tr. 143). He traveled underground on November 27. (Tr. 143).

Ramsey reviewed a photograph, marked as GX-19. (Tr. 144). The photograph depicts the tailpiece where the fire occurred and shows that the belt was burnt. (Tr. 144). The belt is lying on the mine floor. (Tr. 144). It had been burnt more in one area than up near the end. (Tr. 144).

Ramsey reviewed another photograph, marked as GX-20. (Tr. 145). The photograph depicts what was left of the top belt on the #4 head drive behind the tailpiece. (Tr. 145). The remains varied between twelve to sixteen inches in length and forty-two to forty-six inches in width. (Tr. 145).

Ramsey reviewed another photograph, marked as GX-21. (Tr. 145). The photograph depicts black soot on the mine roof adjacent to the left side of the head drive. (Tr. 145). The soot area was twenty feet wide for a distance of around forty feet. (Tr. 145).

Ramsey reviewed another photograph, marked as GX-22. (Tr. 146). The photograph depicts the top belt on the #4 head drive that had burned in two, the burnt section being in the middle. (Tr. 146). The black insulation on the fire detection line had melted. (Tr. 146).

Ramsey reviewed another photograph, marked as GX-23. (Tr. 147). The photograph depicts the torch gauges that Coots said he had used earlier in the day. (Tr. 147). The plastic covering from one of the gauges has a bubble in it from heat. (Tr. 147).

Ramsey reviewed another photograph, marked as GX-24. (Tr. 147). The photograph depicts the acetylene hose Coots had used. (Tr. 147). The hose burnt in two. (Tr. 148).

As part of his investigation, Ramsey interviewed Coots, Johnson, Blevins, Loving, (superintendent at another mine), Matthew Coots, Ray Allred ("Allred") (safety director), and Joe Reece ("Reece") (bookkeeper). (Tr. 148). Lewis Blevins told him that he attempted to inform MSHA of the fire starting at 11:54 a.m. (Tr. 148-149).

⁹ Ramsey began working the mining industry in 1995 and had six years of experience before starting at MSHA. (Tr. 142). He worked as a purchasing agent, an underground general laborer, a repairman, and electrician. (Tr. 142). He has an underground electrician certification and a master commercial and residential electrical license in Kentucky. (Tr. 142). He had been an inspector at MSHA for six years. (Tr. 141). He received 21 weeks of training at the Academy. (Tr. 141-142).

Coots stated that he conducted his pre-shift examination between 4:30 a.m. and 6:10 a.m.¹⁰ (Tr. 150-157). He met Clem and they traveled to the scoop charger and watered the batteries between 6:10 a.m. and 8:00 a.m. (Tr. 157). Coots left Clem at the batteries and traveled to the #3 tailpiece sometime after 8:00 a.m.. (Tr. 157). Coots got equipment together to work on the tailpiece and began to cut holes so that he could put the skirting on. (Tr. 157-158).

While he was cutting with the torch, the security guard called and said the CO system was going off and that he did not know how to shut it down. (Tr. 158). Coots explained how, but the guard could not do it, so Coots said he would go outside. (Tr. 158). Coots said he took his torches apart, placed them in the break, and poured two buckets of water on the hose (holes) he had cut before he left. (Tr. 158). He left the area between 9:00 and 9:15 a.m. (Tr. 158). When he got to the surface he disarmed the CO system and explained it to the guard. (Tr. 159). At that point, Clem was on the surface so they loaded up the shuttle car. (Tr. 159).

Coots went back into the mine between 10:00 and 10:15 a.m. (Tr. 159). He went alone in the buggy but Clem was behind him in the scoop. (Tr. 159). At 10:40 to 10:45 at about break 26 on the #3 belt, he ran into smoke. (Tr. 160). He went over to the return and traveled to the #5 head drive and got two fire extinguishers and went back to the #4 belt. (Tr. 160). Coots could only get between 150-200 feet of the #3 tailpiece because of the smoke, but he saw a glow under the tailpiece. (Tr. 160). Coots said at that point he knew he had a fire. (Tr. 160).

After seeing the glow, Coots said he went back to where he could get into the fresh air and crossed over into the return to where he left his buggy and noticed that Clem's scoop was there, but Clem was not. (Tr. 161). He began to look for Clem; traveling through each man door across all six entries calling for him. (Tr. 161). Wall to wall, it was 400 feet across the entries. (Tr. 161). Where the map says 1823.69 there was a man door marked "D" and circled in silver on the map where he started to walk up the left side return (GX-27). (Tr. 161-162). Coots started in the return on the left side near the "D" and crossed back and forth across all six entries all the way to the surface. (Tr. 162-163). It would take 35 to 40 minutes to walk this entire route. (Tr. 163).

He arrived on the surface at around 11:20 a.m. (Tr. 164). When he got there, he called his father, a foreman at another mine, and told him the situation. (Tr. 164). His father said not to go anywhere and that he would be there in a few minutes. (Tr. 164). He then called the office and spoke to Reece. (Tr. 164). Matthew Coots then arrived at the mine followed by Loving. (Tr. 164).

They were preparing to go underground when Coots noticed a red light on the mine phone. (Tr. 165). It was Clem at the #3 head drive. (Tr. 165). Coots told Clem there was a fire and that he should go to the intake. (Tr. 165). At 12:00 p.m. they went underground, found Clem walking toward the surface from the intake end and picked him up. (Tr. 165-166). They then went to the fire and discharged at least one extinguisher and saw that the deluge system was

¹⁰ Ramsay's testimony regarding Coots' pre-shift examination will be discussed more fully during the discussion of Order No. 8355742.

on. (Tr. 166). The fire did not go out, so they hooked up a fire hose and Loving sprayed the fire.(Tr. 166). This was some time after 12:00 p.m., but Coots did not know the exact time. (Tr. 166.)

III. Lewis Blevins' Testimony

Blevins was at home on November 26, 2009. (Tr. 187). Reece called at 11:50 and Blevins told his wife to take notes, RX-4. (Tr. 188). He always takes notes when someone calls during an emergency and he usually keeps them in a file at the company office. (Tr. 187-188). Reece said that Coots had called the main office and said they could not find Clem. (Tr. 188). Blevins gave Johnson's number to Reece. (Tr. 188). He asked Reece if anyone called MSHA and Reece did not know. (Tr. 189). While Reece called Johnson, Blevins called MSHA's hotline. (Tr. 189).

Belvins testified that he called and pressed "one" for emergency, and the system hung up on him. (Tr. 189). If he called the hotline, there would be an indication in his notes. (Tr. 195). If he tried to call back, that would also be in his notes. (Tr. 196). He then tried to call Bob Ray, an MSHA supervisor in Harlan, and he believed he tried to call the MSHA field office number too. (Tr. 189, 191, 196). He tried to call the state mining officials, but had to reach George Johnson at home. (Tr. 189-190). Eventually, Johnson called him back but by then Clem was already outside and the fire was out. (Tr. 190). He told Johnson to cancel the rescue team. (Tr. 190).

IV. Anthony Coots' Testimony

On November 26, 2009, Coots worked at the #3 tailpiece. (Tr. 206). He worked there because they were having trouble with the skirt; it had torn off earlier in the week and the belt was spilling. (Tr. 206). He was going to put new holes in the tailpiece and bolt a new piece on the skirt. (Tr. 206).

The CO system went off and the guard called. (Tr. 207). The guard did not know how to turn it off. (Tr. 207). Coots does not think his spotter was going off at that time. (Tr. 217). He does not think he turned his spotter off for any reason underground. (Tr. 217-218). Coots went outside and turned off the CO alarm. (Tr. 207). Coots does not remember when the guard called, but it was in his statements. (Tr. 220-221).

He went inside and saw smoke around the #3 Belt. (Tr. 207). It did not take long to travel 28 breaks because the buggy runs at twelve miles per hour and the bottom is good. (Tr. 218). He got off the buggy and went to the next head drive and got two fire extinguishers. (Tr. 207). He tried to get close enough to put it out, and he assumed something was smoldering. (Tr. 207). He could not approach "whatever it was" because of smoke, and because the spotter was going off. (Tr. 207, 213). This was when he started circling to look for Clem, the only other person underground, and he traveled all the way to the surface on foot. (Tr. 207, 213). He was anxious about Clem and yelled for him. (Tr. 208). He never found Clem while he was zigzagging. (Tr. 208, 215). He did not know how long the search took; he was "pretty amped up" and running as hard as he could. (Tr. 216). He did not call out to the guard while he looked for Clem. (Tr. 208). It never crossed his mind because his main goal was to find Clem. (Tr. 208, 216).

He went outside and asked the guard if he saw Clem, but the guard said he had not. (Tr. 208). Then he called Reece from the mine office, but he could not remember at what time. (Tr. 209, 213). Matt Coots, Loving, and Allred arrived seven or eight minutes later. (Tr. 209). Then, Coots saw a light flashing on the man phone and it was Clem. (Tr. 209). Coots told him to get to the intake and they went and got him. (Tr. 209). Clem went to the hospital because he was asked to go, but he came back that night to get his vehicle. (Tr. 210). Then, Coots, Matt Coots, Loving and Allred went back in and put out what was smoldering. (Tr. 209-210). It was just smoldering, it was smoky. (Tr. 210). They sprayed water on everything, mostly on the oxygen an acetylene tanks, to cool everything off. (Tr. 216). It probably took 15-20 minutes. (Tr. 210). Bennett was there by the second or third time Coots came out. (Tr. 210).

Coots never tried to contact MSHA about the fire; he called Reece, as was part of the green plan. (Tr. 215). The green plan is the procedure for immediate reportables and it was in place in 2009. (Tr. 219). The Plan was dated 2007. (Tr. 219). If someone was hurt or their life was in danger, the surface had to be notified within 15 minutes. (Tr. 219). Then, High's Plant would have to be called so the ambulance would come and others would block the road to prevent the news from getting in. (Tr. 219). High's Plant is where he called Reece. (Tr. 219).

Contentions of the Parties

The Secretary contends that Citation No. 8401221 was validly issued, that the violation was highly likely to result in a fatal injury to two persons, that the violation was significant and substantial ("S&S"), that Respondent was highly negligent, and that the proposed civil penalty is appropriate. The Secretary argues that the citation is valid because an accident, specifically a fire, burned for more than ten minutes and was not reported. (*Secretary's Post-Hearing Brief* at 25-27). The Secretary also argues that, with respect to gravity, two men were underground during a fire and could have easily been overcome with smoke. *Id.* at 28-29. Further, Respondent's actions were exhibited high negligence when Coots did not try to contact MSHA and Blevins only attempted to call MSHA after the deadline had passed. *Id.* at 16-19. Finally, the Secretary contends that the assessed penalty is appropriate in light of established case law. *Id.* at 33-35.

Respondent contends that Citation No. 8401221 was not validly issued, the condition was not grave or S&S, and that it was not highly negligent. Respondent argues that the citation was not valid because Blevins attempted to call but there was no answer, because there was no "operator" to take the call, and there was no evidence of when the event became "reportable." (*Respondent's Post-Hearing Brief* at 6-8). Respondent also claims that it did not exhibit high negligence because of Blevins' call, Coots was looking for Clem, a phone call would have been fruitless as MSHA was not answering, and the inspectors endorsed Coots' actions. *Id.* Respondent also argues that the failure to make a phone call was not grave. (*Respondent's Reply Brief* at 6-7). Finally, Respondent argues that the violation was not S&S. *Id.* at 6.

Discussion & Analysis

Under 30 C.F.R. §50.10, an operator is required to call the MSHA hotline in the event of an accident. An accident in underground mines is defined in relevant part as “an unplanned fire not extinguished within 10 minutes of discovery...” 30 C.F.R. §50.2(h)(6). I credit the testimony of the MSHA accident investigators, Jackson and Ramsay, who testified that Coots encountered the fire no later than 10:45 a.m.¹¹ (Tr. 62, 160). Following this discovery, Coots retrieved fire extinguishers, but after ten minutes, the fire had not gone out. (Tr. 60). Respondent had until no later than 11:10 a.m. to contact MSHA regarding the fire. There is no evidence that anyone called MSHA to notify the agency of a fire at or before 11:10 a.m. Therefore, the undersigned finds that Respondent violated 30 C.F.R. §50.10.

Respondent presented several arguments challenging the validity of Citation No. 8401221. However, Respondent’s arguments are not compelling. Respondent asserts that under *Consolidation Coal Co.*, it had the right to conduct an investigation into the accident before reporting it pursuant to 30 C.F.R. §50.10. 11 FMSHRC 1935, 1938 (Oct. 1989). Respondent argues that after Coots used the extinguishers on the fire and went to look for Clem, he had no way of knowing if the fire extinguished itself until he returned at around 12:00 p.m. and found it still smoldering. *Respondent’s Post-Hearing Brief* at 7. According to the Respondent, only at that time did he know there was a fire that took more than ten minutes to extinguish, making it reportable. *Id.*

However, Respondent fundamentally misunderstands the investigative time the Commission interprets 30 C.F.R. §50.10 to include. *Consolidation Coal Co.*, only allows a reasonable opportunity for investigation prior to reporting. 11 FMSHRC at 1938. Further, that investigation must be conducted “in good faith without delay, and in light of the regulation’s command of prompt, vigorous action.” *Id.* This means that an operator is responsible for immediately notifying MSHA about accidents that it knows about or should know about. *See* 50 C.F.R. §50.10 (“The operator shall immediately contact MSHA without delay and within 15 minutes...once the operator knows *or should know* that an accident has occurred”)(*emphasis added*); *see also Pine Ridge Coal Company, LLC*, 33 FMSHRC 987, 1004-1005 (Apr. 2011) (ALJ).

Here, Coots’ delay after attempting to put out the fire was not for the purpose of investigating whether a reportable accident had occurred. He had already determined that a fire existed. Further, I find that Coots did not believe that the fire was out within ten minutes. If he had, he would not have feared for Clem’s safety and frantically searched each entry of the mine for his co-worker. Therefore, the need for investigation (and the additional time allowed for it)

¹¹ The Secretary discusses the possibility that Respondent would argue that there was no fire. *Secretary’s Post-Hearing Brief* at 26-27. However, in its brief, Respondent concedes that Coots encountered a “glow” underneath the #3 tailpiece. *Respondent’s Post-Hearing Brief* at 2-3. Coots also reported seeing smoke. (Tr. 207, 213). A reportable mine fire does not need to include flames, but can instead simply be smoldering material that has the potential for flames. *The American Coal Company*, 35 FMSHRC 380, 385 (Feb. 2013). Therefore, there is no issue as to whether there was a fire.

was over and Respondent was required to report the condition to MSHA. Respondent's reading of the standard would stretch the definition of "immediately" beyond a reasonable time for investigation and into willful ignorance. At its logical conclusion, Respondent's argument would allow Coots to notice the fire and then simply look away and after nine minutes, assume that the fire had "extinguished itself," and toll the reporting requirement. Such a result would undermine the purpose of the standard and must be rejected.

Respondent also argues that if it was required to report the fire before Coots' return to the fire at noon, it attempted to do so but received no answer. *Respondent's Post-Hearing Brief* at 6. Blevins testified that he attempted to call the MSHA hotline sometime after hearing about the accident at 11:50 a.m. (Tr. 188). Ramsey testified that Blevins told him that the call occurred at 11:54 a.m. (Tr. 148-149). There is no evidence of anyone attempting to contact MSHA earlier than approximately 11:50 a.m. However, Respondent was required to contact MSHA no later than 11:10 a.m. Leaving aside any argument about whether Respondent had actually attempted to contact MSHA, the alleged call occurred 40 minutes too late. Therefore, Respondent's assertion, even if true, does not change the validity of the citation.

Respondent argues that the standard requires the "operator" to contact MSHA, but the only person at the mine who was an agent of Respondent, and therefore could count as the operator, was Coots. *Respondent's Post-Hearing Brief* at 6. It argues that it was impossible for Coots to contact MSHA and that the Secretary's position, that the guard should have contacted MSHA, would not have complied with the Act. *Id.* While it may be true that Coots could not have contacted MSHA from the mine to inform the agency of the fire, there is no requirement that the person who witnesses the condition be the one to report it. Coots was able to contact the surface and could have told the guard to contact MSHA. Despite the fact that the guard was not an agent of Respondent, it is unlikely that MSHA would have ignored or rejected a notification of a fire simply because that notice came from a guard. In the extremely unlikely event that MSHA refused to listen to the guard's notification, the guard could have contacted one of several other agents for Respondent who could have made the call. More importantly, MSHA is not required to relax standards to accommodate Respondent's staffing choices. If Respondent did not have the adequate personnel on hand to comply with all applicable standards, it should not have had workers at the mine that day.

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, an operator exhibits reckless disregard where it displays "conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). Mitigating

circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

Respondent's conduct with respect to Citation No. 8401221 constituted high negligence. For the reasons discussed above, Respondent knew, or should have known, that there was a fire in the mine that had existed for more than ten minutes and that MSHA should have been contacted. It is uncontested that, after failing to put out the fire, Coots searched through the mine alone for forty minutes rather than contacting MSHA to ensure a mine rescue team was made ready.¹² Further, even when he returned to the surface, he did not call MSHA. (Tr. 64, 208, 215-216). Instead, he called his father and the bookkeeper to inform them of the conditions at the mine. (Tr. 60, 164, 209, 213).

None of Respondent's actions mitigate this negligence. Respondent argued that Blevins' unanswered calls sometime after 11:50 a.m. mitigated the negligence. However, as shown above, even if Blevins called the MSHA hotline, it was at least forty minutes too late. Therefore, the call does not mitigate Respondent's negligence. Similarly, Respondent's actions were not mitigated by MSHA's alleged failure to answer the phone. Respondent would be required to follow the law, even if MSHA were completely derelict in its duties. The alleged call was late and, therefore, Respondent did not fulfill its obligations; it does not matter for this issue if there was anyone to answer it.

Respondent also raised the argument that Coots' actions in searching for Clem rather than calling MSHA were themselves praiseworthy and therefore mitigated any violation of the act. However, Respondent cites no authority for the proposition that a foreman can substitute his own judgment about correct action for the requirements of the standard. If anything, Coots' statement that calling MSHA was the last thing on his mind and that he chose instead to search for Clem shows disregard for the standard. It is possible that Coots' actions that day were brave, but they were not the required actions under the law. As shown by the evidence, his decision to negligently avoid the requirements of the Act put himself and Clem in danger.

In its brief Respondent raises a related argument by noting that the inspectors stated they agreed with Coots' actions on the day of the accident. *Respondent's Post-Hearing Brief* at 7-8. Respondent cited to Jackson's testimony when he stated "I do not have a problem with what he did."¹³ (Tr. 84). Respondent also cites to Ramsay's testimony that he recalled telling Coots he appreciated his efforts to take care of safety in the mine. (Tr. 182). Further, Respondent provides no authority for the proposition that an inspector's comments to a miner mitigate negligence. The undersigned finds that the inspectors' words do not denote endorsement of Coots' actions or a belief that he acted correctly. Even if they did, such an endorsement does not

¹² Ramsay estimated it would take 35-40 minutes to conduct the search. (Tr. 163). Coots said he did not know how long it took. (Tr. 216).

¹³ Although, Respondent did not note that shortly thereafter Jackson also stated, "I have a problem because he did not do what he was required to do." (Tr.84).

change the law and the requirements placed on an operator. In short, Respondent's actions were negligent without mitigation.

The undersigned finds the evidence establishes that this violation was highly likely to result in a fatal injury to two persons. Respondent argues that the failure to make a phone call was not grave because no one answered the phone for MSHA and, as a result, the failure to call did not delay the arrival of MSHA officials. (*Respondent's Reply Brief* at 6-7). However, Respondent merely asserted that this was true. Respondent presented no phone records or any other evidence to suggest that such a call actually occurred or that MSHA officials were unprepared for an emergency. In fact, as soon as MSHA officials learned about the fire (from the local news) they immediately sprang into action and went to the mine. (Tr. 13-14). Thus the evidence suggests that, more likely than not, the phone call to MSHA never occurred. Or, if it did occur, a mechanical error caused the hotline to hang up on Blevins, in which case he should have called back. In light of this finding, the undersigned finds that the failure to contact MSHA created a grave risk to the miners. The Secretary presented evidence that a mine fire occurred and produced thick, toxic smoke. Miners were in danger of succumbing to carbon monoxide poisoning and possibly even burns. These two miners could have lost consciousness and may not have been discovered for the rest of the day. The failure to notify MSHA meant that rescue personnel were unnecessarily delayed in arriving. In the event that a mine rescue team had been needed (and it should be noted that Respondent was very lucky a team was not needed), they may not have arrived until it was too late.¹⁴

Respondent's violation cited in Citation No. 8401221 was significant and substantial ("S&S"). In order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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). As already shown, Respondent violated 30 C.F.R. §50.10. However, Respondent argues that §50.10 is not a mandatory standard, but instead a "regulation" that cannot be adjudicated S&S. (*Respondent's Reply Brief* at 1-2 citing *Cyprus Emerald Resources Corporation v. Federal Mine Safety and Health Review Commission*, 195 F.3d 42 (D.C. Cir. 1999)). On this point, the undersigned finds Judge McCarthy's reasoning in *Pine Ridge Coal Company*, persuasive. 33 FMSHRC 987, 1003-1008 (Apr. 2011). Specifically, the undersigned finds that since the decision cited by Respondent was issued, §50.10 has been codified under 30 U.S.C. §§811, 813(j) and promulgated as a new emergency standard. Therefore, it is now a mandatory standard. As a result, Respondent's failure to comply with §50.10 was a violation of a mandatory standard.

This condition meets the second element of *Mathies* since the violation of a mandatory standard contributed to the hazards of smoke inhalation or burns by prolonging exposure and preventing the arrival of rescue personnel. Respondent argues that the failure to make a phone

¹⁴ Similarly, Respondent argued that the call was unnecessary because, if there was an emergency, the miners would have died waiting for rescue, citing to Jackson's testimony. (*Respondent's Reply Brief* at 3-4). However, the undersigned credits Jackson's testimony that miners would not have died waiting. (Tr. 88).

call did not contribute to a hazard because the MSHA office was closed, so a call would have no effect. (*Respondent's Reply Brief* at 3-4). Further, it argues that there were only two miners at the location and Coots was more concerned with safety than with calls. (*Id.*). As already noted, the evidence suggests that MSHA was prepared to deal with an emergency on the day of the fire and were not called. Further, Coots is not permitted to substitute his judgment for the requirements of the standard, and he should have contacted MSHA so that it could prepare for rescue operations. Failure to do so increased the time during which the miners were exposed underground and contributed to the hazards noted above.

The Commission has recently clarified the third element of *Mathies*, stating the test “is whether there is a reasonable likelihood that the hazard contributed to by the violation... will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *see also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* There is no question that a mine fire could cause injury, either from burns or from smoke inhalation. Finally, it is reasonably likely that the injuries resulting from such an accident would be reasonably serious, even fatal. As a result, this violation was S&S.

In light of these findings, a civil penalty is appropriate. Under 30 U.S.C. §830(i), there are six penalty criteria to consider when assessing a civil penalty. Those criteria are the operator’s history of previous violations; the appropriateness of the penalty compared to the size of the Operator’s business; whether the Operator was negligent; the effect on the Operator’s ability to remain in business; the gravity of the violation; and the demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

Respondent argued that the penalty was too high. (*Respondent's Reply Brief* at 5-7). However, that argument was based on Respondent’s disagreement with the Secretary’s findings with respect to gravity and negligence. *Id.* Having considered the findings and the six statutory criteria listed above, the undersigned **AFFIRMS** Citation No. 8401221 as written by Jackson and find that the proposed penalty of \$18,271.00 is appropriate for this violation.

CITATION NO. 8401220

On February 11, 2010 at 9:45 a.m. Inspector Jackson issued Respondent Citation No. 8401220 for an alleged violation of 30 C.F.R. §75.1501(a). That standard states:

(a) For each shift that miners work underground, there shall be in attendance a responsible person designated by the mine operator to take charge during mine emergencies involving a fire, explosion, or gas or water inundation.

(1) The responsible person shall have current knowledge of the assigned location and expected movements of miners underground, the operation of the mine ventilation system, the locations of the mine escapeways and refuge alternatives, the mine communications system, any mine monitoring system if used, locations of firefighting equipment, the mine's Emergency Response Plan, the Mine Rescue Notification Plan, and the

Mine Emergency Evacuation and Firefighting Program of Instruction.

(2) The responsible person shall be trained annually in a course of instruction in mine emergency response, as prescribed by MSHA's Office of Educational Policy and Development...

(3) The operator shall certify by signature and date after each responsible person has completed the training and keep the certification at the mine for 1 year...

30 C.F.R. §75.1501(a). In this citation, Jackson observed the following condition or practice:

The operator had no responsible person in attendance for the day shift on November 26, 2009 when miners were working underground. Foreman Anthony Coots, knowing that no responsible person was in attendance, entered the mine to conduct a pre-shift examination this day. He subsequently returned to the surface and then re-entered the mine with another miner in order to perform the day's assigned tasks. A mine emergency involving a fire occurred during this shift, endangering the miners underground. This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-10).

Jackson found that this violation was highly likely to lead to an injury and that such an injury could reasonably be expected to be fatal. *Id.* He determined that the violation was S&S and affected two persons. *Id.* Jackson found Respondent's actions were an unwarrantable failure and exhibited High negligence. *Id.*

A subsequent Action was filed by the same day at 1:50 p.m. stating, "Foreman Coots has been trained as a 'Responsible Person' and the operator has reviewed the requirements of a 'Responsible Person' with other foremen." *Id.* at p. 2

Summary of Testimony

I. Jackson's Testimony

Jackson reviewed the 104(d)(1) citation he issued on February 11, 2010 under 75.1501(a), GX-10. (Tr. 33). The cited regulation requires operators to provide a "Responsible Person," someone trained for fire events, at a mine site in case of an emergency. (Tr. 33). That person must call the proper authorities and comply with the Mine Emergency Evacuation Firefighting Plan ("the Plan"). (Tr. 33). Responsible Persons are trained by a certified instructor and receive a signed 5023 form. (Tr. 33-34). The citation was issued because on the day of the fire, Coots, Clem, and a security guard were the only miners present, and they were not Responsible Persons. (Tr. 34). None of their names were posted on the list of such persons on the mine office wall. (Tr. 34, 50). Coots did not have a 5023 form. (Tr. 83). Also, the miners did not behave like Responsible Persons. (Tr. 34-35, 83). On cross examination, Jackson conceded that if Coots said he was trained there would be no grounds to disagree with him, other than his actions. (Tr. 83-84).

Jackson reviewed the Plan for the C-5 mine, GX-11. (Tr. 35). Plans are approved to prevent hazards during an emergency. (Tr. 35). The C-5 mine's Plan was approved on November 21, 2007 and was in effect on the day of the fire. (Tr. 35-36). Under paragraph one of the Plan, the primary Responsible Person can appoint a temporary Responsible Person in instances when the primary person is in inaccessible areas. (Tr. 37). On November 26, 2009, there was no Responsible Person on the surface or at the mine. (Tr. 37-38).

With respect to the Plan, Respondent did not comply with Paragraph 4. (Tr. 40). That paragraph states, “

As persons enter the mine, their designation will be recorded by an outside dispatcher. Upon arrival at the destination, the dispatcher will be notified. Any change in location will be communicated to the outside dispatcher. For persons traveling such as mine examiners, the expected route of travel will be recorded. Any deviations from the anticipated travel route will be communicated to the dispatcher. A log will be maintained on the surface as to the location of each person underground.

(Tr. 38-39). Coots did not comply with this paragraph because he did not know where Clem was located and no one was logging where people were underground. (Tr. 40, 74-75). He went underground and found fire at the #3 tailpiece. (Tr. 40). He traveled inby, got fire extinguishers, and tried to find Clem. (Tr. 40). He traveled back and forth through man doors, though all six entries and traveled back to the surface without finding Clem. (Tr. 40). This amount of activity would take 30-40 minutes. (Tr. 40, 69). This was dangerous to both Clem and Coots. (Tr. 40).

Respondent did not comply with Page 2, Item 5 of the Plan. (Tr. 40-41). It requires all miners to assemble so they can be counted by the Responsible Person and be utilized during an emergency. (Tr. 41). When the fire occurred there was no assembly of men and neither Clem nor the guard even knew there was a fire. (Tr. 42, 75). Coots should have called outside to the security guard and told him where he was and where he was going to look for Clem. (Tr. 75). Assembly would occur underground at designated locations. (Tr. 76). Jackson knew that Clem was not aware of the fire because Clem called Coots to ask what was going on. (Tr. 43). Coots told him there was a fire and told him to go to the #2 head drive to be picked up. (Tr. 43).

Respondent did not comply with Page 3, Item 14. (Tr. 43). It requires all power to be turned off on equipment in the effective area, with only power necessary for travel, evacuation or ventilation used. (Tr. 43-44). The power was on when Jackson got to the tailpiece. (Tr. 44). He knew this because the power center was on, the lights were on, and the deluge had gone off when he entered the mine at 2:05 p.m. (Tr. 76).

Respondent did not comply with Page 4, Item 5D. (Tr. 44). It requires the Responsible Person to report occurrences to MSHA if required. (Tr. 44). A fire lasting more than 10 minutes must be reported and this one lasted longer than ten minutes. (Tr. 45). This was not reported, MSHA learned about it from the news. (Tr. 44-45).

Respondent did not comply with Page 4, Item 5E. (Tr. 45). It requires the Responsible Person to disconnect power from an affected area; that did not occur here. (Tr. 45). Jackson knew this because the lights were still on at the power center and head drive. (Tr. 45). However, Jackson was not there at the time of the fire. (Tr. 79).

Respondent did not comply with Page 4, Item 5F. (Tr. 46). It requires the Responsible Person to assign a qualified person to monitor the fan or returns for methane or carbon monoxide during an emergency. (Tr. 46). This was not being done. (Tr. 46). When Jackson arrived, he went over to the fan and checked for methane and CO, and he found 30 ppm of CO showing light smoke in the #1 return portal. (Tr. 79-80).

Respondent did not comply with Page 5, Item (1)(i). (Tr. 47). It requires the Responsible Person to conduct an immediate evacuation of a mine with an imminent danger due to fire. (Tr. 47). When Coots realized there was a fire he traveled looking for Clem for thirty or forty minutes and only reached him when Clem called outside. (Tr. 47).

On cross examination, Jackson stated that he did not testify that Coots should not have looked for Clem; rather, he testified that Coots did not do what a Responsible Person would do. (Tr. 80-81, 84). If Jackson were to look for Clem, he would first call out to the security guard, tell him there was a fire, tell him he was looking for Clem, and ask him to call for help. (Tr. 81, 88). If Coots had been overcome by smoke, the security guard may have left after his shift and the miners would have died underground without anyone knowing. (Tr. 81). He conceded that it takes a while to assemble the mine rescue team and Clem could have died waiting. (Tr. 81-82, 88). Jackson did not believe he would die waiting. (Tr. 88).

Citation No. 8401220 was marked as high negligence and issued under 104(d)(1) of the Act. (Tr. 48). It was an unwarrantable failure because it was the responsibility of Respondent to make sure there was a Responsible Person on duty any time miners were underground and no one was. (Tr. 49). There was a large amount of danger because Coots and Clem were underground and there was smoke and soot. (Tr. 49). Coots said that at the tailpiece he could not get closer than 100 to 150 feet because the smoke was so thick. (Tr. 49). He also said there was 90 ppm of CO outby the #3 tailpiece. (Tr. 49). Despite this, Coots did not end up in the hospital. (Tr. 86-87). Jackson heard that Clem was sent to the hospital to get checked out. (Tr. 87). He did not know if Clem checked out of the hospital and returned to work on the same day. (Tr. 87).

This citation was marked as highly likely because there was a mine fire and two people underground. (Tr. 50-51). Coots created a hazard when he went to go look for Clem because he knew he had smoke and CO and did not use a Self Contained Self Rescuer ("SCSR"). (Tr. 51). Jackson knew Coots had not used it because he still had it. (Tr. 51). Once he encountered smoke and CO, he was required by law to put on his SCSR. (Tr. 85-86). Jackson did not believe that Coots would be the best judge of when to put on the SCSR. (Tr. 86). He marked this citation as fatal because they could have both been lost in the mine, in dense smoke, and been overcome by carbon monoxide. (Tr. 51, 85). Jackson marked two persons because only Coots

and Clem were underground. (Tr. 51-52). Jackson marked this violation as S&S because this was a mandatory standard and the violation created a risk of injury or death. (Tr. 52).

II. Coots' Testimony

Coots is positive he had Responsible Person training conducted by Johnson and Matt Coots. (Tr. 210-211). He received the training long before this incident. (Tr. 211). They tried to find the papers; they were kept in a folder in the office. (Tr. 211). There are three copies of the 5023 Responsible Person form. (Tr. 212). Coots thought he put his copy in the company record, but he is not sure. (Tr. 212). He never found the form for the training he received before the incident. (Tr. 212). Coots does not recall a list on the wall of Responsible Persons. (Tr. 212-213). He was trained again after the incident but he did not learn anything new. (Tr. 212).

Coots reviewed the Mine Emergency Evacuation Plan in effect at C-5 Mine, GX-11. (Tr. 213-214). The plan controls what should be done in the event of a fire. (Tr. 214). Coots does not recall if Respondent received a citation for failure to track people in the mine. (Tr. 214). Further, the electrical power on the #3 tailpiece did not need to be de-energized because the system had never been turned on. (Tr. 214). The deluge system was off when they went back in to put the fire out. (Tr. 214). There was a battery back-up hooked to the power center. (Tr. 214). Respondent assigned someone after the fire to monitor the CO coming out of the return, but not methane. (Tr. 215). It assigned someone when MSHA ordered them to do so. (Tr. 215). There was no one to monitor for methane because he was looking for Clem. (Tr. 220).

Contentions of the Parties

The Secretary contends that Order No. 8401220 was validly issued, that the violation was highly likely to result in a fatal injury to two persons, that the violation was significant and substantial ("S&S"), that Respondent was highly negligent, that the violation was caused by an unwarrantable failure, and that the proposed civil penalty was appropriate. The Secretary argues that the citation is valid because no one at the mine was a Responsible Person. (*Secretary's Post-Hearing Brief* at 18-21). The Secretary argues that, with respect to gravity that no one knew where Clem was located and Coots was not wearing his SCSR, meaning that someone could have died. *Id.* at 24. Further, Respondent's actions were highly negligent and the result of an unwarrantable failure because it was supposed to make sure a Responsible Person was present and failed to do so and a serious incident occurred. *Id.* at 21-23. Finally, the Secretary contends that the assessed penalty is appropriate in light of established case law. *Id.* at 33-35.

Respondent contends that Order No. 8401220 was not validly issued, was not S&S, and not the result of high negligence nor an unwarrantable failure. Respondent argues that the citation was not valid because Coots was a Responsible Person and was present. (*Respondent's Post-Hearing Brief* at 8-11). Respondent argues that any negligence was mitigated because this was not a normal situation as only two miners were underground. (*Respondent's Reply Brief* at 11-12). For the same reasons, it argues that the violation was not S&S. *Id.* Finally, Respondent argues that this violation was not an unwarrantable failure because the Secretary never identified any aggravating conduct. *Id.*

Discussion & Analysis

Under 30 C.F.R. §75.1501(a), an operator is required to have a Responsible Person on site while miners are working underground. This person is supposed to be familiar with the Emergency Response Plan, the Emergency Evacuation and Firefighting Plan, and other procedures related to mine emergencies. 30 C.F.R. §75.1501(a)(1). A Responsible Person is supposed to have annual training on mine emergency response and signed certification of that training is to be kept at the mine for a year. 30 C.F.R. §75.1501(a)(2)-(3).

With respect to Order No. 8401220, the issue is whether Coots was a Responsible Person. In its brief, Respondent could only point to the fact that Coots asserted that he received the training as evidence that he was a Responsible Person. (*Respondent's Post-Hearing Brief* at 11). However, it is uncontested in this case that Respondent failed to maintain a record of Coots' alleged certification. (Tr. 83, 212). Despite the fact that a miner trained as a Responsible Person receives three copies on the 5023 form, Respondent could not produce any documentary evidence of Coots' training. (Tr. 212). Significantly, Jackson credibly testified that Coots' name was not on a list of Responsible Persons at the mine. (Tr. 34). Respondent argues that this failure is merely a paperwork violation and one for which it was not cited. (*Respondent's Reply Brief* at 11). However, it is more than that. It is evidence that Coots was not trained as a Responsible Person at all or that his training had lapsed due to the passage of time.

In addition to the lack of documentation, the inspector credibly testified that Coots failed to act as a Responsible Person should act in the event of an Emergency. (Tr. 34-47, 80-84) Specifically, Coots failed to log the locations of people underground, he did not assemble miners and count them during the emergency, he did not (as shown in Citation No. 8401221) report the incident to MSHA, he did not turn off and disconnect the power, he did not monitor the return air, and he did not conduct an evacuation.¹⁵ (Tr. 40-47, 74-75).

In light of Respondent's inability to produce a 5023 form, the absence of Coots' name from the list of Responsible Persons, and Coots' failure to behave like a Responsible person the undersigned holds that Respondent did not have Responsible Person at the mine on the day of the fire. Therefore, the undersigned finds that Respondent violated 30 C.F.R. §75.1501(a)

Respondent's conduct with respect to Citation No. 8401220 constituted high negligence and an unwarrantable failure. For the reasons discussed above, Respondent knew, or should have

¹⁵ In its brief, Respondent downplays the significance of Coots' failure to conform to the requirements placed on a Responsible Person. (*Respondent's Post-Hearing Brief* at 9-10, FN 3). Specifically, Respondent notes that Coots was looking for the only other miner underground to evacuate and that the effected areas may have been de-energized. *Id.* It is uncontested that Coots did not know where Clem was, despite the requirement that Clem's location be tracked, and this meant that Coots could not assemble or evacuate Clem in the way countenanced by the plan. (Tr. 40, 74-75). Also, I credit the testimony of the Secretary's witness that the affected areas of the mine were not de-energized. (Tr. 43-44).

known, that the C-5 mine was operating without a Responsible Person. Respondent had only three employees present on the day of the fire and none of those workers had the appropriate credentials. Even if Respondent believed Coots' was a responsible person, a quick check of the pile of 5023 forms in the mine office would have shown that Coots had not received the requisite training. Respondent argues that the negligence was mitigated because this was not a normal situation as only two miners were present, making compliance with the Plan as written impossible. (*Respondent's Reply Brief* at 12). However, Respondent cannot avoid the requirements of its Plans simply by short staffing. If Respondent is required to "assemble miners" and check for carbon monoxide at the return, then it is required to have sufficient personnel present to complete those actions. Its failure to properly staff the mine does not mitigate its negligence, nor does anything else. Therefore, the high negligence designation is appropriate.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds."). Unwarrantable failure is defined as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission has formulated a six factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). Those factors are the extent of the violative condition, the length of time it existed, whether it was obvious or posed a high degree of danger, whether the operator was on notice of the need for greater efforts in compliance, the operator's actions in abatement, and whether the operator had knowledge of the violation.¹⁶ *Id.*

In the instant case, Respondent's actions clearly constituted an unwarrantable failure. With respect to extent, the failure to provide a Responsible Person affected the entire mine and everyone working underground. No one was present to ensure that proper safety procedures were followed when the emergency occurred or to responsibly ensure the safety of Coots and Clem. The violation existed the entire shift. The violation was obvious because even a brief document check would show that Coots was not a certified Responsible Person. Additionally, it posed a high degree of danger because miners were underground when an emergency occurred and no one was present to take charge and ensure safety. There is no evidence that Respondent was on a specifically communicated notice for the need to provide a Responsible Person, beyond the requirements of 30 C.F.R. §75.1501(a). Considering the mine's emergency plans that were in effect, there was no need for any special, additional notice. Respondent abated the condition by training Coots, but it was too late, an emergency had already occurred that required a Responsible Person and no such person was present. Finally, Respondent knew that Coots was

¹⁶ While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal*, 31 FMSHRC at 1351.

the only supervisor present and had no reason to believe that he was a Responsible Person.¹⁷ In light of the above factors, the undersigned finds that an unwarrantable failure was demonstrated.

The undersigned finds that the evidence established that this violation was highly likely to result in a fatal injury. The Secretary presented evidence that a mine emergency, in this case a fire, occurred and filled an area of the mine with thick, toxic smoke. (Tr. 49, 51, 85). Miners were in danger of succumbing to carbon monoxide poisoning and possibly even burns. (Tr. 49, 51, 85). The failure to provide a Responsible Person to coordinate the emergency response and ensure safety meant that the two miners were underground and acting without competent direction. Either miner, or both, could have become trapped underground or rendered unconscious and not been discovered for the rest of the day. The miners were not trained to take charge in an emergency situation and, as a result, they did not take the appropriate actions to minimize the risk of death. It is fortunate that no one was seriously injured.

Respondent's violation cited in Order No. 8401220 was S&S. Once again, the *Mathies* factors must be used to assess whether the violation as S&S. First, as already shown, Respondent violated 30 C.F.R. §75.1501(a). That violation contributed to the hazards of smoke inhalation or burns by maximizing the risks posed by the fire and smoke. The failure to have a Responsible Person prolonged the exposure to the fire and smoke. There is no question that increased exposure to a mine fire could cause injury, either directly from burns or indirectly from smoke inhalation. Finally, it is reasonably likely that the injuries resulting from such an accident would be reasonably serious, even fatal. As a result, this violation was S&S.

In light of the above findings and the six statutory criteria in 30 U.S.C. §830(i), I **AFFIRM** Order No. 8401220 as written by Jackson and find that the proposed penalty of \$18,271.00 is appropriate for this violation.

ORDER NO. 8355742

On February 11, 2010 at 10:30 a.m. Inspector Charles Ramsey issued Respondent Order No. 8355742 for an alleged violation of 30 C.F.R. §75.360(b). That standard states in pertinent part:

¹⁷ With respect to knowledge, Coots knew or should have known that he was not a Responsible Person. Well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. See *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine." 30 U.S.C. §802(e). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. See *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) citing (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984).

(b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction...

30 C.F.R. §75.360(b). In this order, Taylor observed the following condition or practice:

The foreman failed to conduct an adequate pre-shift exam on 11-26-2009. The person performing the pre-shift exam is required to test for methane and oxygen deficiency. In a statement by foreman Coots, he said his first D.T.I.'s of his pre-shift exam were 4:45 a.m. at the #2 head drive. (See attached picture). A data memory check of the foreman's spotter, MSA Solaris s/n A5-80274, indicated that the spotter was not turned on until 5:10 a.m. One of the last times recorded on the outby pre-shift exam was 5:13 a.m. at #4 head drive. Foreman Coots engaged in more than ordinary negligence in that the proper checks for methane and oxygen were not conducted as required by 30 C.F.R. and exposed Bill Clem, scoop operator, to exposure of possible unknown gases that could have been present and only detected with an approved gas detector. This mine liberates approximately 31,253 cubic feet of methane in a 24 hour period and has a blowing fan which moves the air towards the surface from the face. This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-30).

Jackson found that this violation was reasonably likely to lead to an injury and that such an injury could reasonably be expected to be fatal. *Id.* He determined that the violation was S&S and affected two persons. *Id.* Jackson found Respondent's actions were an unwarrantable failure and exhibited high negligence. *Id.*

A subsequent action was filed by the same day at 1:36 p.m. stating, "A pre-shift exam with the recorded levels for CH₄, O₂, and CO are being recorded in the pre-shift exam record book." *Id.* at p. 2

Summary of the Testimony

I. Jackson's Testimony

On November 26, 2009, Sam Creasy took into custody the three Solaris multi-gas detectors used by Clem, Coots, and Johnson.¹⁸ (Tr. 30, 72). They then filled out the chain of custody forms, GX-9. (Tr. 30-31). Jackson reviewed those forms. (Tr. 31). There are three forms, one for each detector. (Tr. 31). Kevin Doan received the detectors on November 30, 2009 and signed for them.¹⁹ (Tr. 32-33). They were then passed to Charles J.C. Maggard

¹⁸ Sam Creasy is the supervisor at MSHA's Harlan office. (Tr. 13).

¹⁹ Kevin Doan is a MSHA roof control specialist. (Tr. 15).

(“Maggard”), an electrical supervisor. (Tr. 32). Maggard passed them on to Carla Marcum (“Marcum”), a specialist who downloads Solaris information.²⁰ (Tr. 32). The documents are kept in the ordinary course of business. (Tr. 32).

II. Carla Bard Marcum’s Testimony

Marcum has experience with multi-gas detectors, which are devices that analyze the atmosphere using more than one sensor. (Tr. 97). Marcum first gained experience with multi-gas detectors in 1996 as a health specialist. (Tr. 97). She used them to obtain emissions readings from diesel equipment and to determine how much ventilation was needed at the face to neutralize methane. (Tr. 97-98). A Solaris detector is a hand-held multi-gas detector with three modes: usage, calibration, and download.²¹ (Tr. 98, 105-106). A download takes data stored in the detector and puts it on a computer where it can be printed. (Tr. 98, 102). Marcum has downloaded hundreds, maybe thousands, of reports, both from her detectors and ones used by miners during a survey. (Tr. 102). She has also downloaded detectors when events take place; fires, methane ignitions, explosions, or where there were questions about whether miners were using them. (Tr. 102-103).

Marcum was not part of the investigation team for the fire at issue here. (Tr. 103). She became involved on November 30, 2009 when she was contacted by the electrical supervisor, Maggard. (Tr. 103-104). Maggard brought her three bagged Solaris detectors with the chain-of-custody form attached and asked that she download each. (Tr. 104).

Marcum reviewed the chain-of-custody forms she received from Maggard, GX-9. (Tr. 104). According to those documents, the Solaris detector, serial number A5-80274 was taken from Coots, serial number A5-65867 was taken from Clem, and A5-61509 was taken from Johnson. (Tr. 104). The forms reflect that Marcum downloaded the reports. (Tr. 105). Clem’s did not download properly. (Tr. 105).

Marcum reviewed an information sheet regarding Coots’ Solaris detector, serial number A5-80274, GX-16. (Tr. 107-108). She wrote notes on top of the first page of GX-16 because it

²⁰ Marcum is employed by MSHA as a geologist in the roof control division. (Tr. 95-96). She has been in the roof control division for two years and at MSHA for twenty years. (Tr. 96). She worked as an inspector for six years, a ventilation specialist for six years, and a health specialist for six years. (Tr. 96). She has a bachelor’s degree from Berea College with an independent major emphasis on geology, soil sciences, and planning. (Tr. 96). She can certify mine maps, facilitate the design and lay-out of a mine, and coordinate drilling. (Tr. 96-97).

²¹ Marcum reviewed a front-view photograph of a Solaris multi-gas detector, GX-14. (Tr. 99). There are four sensor points, a viewing screen, and an infrared reader (the red dot behind the screen, circled in blue). (Tr. 99-100). The infrared reader is designed to be the contact point between the reader and the sensor. (Tr. 100-101). Marcum also reviewed a back-view of a Solaris multi-gas detector, GX-15. (Tr. 101). There is a serial number, and a clip so that it can be worn. (Tr. 101). The photograph was magnified to make the serial number larger. (Tr. 102).

was the only way to include the serial number and name. (Tr. 116-117). She did not write the second line. (Tr. 117). The sheet shows three sensors, the date it was downloaded, the ID, the calibration date, and things of that nature. (Tr. 108). The second page shows the session download. (Tr. 108). Every time the sensor is turned on, whether for usage, calibration, or download, this is called a session. (Tr. 108-109). Every time the sensor is turned on and then off, a session is logged showing the duration of the session and what the sensors show. (Tr. 109). This session shows three sensors: methane, oxygen, and CO. (Tr. 109). It will also list any events like an alarm or calibration. (Tr. 109). The gas readings will show peaks, minimums, and time-weighted averages. (Tr. 110). Time can be set manually with a computer. (Tr. 110). A calibrator can also be used to calibrate, set the time, and do a bump test. (Tr. 110).

With respect to time, Solaris detectors are not always correct because they are no different than any other timing device and synchronizing can be difficult. (Tr. 111-112). A large percentage, perhaps fifty percent, of the detectors Marcum has downloaded have had incorrect times. (Tr. 112). She often has to conduct a time correlation between real time and whatever time the instrument believes the time to be. (Tr. 112). To do this, she compares the time on the Solaris to the time on her computer. (Tr. 135). She subtracts the difference between the instrument time and the actual time. (Tr. 135-136). The difference is specific for each instrument. (Tr. 136). Marcum was trained in adjusting time differentials on the Solaris at her first training on multi-gas detectors by an MSA employee at a ventilation specialists' conference. (Tr. 126-127).

With respect to the download of Coot's spotter, page 2 states that the download took place on November 30, 2009 at 11:27 a.m. (Tr. 112). The Solaris download notes say that the session occurred at 1:45 p.m.-1:35 p.m. (Tr. 113). Therefore, there was a two hour and eighteen minute difference between the actual time and the instrument time. (Tr. 113). Page 13 shows when the unit was used on November 26, 2009. (Tr. 113). It was turned on at 7:34 a.m. and stayed on until 10:56 a.m. (Tr. 113-114). Marcum adjusted the time two hours and eighteen minutes to around 5:14-5:15 a.m. (Tr. 114).

This sort of discrepancy can occur because, when the instrument is calibrated or downloaded, it can mark a certain minute in the day. (Tr. 114-115). However, it does not know the exact second, so it can be off. (Tr. 114-115). The instrument was last calibrated November 4, 2009. (Tr. 115). Nothing else could have changed the time of the instrument between the fire and Marcum's download. (Tr. 115). The print-out on pages 13 and 14 show that after the instrument was activated on November 26, 2009, it was not turned on again until Marcum's download. (Tr. 115-116). She does not know if the Solaris is bad at keeping time and is not acquainted with the phrase "time drift" with respect to the Solaris.²² (Tr. 127-128).

Marcum reviewed an illustration depicting the download of Coots' Solaris, GX-18. (Tr. 120-121). Marcum prepared this document to explain her time correlations. (Tr. 121). The top portion of the sketch shows the real time computer at 11:25 a.m. on 11/30/2009. (Tr. 121). The center portion shows a Solaris with four sensors and a screen with information. (Tr. 121). There

²² Respondent offered RX-1, a printout from an MSHA website regarding the reliability of the Solaris at keeping time. (Tr. 128-135).

were several red “AC” marks and a red “A” on Coots’ Solaris (Tr. 122). Miners often mark a Solaris so they know which one they typically use. (Tr. 122-123). The lower third of the picture shows the date and time of 11-26-2009 at 7:35 a.m. and then shows how the time correlation set the actual time to 5:14 a.m. (Tr. 123). These were not exact times; they could be a minute or two off in either direction. (Tr. 123-124). The notes also state a time of 5:10 a.m., and that was Marcum’s estimate of the earliest time the instrument could have been turned on. (Tr. 124-125).

Marcum reviewed an information sheet regarding Johnson’s Solaris, serial number A5-61509, GX-17. (Tr. 117-118). It shows there were sensors embedded in the equipment and shows the calibration dates for each. (Tr. 118). The serial number and “Tim J.” was handwritten by Marcum for the same reasons as the other spotter. (Tr. 118). The rest of the pages show the same type of information as in GX-16. (Tr. 118-119). On page one it shows that Marcum used the Solaris on November 30, 2009 at 10:14 a.m. (Tr. 119). The discrepancy between the actual time and Solaris’ time was the same for Johnson’s Solaris as it had been for Coots’, two hours and 18 minutes. (Tr. 119). This was because they used the same calibrator. (Tr. 119-120).

During download, the infrared sensor communicates with the infrared reader and after a few minutes, if it does not go through, the download will stop. (Tr. 106). This occurred with Billy Clem’s Solaris. (Tr. 105, 136). She cleaned off the sensor to make sure it did not have soot, she tried to download again but was unsuccessful. (Tr. 106-107). Something was wrong with Clem’s spotter. (Tr. 107). However, Marcum conceded on cross examination that on the second attempt it downloaded all the way through. (Tr. 136). Marcum reviewed an information sheet regarding the Clem’s Solaris sensor serial number A5-65865, RX-2. (Tr. 137). On the final page of that document it shows that on 11-26-2009 it was turned on at 7:40 a.m. and turned off at 1:18 p.m. (Tr. 137). There is no reason to believe those times are inaccurate. (Tr. 138). Marcum stated she would have to look at her notes to see the differential. (Tr. 138). Marcum reviewed her notes dated November 13, 2009, RX-3, and they showed that she marked that Clem’s Solaris was turned on at 5:15 a.m. (Tr. 139-140).

III. Ramsey’s Testimony

Ramsey interviewed Coots on November 27 and December 9. (Tr. 149). He reviewed a timeline he prepared based on the interviews, GX-25. (Tr. 149-150). He created the timeline to show where Coots was during the fire. (Tr. 150). The timeline begins at 4:30 a.m. when he arrived at the mine. (Tr. 150). Coots related that he got his equipment and began his pre-shift examination. (Tr. 150).

Ramsey reviewed a map of a portion of the mine, GX-27. (Tr. 151-152). At the bottom left of the map, where it says “portals,” is where Coots entered the mine. (Tr. 152). At 4:45, Coots recorded his date, time, and initials (“DTI’s”) at the #2 head drive. (Tr. 150-151). The #2 head drive is shown on GX-27 where it states #2 belt conveyor drive with an arrow. (Tr. 152). The #2 belt drive was 2,365 feet from the surface. (Tr. 153-154). Ramsey reviewed a photograph, GX-26. (Tr. 151). It depicts the date board on the #2 head drive and shows that Coots was there at 4:45 a.m. (Tr. 151). Ramsay noted that Coots would have turned on his Solaris at around 4:30 a.m., as it takes a few minutes to start it up and then a few more to conduct a bump test. (Tr. 152). Before placing his DTI’s anywhere, law required Coots to check for

hazardous conditions, methane, and oxygen. (Tr. 153, 156). He would use a detector to check for methane about 12 inches from the top and lower for oxygen. (Tr. 153).

After checking the #2 belt conveyor he checked the #2 power center at 4:55 a.m. (Tr. 154). Ramsey saw Coots' DTI's at that location. (Tr. 154). Then Coots traveled to the #3 power center and recorded his DTI's at 5:02 a.m. (Tr. 154-155). This was around 3,000 feet from the surface. (Tr. 155). Then he traveled to the #3 head drive and did his pre-shift at 5:08 a.m. (Tr. 155). Ramsey saw Coots DTI's at that location. (Tr. 155). That location is shown on the map with the #3 conveyor and an arrow. (Tr. 155).

Coots then traveled to the #4 belt drive, the accident area. (Tr. 155). That location is marked as the #4 conveyor tailpiece and fire location on the map. (Tr. 155). Ramsey reviewed another photograph, GX-28. (Tr. 155). It depicts the date board on the #4 head drive and shows that Coots was there on November 26 at 5:13 a.m. (Tr. 155-156).

Coots then traveled to the section scoop charger or section power center, between 5:42 and 5:45 a.m. (Tr. 156). Ramsey did not actually observe Coots' DTI's there. (Tr. 156-157). Ramsey observed all the DTI's himself except for the last pre-shift examination at 5:42 to 5:45 a.m. (Tr. 182-183). Coots arrived back at the surface following his pre-shift examination at between 6:00 and 6:10 a.m. (Tr. 157).

Ramsey reviewed a manual on the tracking system required by the Plan, GX-29. (Tr. 166). It requires Respondent to track anyone underground. (Tr. 166). It shows that Coots and Clem went underground at 5:45 a.m. and that they arrived at the section at 6:00 a.m. (Tr. 167). Ramsey learned this from the mine site and the guard, Melvin Noland, who thought he had done the tracking. (Tr. 167-168). The mine does not have to maintain a book with these records, but keeps them in a folder. (Tr. 167-168).

Ramsey reviewed the 104(d)(1) order issued to Respondent under 75.360(b) for failure to conduct a pre-shift examination, GX-30. (Tr. 169). Ramsey issued the order because Coot's first DTI's, which should have included a check for methane, was at 4:45 a.m., but according to Marcum's download he did not turn his Solaris on until 5:10 a.m. (Tr. 169-170). Ramsey reviewed the download of Coots' Solaris, GX-16. (Tr. 170). He wrote on the form that there was a time difference of two hours and eighteen minutes. (Tr. 170-171). He also reviewed a copy of the download of Johnson's Solaris, GX-17 and noted the same time difference. (Tr. 171).

Air quality is one of the biggest dangers facing miners. (Tr. 170). Ramsey stated that this violation was based on the calculation to determine real-time. (Tr. 177-178).

Ramsey marked this citation for high negligence because Coots recorded his DTI's and knew that he had to test for oxygen and methane but also knew that his spotter was turned off. (Tr. 171, 173). To comply he would have to look at the Solaris twice. (Tr. 171-172). The Solaris has a red light and a green light and they will go off, but it was not illuminated. (Tr. 178). In order to read the readout on the Solaris, Coots would have to shine his cap lamp on it.

(Tr. 183). Miners depend on the examination to check for any hazards. (Tr. 173). Ramsey found this was high negligence solely because Coots knew the Solaris was not on. (Tr. 178).

Ramsey marked the gravity of this Order as reasonably likely because the ventilation is important and failure to turn on the Solaris meant that there was no way to detect differences in air quality. (Tr. 173). There could have been a build up of methane or a depletion of oxygen. (Tr. 173-174, 178). On cross examination, he conceded that there was no reason to believe that the ventilation was down in the mine. (Tr. 179). The only evidence of methane was the liberation rate.²³ (Tr. 179). The gravity was marked because those things could have happened. (Tr. 179). Ramsey marked this Order as fatal because miners in the past had died from low oxygen. (Tr. 174). This mine liberated 31,253 cubic feet of methane in a 24-hour period. (Tr. 175). He marked this as affecting the two people in the mine that day. (Tr. 174-175).

Ramsey marked this Order as S&S because all of the factors involved would lead to an increased likelihood of injury. (Tr. 175). The Order affected the areas of the mine pre-shifted between 4:45 a.m. and 5:10 a.m. (Tr. 175).

Ramsey reviewed a 104(a) citation issued to Rex Coal Company, GX-31. (Tr. 176). It was issued for a violation of 75.360(g) which requires a pre-shift examination record on the surface before miners go underground. (Tr. 176). There was no record in the examination book on the day of the accident before Coots and Clem went underground the second time. (Tr. 176). The extent of the violation was that there was no report. (Tr. 177).

IV. Coots' Testimony

On November 26, 2009, Coots and Clem were at the mine to do "dead work" on the off-shift. (Tr. 203). At 4:40 a.m., Coots arrived at the mine. (Tr. 203). At 4:45-4:50 he got a spotter off the wall. (Tr. 203-204). Coots turns his spotter on when he gets it off the wall. (Tr. 204). He has never failed to turn on his spotter. (Tr. 205). When it turns on it rings and goes through the full system. (Tr. 204). It would be surprising if it were silent. (Tr. 204). He turned on his spotter that day and it was on the whole time he was in the mine and at every electrical installation he saw. (Tr. 204-205). There is no doubt in his mind that he turned it on.²⁴ (Tr. 206). Coots can see the readout on the spotter because it flashes green every few seconds. (Tr. 205-206). It did so that morning. (Tr. 206).

²³ Methane is measured using samples of the atmosphere, air readings, and a formula. (Tr. 180). Samples are taken anywhere air exits the mine and also on the active section. (Tr. 180). Ramsey will often take them near seals. (Tr. 180). Ramsey does not know how many sample bottles were taken in 24-hours, but the amount is based on a calculation. (Tr. 180-181).

²⁴ Coots reviewed the chain of custody form, GX-9 and the signature on that does not look like Coots', because he writes in cursive and that was in print. (Tr. 218). However, Coots provided MSHA with the Solaris that was at his side when he came out the second or third time. (Tr. 220).

At 4:45-4:50 he went inside to do a pre-shift. (Tr. 203-204). Coots conducts pre-shifts all the time and has made them with every inspector at the Harlan office. (Tr. 205). Coots used his wrist-watch for his DTI's. (Tr. 216-217). He had no motive not to do a pre-shift examination. (Tr. 219-220).

V. Billy Joe Clem, Jr.'s Testimony

On November 26, 2009, Clem arrived at the mine between 5:40 and 5:55. (Tr. 199). That is the regular start time. (Tr. 199). He was the first to arrive and saw Coots when he came out of the changing room. (Tr. 199). A few minutes before he went into the mine he turned on the spotter. (Tr. 200). Clem went into the mine with Coots between 5:45 and 6:00 a.m., probably at 5:45. (Tr. 200-201). That was the normal time. (Tr. 200-201).

VI. Blevins' Testimony

Blevins brought three new methane spotters to the hearing from the company. (Tr. 191-192). They make a loud whistle when turned on. (Tr. 192). It takes a few minutes after a Solaris is turned on for it to be ready go, it has to count down through the system. (Tr. 196). When there is a situation, it lights red and beeps loudly. (Tr. 192). The time on one of the spotters was 15:18, another was 15:27, and the final one was 15:21. (Tr. 193-194). Respondent's counsel noted that the actual time was about 2:00 p.m. (Tr. 193). Blevins never uses the spotters to tell time, he uses his watch. (Tr. 194). No one, not even federal inspectors, use the time from the spotters. (Tr. 195).

Blevins' personal Solaris has "LB" written on it. (Tr. 197). Miners often put their initials on them so they can get them back after they are sent off. (Tr. 197). There are fifteen to eighteen spotters at C-5. (Tr. 197). There are 14 people per shift who use spotters. (Tr. 198).

Contentions of the Parties

The Secretary contends that Order No. 8355742 was validly issued, that the violation was highly likely to result in a fatal injury to two persons, that the violation was S&S, that Respondent was highly negligent, that the violation was caused by an unwarrantable failure, and that the proposed civil penalty was appropriate. The Secretary argues that the citation is valid because the DTI's entered on the pre-shift boards were entered before Coots' spotter was turned on, meaning he could not have done the required gas checks. (*Secretary's Post-Hearing Brief* at 29-30). The Secretary argues that, with respect to gravity that miners rely on the air quality tests and there could have been a number of dangerous conditions. *Id.* at 32. Further, Respondent's actions were highly negligent and the result of an unwarrantable failure because it knew it was supposed to test for gases and did not. Coots' knew the spotter was not on, and a supervisor was involved. *Id.* at 31-32. Finally, the Secretary contends that the assessed penalty is appropriate in light of established case law. *Id.* at 33-35.

Respondent contends that Citation No. 8355742 was not validly issued. Respondent argues that the citation was not valid because Marcum's method for determining the time of the

pre-shift examination was flawed and Coots said that he conducted the pre-shift examination. (*Respondent's Post-Hearing Brief* at 12-16).

Discussion & Analysis

Under 30 C.F.R. §75.360(b), an operator is required to conduct pre-shift examinations, including checks for methane and oxygen levels, in working sections of the mine. With respect to Order No. 8355742, the issue is whether Coots actually took the required methane and oxygen readings at the times he listed on the DTI boards. I find that the Secretary provided credible evidence to support a finding that Respondent did not test for methane and oxygen at the times listed. According to the Secretary, the underground records show that Coots recorded his first DTI's at the #2 head drive at 4:45 a.m. (Tr. 150-151) (GX-26). At 4:55 a.m. Coots recorded his DTI's at the #2 power center. (Tr. 154). At 5:02 Coots recorded his DTI's at the #3 power center. (Tr. 154-155). At 5:08 Coots recorded his DTI's at the #3 head drive. (Tr. 155) (GX-X). No earlier than 5:10 a.m., according to Marcum's testimony, Coots turned on his spotter. (Tr. 123-125). That would mean that the four DTI's that Coots signed before 5:10 occurred without the use of the spotter. Coots could not have known the methane and oxygen levels at those locations. The first location where Coots' spotter was on was the #4 head drive at 5:13 a.m. (Tr. 155-156)(GX-28). Therefore, the pre-shift examination did not meet the requirements of 30 C.F.R. §75.360(b).

Respondent proffered several arguments to undermine the validity of this citation. However, I do not find any of those arguments to be compelling. First, Respondent presented evidence in the form of Coots' testimony, which included a timeline different from the Secretary's. Specifically, Coots testified he arrived at the mine at 4:40 a.m. (Tr. 203). At 4:45-4:50 Coots retrieved his spotter and turned it on. (Tr. 203-204). At 4:45-4:50 Coots went underground to do his pre-shift examination. (Tr. 203-204). Therefore, he would have turned his spotter on before beginning the pre-shift examination and could have checked for methane and oxygen. After that, Coots no longer testified to specific times. However, I find that the evidence best supports the Secretary's timeline. First, as has already been shown with respect to Citation No. 8401220, Coots was not a credible witness. Beyond his lack of credibility with respect to Responsible Person training, Coots' testimony regarding the timeline is not credible. He claims he arrived at the mine at 4:40, turned on his spotter between 4:45-4:50 a.m. and then went underground. However, the photographic evidence shows that his first DTI's were also recorded at 4:45 a.m. at the #2 head drive. The mine map and Ramsay's testimony show that the #2 head drive was 2,365 feet underground, nearly half a mile from the surface. (Tr. 153-154). Coots could not have been entered the mine at the same time he was taking methane and oxygen readings at the #2 head drive. As Coots' testimony is the only evidence supporting the Respondent's timeline, it is not credible. Instead, the undersigned finds that the Secretary's timeline best conforms to the evidence.

Respondent also argues that Marcum's calculation regarding the time Coots turned on his spotter was inaccurate. If the Secretary cannot prove that the spotter was not turned on until 5:10 a.m., then he cannot prove that Coots filled in his DTI's without checking for methane and oxygen. Marcum testified that that she determined that Coots could not have checked for methane and oxygen before 5:10 a.m. by conducting a time correlation with Coots' spotter.

Apparently, the calibration process will often cause the spotters to have the wrong time. When downloading the information on the spotter, a technician can determine the correct time by correlating the actual time with the time the spotter believes it to be. For example, in this case Marcum downloaded Coots' spotter at the actual time of 11:27 a.m. (Tr. 112). However, the spotter stated that the time was 1:45 p.m., a discrepancy of two hours and 18 minutes. (Tr. 113). Marcum then looked at the time the spotter was turned on the day of the fire. The spotter believed it was turned on at roughly 7:35 a.m. (Tr. 113-114). Adjusting for the fact that the spotter was off by two hours and 18 minutes, Marcum determined that the spotter had been turned on no earlier than 5:10 a.m.

Respondent questions the accuracy of the time correlation conducted by Marcum. First, it introduced a memo issued during the Upper Big Branch investigation. (RX-1). That document showed that several multi-gas detectors used at UBB experienced "time drift." With respect to spotters, time drift means the "internal clocks can deviate from the length of the same time period measured by more precise means: one second measured by a gas detector can differ from one second measured by the National Institute of Standards and Technology (NIST)." *Id.* at 8. If Coots' spotter had a time drift, his spotter may be two hours and 18 minutes off one day and, for example, three hours off another. This would make Marcum's calculation of the time Coots turned on his spotter inaccurate. However, Respondent reads this memo too broadly. It simply states that spotters can experience time drifts and that, after investigation in laboratory conditions, the spotters at UBB proved to have them. These findings do not show that the spotters at C-5 experienced time-drift or that Marcum's calculations were flawed. If Respondent wished to undermine Marcum's calculations in this way, it needed to show that the spotters at C-5 Mine experienced time drift. As no evidence on that point was raised, the undersigned sees no reason to hold that Coots' spotter experienced a time drift or that Marcum's simple mathematical calculation could not be used to determine the actual time. The fact that Johnson's spotter was calibrated at the same time and had the same deviation confirms the accuracy.

Respondent also showed that the download of Coots' spotter had 32 start-times recorded between 5/16/09 to 11/26/09 that varied greatly despite the fact that Coots works the same shift everyday. (*Respondent's Reply Brief* at 8-9 citing GX-17). Respondent argued that this means that the simple subtraction conducted by Marcum could not accurately determine the time as the spotter time oscillated erratically and would not remain static from November 26, 2009 to November 30, 2009. However, Marcum noted in her testimony that the time a spotter's time is set is affected by calibration. (Tr. 114-115). In essence, each calibration "re-sets" the clock in the spotter to a new time. According to Marcum, the last calibration date was 11-4-2009. (Tr. 115). That means that any times before November 4, 2009 would not deviate from the actual time by the same amount as after that calibration because the spotter's time had been re-set. Only four of the 32 start times listed by Respondent in its *Response Brief* occurred on or after November 4, 2009. The other 28 times are not relevant as the start times were not set relative to the same calibration.

Furthermore, one of the four remaining start-ups actually occurred on November 4, 2009 and therefore it is possible the calibration occurred before the start-up on that date. However, even if that start-up occurred after the calibration, there is no evidence to suggest that the calculation of time conducted by Marcum would therefore be inaccurate. On November 26,

2009 the startup time according to the spotter was 7:28 a.m. Marcum determined that it was actually on at around 5:10 a.m. On November 13, 2009, for example, the spotter was turned on at 8:08 a.m., meaning that if the deviation was constant that it would actually be turned on at 5:50 a.m. Respondent presented no evidence to show that Coots turned his spotter on before or after 5:50 a.m. on that date and Coots' arrival time on those dates were not verified. It is entirely possible that the discrepancy between the actual time and the time the spotter stated on both of those days was two hours and 18 minutes. The same is true of the other dates after the last calibration.²⁵ Therefore, the undersigned does not believe that this evidence undermines Marcum's calculations.

Along a similar vein, Respondent notes that, using the time correlation, the Clem's spotter showed it was turned on at 5:15 a.m., about 25 minutes before he arrived at the mine. (*Respondent's Post-Hearing Brief* at 12-13). It argues that, given the impossibility of the spotter being turned on before Clem's arrival, the method of calculating times is not as precise as the Secretary claims and raises doubt about when the spotter was turned on. *Id.* However, Respondent's argument ignores the fact that Marcum testified that there was something wrong with Clem's spotter and that she could not glean useful information from it. (Tr. 106-107). The two spotters that she was able to download showed a consistent two hour and 18 minute discrepancy. (Tr. 119-120). Further, Marcum has downloaded hundreds, perhaps thousands, of spotters and was trained on conducting time correlations by a representative of the manufacturer. (Tr. 102). There is no reason to doubt her testimony regarding the efficacy of the time correlation, the time Coots' spotter was turned on, or the lack of usable information provided by Clem's spotter.

Respondent also notes that Coots was using his watch to determine the time, not the time provided by the spotter. Since the Secretary's calculation of 5:10 a.m. is based on the spotter, Respondent argues that the discrepancy is not based on Coots' failure to turn on the spotter, but the difference between the time on his watch and the actual time as calculated with the spotter. However, for this to be true Coots' watch would have had to be running 25 minutes slow. It is not reasonable to believe that he used a watch that was so far off from the actual time without noticing. Perhaps more importantly, regardless of the time his watch stated, Coots' credibility with respect to the time he acted has already been called into question.²⁶

In light of the evidence showing that Coots conducted pre-shift examinations in four locations without the use of his spotter, the undersigned finds that Respondent violated 30 C.F.R. §75.360(b).

²⁵ Further, there is no evidence to suggest that Coots was using this spotter on those dates. It is possible it was used by another miner on that day while Coots used a different one.

²⁶ Coots' lack of credibility, as discussed above, stems from the discrepancy between his testimony about the time and the photographic evidence of his DTIs and also from his testimony regarding Responsible Person training. None of this relies on the time provided by the spotter and therefore could not have been caused by an inaccurate watch.

Respondent's conduct with respect to Citation No. 8355742 constituted high negligence. For the reasons discussed above, Respondent, through its agent Coots, knew, or should have known, that the pre-shift examination was being conducted inadequately. Specifically, Coots knew he was not checking for methane and oxygen because he did not turn on his spotter. As noted in the hearing and even in Respondent's brief, it would be impossible for Coots to mistakenly believe his spotter was on given the fact that it emits an ear-splitting screech when turned on and has several lights that blink while in use. As a result, there are no mitigating factors with respect to Coots' failure to turn on his spotter until 5:10 a.m. Therefore, the high negligence designation is appropriate.

Respondent's actions also clearly constituted an unwarrantable failure. With respect to extent, the failure to provide a Responsible Person affected every area pre-shifted before the spotter was turned on and everyone working underground. The violation was obvious because Coots knew that he had not checked for methane and oxygen. Additionally, it posed a high degree of danger because the mine liberates methane and there actually was a fire that day. If there had been methane present that day, there may have been a deadly explosion in addition to the fire. There is no evidence that Respondent was on specific notice with respect to 30 C.F.R. §75.360(b).²⁷ Respondent abated the condition by conducting a new pre-shift examination, but it was too late. Miners had already worked underground without a proper pre-shift examination and Respondent was extremely fortunate there was no explosion. Finally, Coots was a supervisor and knew he was not properly conducting the pre-shift examination. In light of the above factors, the undersigned finds that an unwarrantable failure has been established.

The undersigned finds that the evidence established that this violation was reasonably likely to result in a fatal injury to two persons. The Commission has recognized pre-shift examinations as "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); see also *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the pre-shift inspection requirement as "the linchpin of Mine Act safety protections." *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (Aug. 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, pre-shift, and weekly examinations, in order to ensure miner safety. "These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine." *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ). The Commission has clarified that the term "hazardous conditions" in §75.360(b) does not require that the condition be S&S or reasonably likely to result in injury; rather, the term "hazard" denotes a measure of danger to safety or health. *Enlow Fork Mining Co.*, 1997 WL 14346, *7 (Jan. 1997). "The Commission has approved the definition of "hazard" as "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or

²⁷ Respondent undoubtedly received notifications regarding the importance of pre-shift examinations following the Sago disaster and UBB disaster, as the other mines in the country did. However, that issue was not raised at hearing. Furthermore, it is possible that C-5 mine may have some history of violations with respect to 30 C.F.R. §75.360(b). However, the Secretary submitted the violation history of Webster County Coal LLC's Dotiki Mine, rather than Rex Coal Company, Inc.'s C-5 mine. (GX-32).

increase the possibility of loss.” *Id.* The documented failure in this case to conduct an adequate pre-shift examination meant that miners were working in an environment with unknown atmosphere. This mine liberates methane. Respondent is fortunate that there was no explosion in this mine. Considering the high level of danger presented by a required examination that did not adequately check for hazards where miners were about to work, I find that the special assessment was fully justified.

Respondent’s violation cited in Order No. 8355742 was S&S. Once again, the *Mathies* factors must be used to assess whether the violation as S&S. First, as already shown, Respondent violated 30 C.F.R. §75.360(b). That violation contributed to the hazards of asphyxiation from lack of oxygen or explosion from the presence of methane in an area where fire was present. There is no question that lack of oxygen or explosion could lead to injury. Finally, it is reasonably likely that the injuries resulting from such an accident would be reasonably serious, even fatal. As a result, this violation was S&S.

In light of the above findings and the six statutory criteria in 30 U.S.C. §830(i), I **AFFIRM** Order No. 8355742 as written by Jackson and find that the specially assessed penalty of \$44,600.00 is appropriate for this violation.

SUMMARY

Citation No. 8401220, Citation No. 8401221, and Order No. 8355742 were **VALIDLY ISSUED**. The Citations and Order are **AFFIRMED** as issued. The assessed penalties have been considered using the six statutory criteria set forth above and found to be appropriate, including the special assessment for No. 8355742

The total amount of \$81,142.00 is **AFFIRMED**.

ORDER

Respondent is **ORDERED** to pay civil penalties in the total amount of \$81,142.00 within 30 days of the date of this decision.²⁸

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

²⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution: (U.S. Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

Telephone: 202-434-9933

August 5, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-1283-M
Petitioner	:	A.C. No. 1512905-292011-01
	:	
v.	:	
	:	
HANSON AGGREGATES MIDWEST	:	Mine: Laurel Quarry
Respondent	:	

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

In this matter, the parties filed cross-motions for summary judgment on the issue of whether the Respondent, Hanson Aggregates Midwest LLC, failed to give MSHA notice of a reportable accident within 15 minutes, pursuant to 30 C.F.R. §50.10(b). As the facts are not in dispute, this matter is appropriate for summary judgment. For the reasons which follow, as the Court finds that this was not a reportable event, it GRANTS the Respondent’s Motion and DENIES the Secretary’s Motion.

The agreed-upon facts may be succinctly stated. Citation No. 8640910, issued February 4, 2012 states: “A heart attack which occurred on mine property on 02/03/2012 was not reported to MSHA within the allowed time frame of 15 minutes. The mine [superintendent] knew of the condition for about 45 minutes before notifying MSHA. This is in violation of 30 CFR [§] 50.10b.” To abate the alleged violation, the section 104(a) citation states that the “operator changed their policy and now have implemented the practice to call MSHA immediately following any 911 call.”¹

In its “Statement of Facts” the Secretary informs that: “On February 3, 2102, Ralph Newcomb, a miner employed at the Hanson Aggregates Laurel Quarry, began suffering chest pains at approximately 3:25 p.m. Mr. Newcomb began his shift that day at 7:30 a.m. At the time that his chest pains began, he was operating a CAT 773B haul truck hauling overburden at the spoil pile dump site on the mine property. He exited the cab of the truck and laid down beside a berm. Larry Tedders, dozer operator, saw Mr. Newcomb and went to check on him. Another haul truck driver, Cordell Burdine, also went to check on Mr. Newcomb. Mr. Newcomb, who is trained in CPR, told Mr. Tedders he thought he was having a heart attack and asked him to call the office. Upon receiving Mr. Tedders’ call, the office clerk called 911 at

¹ The Secretary proposed a penalty of \$5,000.00 for this alleged violation.

3:35 p.m. At the same time, lead man Rick Wilson called Plant Manager James Kirby, and told him about Mr. Newcomb's condition. The ambulance arrived at 3:55 p.m. and transported Mr. Newcomb to the hospital. Mr. Kirby arrived at the mine site at about 4:05 p.m. as the ambulance was leaving the mine. Mr. Kirby then called Charles Sellards, Area Safety Manager at 4:10 p.m. to inform him of the incident. After talking to Mr. Kirby, Mr. Sellards called MSHA to report Mr. Newcomb's heart attack at 4:20 p.m. Mr. Newcomb was admitted to the ER and diagnosed with acute myocardial infarction as a result of a blockage in his right coronary artery. The ER doctor performed a thrombectomy that [same day, removing] the blockage. Mr. Newcomb returned to work [about six weeks later] on March 19, 2012. The operator maintained an emergency response telephone list in the mine office. This list included local emergency contact numbers only. MSHA's 1-800 number was posted on a bulletin board in the main office area where the emergency response telephone was posted, as well as in Mr. Kirby's office." Sec. Motion at 1-2. The foregoing represents the entirety of the Secretary's statement of facts. The Respondent does not challenge the Secretary statement of the facts, nor offer contrary facts.

The Parties' Contentions

The Secretary points to the wording of Section 30 CFR § 50.10(b) which requires that an "operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number . . . once the operator knows or should know that an *accident has occurred* involving . . . [b] *an injury* [of] an individual at [the] mine which has a reasonable potential to cause death." It notes that the provision "is triggered *once an accident occurs*" and that "Section 50.2(h) defines an 'accident' *as an injury* to an individual at a mine which has a reasonable potential to cause death." Sec. Motion at 2. (emphasis added).

Respondent takes note of what has been informally referred to as MSHA's "Yellow Jacket,"² which is more formally and accurately, identified as the "MSHA Report on 30 C.F.R. 50, from the Directorate of Technical Support," dated December 1986, PC-7014. See, <http://www.msha.gov/stats/part50/rptonpart50.pdf>.³ This was updated in a Program Information Bulletin, No. 88-05, dated September 28, 1988. That update is useful because it presents the distinction between an *injury* vs. *an illness*, providing that "[t]he basic definition of an occupational injury includes those cases which result from a *work accident* or from an *exposure* involving a single instantaneous incident in the work environment. Contact with a hot surface or a caustic chemical which produces a burn in a single instantaneous moment of contact is an

² Inferentially, the "Yellow Jacket" name derives from the yellow cover sheet for the document.

³ Although this is the correct link for the "Yellow Jacket," it may not appear when the link is attempted. The Court has found that searching for "MSHA Program Information Bulletin, No. 88-05, September 28, 1988," which is also described as "MSHA PC-7014 - Report on 30 CFR Part 50 - Yellow Jacket," is an alternative to lead one to the MSHA Yellow Jacket Report.

injury. Sunburn or welding flash burns which result from prolonged or repeated exposure to sunrays or welding flashes are considered illnesses. Similarly, a one-time blow which damages the tendons of the hand is considered an injury, while repeated trauma or repetitious movement which produces tenosynovitis is considered an illness. The basic determinant is the single-incident concept. If the case resulted from something that happened in one instant, it is classified as an injury. If the case resulted from something that was not instantaneous, such as prolonged exposure to hazardous substances or other environmental factors, it is considered an illness.” Yellow Jacket at p. 2. (Italics added).

Respondent notes that the same document describes a heart attack as an illness “because they do not normally result from work accidents or [a] single[,] instantaneous exposure in the environment.” Respondent’s Opposition at 2, quoting from the Yellow Jacket at p. 30. Further, Respondent notes that the preamble to the final rule for the cited provision, while listing many injuries, does not include a heart attack among them. Respondent’s Opposition at 2, citing 71 Fed. Reg. 71430, 71434 (December 8, 2006). Given MSHA’s own distinction between an accident and an illness, Respondent observes that “[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.” *Id.* at 3, quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 at 1193 (9th Cir. 1982).⁴

Respondent also asserts that because the Secretary has clearly articulated it’s interpretation, it can’t now move away from it, simply because of this litigation and, in such circumstances, no deference is due. *Id.* at 3-4, citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) and *United States v. Mead*, 533 U.S. 218, 227-228 (2001).⁵

⁴ Even if the provision could be stretched on the basis of the preamble’s reference to “cases requiring cardio-pulmonary resuscitation (CPR),” Respondent notes that the miner did not receive CPR and that the parties so stipulated to that fact. Joint stipulation 27. The Court agrees with Respondent’s point, but adds that the reference to CPR is not a stand-alone basis for the injury reporting requirement. Clearly, in context, CPR use is linked to an injury, prompting its use.

⁵Alternatively, Respondent contends that, even if the Secretary’s new interpretation was accepted, Respondent’s call still met the 15 minute reporting time requirement as, by Commission interpretation, that provision allows time for a mine operator to determine if an accident has occurred. Here, per the parties’ stipulations, Respondent’s management personnel were off site at the time of the miner’s heart attack. Thereafter, they promptly investigated the event and reported it. Respondent’s Opposition at 4-5, citing joint stipulations 22, 25, and 28. Given that mine operators are afforded a “reasonable opportunity to investigate an event” before the 15 minute clock is triggered, management learned of the miner’s chest pain ten minutes after that occurred, then arrived at the mine 30 minutes after that notification. Following that, Respondent spent 10 minutes to discuss what had transpired and called MSHA 15 minutes after
(continued...)

Discussion⁶

The particular provision of the cited standard, 30 CFR § 50.10(b), requires immediate notification to MSHA for “[a]n *injury* . . . which has a reasonable potential to cause death.” (emphasis added).

The Secretary has cited to *Cougar Coal Co. Inc.* 25 FMSHRC 513, 520 (Sept. 2003) (“*Cougar*”), and *Newmont USA Ltd.*, FMSHRC 391, 396 (ALJ April 2010) (“*Newmont*”). However, in the Court’s view, the Commission’s holdings on this issue do not support the Secretary’s interpretation. In *Cougar*, a miner was working, removing electrical equipment from a high line cable, when he touched a live wire, received a 7,200 volt shock, and fell some 18 feet.⁷ Clearly, an “accident” occurred in *Cougar* because there was an associated *injury* to the miner.⁸

⁵(...continued)

management’s arrival at the scene. *Id.*, citing Jt. Stips. 15, 21, 22, 25, 28, and 29. Under these facts, the Court would agree that Respondent’s call was timely. Because the Court finds that the duty to report never arose here, this information is relegated to a footnote.

⁶ Section 30 CFR § 50.10 provides: Immediate notification. The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident.

“Accident” is defined at 30 CFR § 50.2, where, in relevant part, that definition provides: As used in this part: “(h) Accident means (1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death; (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death; . . . (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.” Items (4) through (11) are omitted here because they refer to events at a mine *apart from those immediately impacting an individual*. They include events such as an unplanned ignition, and an unplanned roof fall. Those events have no reference to, or requirement that, individuals are affected. Thus they are materially different from items (1) through (3) and item (12) and are not applicable here factually, nor in understanding the application of the term in the context of this litigation.

⁷ Remarkably, the miner survived.

⁸ As for the determination in *Newmont*, decisions of fellow ALJ’s have no precedential effect beyond their persuasiveness. Even the persuasiveness consideration is not present because, unlike present matter, an accident did occur in *Newmont*: “An accident happened on
(continued...) ”

With no controlling precedent, the Secretary's Motion must fail for several, independent, reasons. To begin, the words of the cited standard are clear and exclude the non-work-related event which occurred at the Respondent's mine. Supporting the text of the standard, the Federal Register's preamble to the cited standard is entirely consistent with those words; it does not list a heart attack as an "injury." The whole of Part 50's obligations arise in the context of a mine accident's occurrence. The "Purpose and scope" section for Part 50 also makes clear that the duty to notify is all about accidents, requiring mine operators to "immediately notify [MSHA] of *accidents*, requires to investigate *accidents*, and restricts disturbance of *accident* related areas." 30 C.F.R. § 50.1. An "Accident," in turn, is defined by 12 separate categories, with only the second listed category, "[a]n injury to an individual at a mine which has a reasonable potential to cause death," applying here.⁹

Here, as noted, the Secretary has relied upon the definition of an "accident," particularly pointing to subsection (h)(2), which defines that category of "accident" as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." Therefore, an injury must first have occurred for an accident to be reportable. Although the wording is plain and sufficient to reach the result here, as mentioned, the preamble to the final rule speaks solely in terms of a "'reasonable potential to cause death' basis *for injuries* and entrapments [and later it illustrates] some types of *'injuries* which have a reasonable potential to caused death.'" 71 Fed. Reg. 71430, 71433- 71434 (emphasis added). Not surprisingly, the examples offered in the final rule are prefaced as "*types of 'injuries* which have a reasonable potential to cause death.'" As also noted above, the Agency's Yellow Jacket confirms what the plain language of the standard provides. Thus, the Yellow Jacket is also consistent with the standard's wording. In sum, all sources point to the same conclusion: there must be an work injury for this provision to apply.¹⁰

MSHA's concern is about workplace health and safety. It is the intersection of work activity and an injury resulting from performing such work activity that triggers the reporting requirement. MSHA *raison d'être* comes into play when such *work activity* results in an injury from an accident. Here, there was no "accident" at Hanson Aggregates Laurel Quarry Mine.

⁸(...continued)

07/23/2007 in the main drift between 152 stope and the 161 laydown, where a miner was pinned between the rib and a haul truck, causing him to be twisted around, breaking his left femur." *Newmont* at *392.

⁹ It has been noted that the definition of an "Accident," is expansive and detailed, including among the 12 categories, events such as unplanned inundations, ignitions or explosions, entrapment of an individual and any death at a mine. 30 C.F.R. §50.2(h).

¹⁰ The only exception, in this context, is that anytime an individual dies at a mine, that is considered to be an "accident" under the provision. Thus a death creates a duty to notify MSHA apart from any injury.

The miner was a haul truck operator and was simply performing that function. The truck was not in any accident; it did not crash, roll-over, or otherwise have an incident. With no accident, there was no associated injury occurring.

Under MSHA's suggested interpretation in its Motion for summary judgment, *any* untoward event to a miner, regardless of whether it was associated with work activity, would be reportable. As applied under MSHA's theory, a duty to report would arise if a miner, while eating a donut in a break room, then choked while eating it and passed out, and then required rescue personnel to arrive at the mine to resuscitate him. In either instance; when no work activity is involved or where, as in this litigation, a miner succumbs to some medical malady, completely apart from any work activity mishap, the regulation, properly, requires no reporting requirement.¹¹

Based on the foregoing, the Court finds that this was not a reportable event, and accordingly it GRANTS the Respondent's Motion and DENIES the Secretary's Motion.

SO ORDERED.

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

¹¹ Even the Agency's requirement for the abatement here was outside of its authority under the cited provision. The action to terminate states that the "operator changed their policy and now have implemented the practice to call MSHA immediately following any 911 call." Citation No. 8640910. However, nowhere in Part 50 is a "911 call" listed as a trigger to notify MSHA. Neither the cited provision, 30 C.F.R. § 50.10(b), nor the definition of an "accident," at 30 C.F.R. § 50.2(h) make any reference to 911 calls.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

August 5, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-1059
Petitioner,	:	A.C. No. 12-02010-265360
	:	
v.	:	
	:	
PEABODY MIDWEST MINING LLC	:	Air Quality #1 Mine
Respondent.	:	

DECISION

Appearances: Emily Hays, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

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

The Air Quality #1 Mine is a large underground coal mine in Knox County, Indiana. Two section 104(d)(2) orders and three section 104(a) citations were adjudicated at the hearing. Ten citations and orders were settled prior to the hearing. The Secretary proposed a total penalty of \$268,600.00 for the citations and orders that were adjudicated.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial (“S&S”) nature. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable

likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

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

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575.

All of the citations and orders in this case involve roof control issues. It is well recognized that roof falls pose one of the most serious hazards to miners in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) *citing* Roof Support Standards, 53 Fed. Reg. 2,254 (1988)). The Commission has noted the inherently dangerous nature of mine roofs and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986).

B. Negligence and Unwarrantable Failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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

30 C.F.R. § 100.3(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

C. Burden of Proof and Credibility Determinations

In order to establish a violation of a safety standard, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (*citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). This same standard applies to the Secretary’s burden to establish that the violation was S&S and was the result of the operator’s unwarrantable failure to comply with the safety standard. When determining whether the Secretary met this burden, I was required to make a number of credibility determinations. Determining the credibility of witnesses is one of the most important and difficult responsibilities that a Commission administrative law judge must complete. Although a judge will occasionally find himself in a situation where he believes that a witness is lying, most of the time resolving credibility issues involves determining whether a particular witness’s testimony is worthy of trust. The primary issue is whether the testimony is believable. Often, a judge credits the testimony of witness A over witness B because he believes that the witness A is in a better position to know the particular facts at issue. Credibility determinations involve not only weighing the trustworthiness of a witness but also determining whether a particular witness has the knowledge necessary to give his testimony weight. The witness may be competent to testify about the conditions at a mine but he may not have a complete understanding about factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Credibility can be defined as “that quality in a witness which renders his evidence worthy of belief.” *Black’s Law Dictionary* 330 (5th ed. 1979). Thus, a witness’s experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial in evaluating credibility.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8415059

On July 31, 2010, MSHA Inspector Stanley Reeder issued Citation No. 8415059 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed at the 1R/MS seals between the number 5 and number 6 seals and in front of the number 6 seal. Loose and cracked material was observed that had fallen out between the roof bolts between the two seals. Loose material was also observed in the roof between the pins that had not fallen out as of yet. The loose material extended from the end of the hog panel at the number 5 seal to the beginning of the hog panel at the number 6 seal. This area had no hog panels placed in it to prevent loose material from falling out between the pins.

(Ex. G-1). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.202(a) of the Secretary's safety standards provides 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 outbursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of \$50,700.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of the Evidence

Inspector Stanley Reeder testified that during his inspection on July 31, 2010, he determined that the mine roof in the 1 Right, Main South between the No. 5 and 6 seals was not being adequately supported. (Tr.I 17; Ex. G-1).¹ He observed an area of unsupported roof where he saw multiple cracks and large chunks of loose hanging material in the roof that had not fallen. *Id.* Inspector Reeder also saw chunks of material throughout the middle of the 19-foot entry. *Id.* The inspector believed that the lack of hog paneling in this unsupported area was allowing loose material to fall from the mine roof. (Tr.I 18).

¹ Each day of this two-day hearing has a separate transcript and each transcript begins at page 1. Therefore, I refer to the transcript from the first day of the hearing as "Tr.I" and the transcript from the second day as "Tr.II."

The inspector testified that he designated the citation as S&S because the conditions he observed made it reasonably likely for an accident to occur that would permanently disable a miner hit by a falling rock. (Tr.I 25). In addition, he testified that one person would be affected in a potential accident because he was primarily concerned with a mine examiner traveling through the area. (Tr.I 30). He also believed that because of the constant weathering in this part of the mine, “huge” chunks of material would fall more frequently. (Tr.I 20-21).

The inspector determined that the violation was the result of Peabody’s high negligence. (Tr.I 33, Ex. G-1). He believed that the examiner knew or should have known about the hazardous roof conditions between the No. 5 and 6 seal because the examiner had walked through the area the previous day and the conditions would not have changed. (Tr.I 34). The inspector also considered that the mine had been cited 219 times in the previous two years for violating this standard; the mine had notice of recurring violations. (Tr.I 36).

The inspector testified that there was hog fencing present in the front of the Nos. 5 and 6 seals. (Tr.I 43). The inspector testified that in his field notes, he stated that the material lying on the mine floor was “fresh,” meaning that the material could have been there for a few days. (Tr.I 48, Ex. G-3). The inspector also stated that there has never been a fatality from a rock fall at the Air Quality #1 Mine. (Tr.I 45).

Nathan Leighty was the miner who performed the examination of the mine roof in the Main South. (Tr.I 70-71). Leighty testified that he examined that area once a week. (Tr.I 72). At the time of his most recent examination, which was a day before Inspector Reeder inspected the Main South, Leighty testified that he did not observe any adverse roof conditions. (Tr.I 78). He also believed that due to the constant weathering in this part of the mine, roof conditions can change in a span of 24 hours. (Tr.I 78).

Todd Waldroup was the safety technician who escorted Inspector Reeder when he inspected the Main South. (Tr.I 90-91). Waldroup testified that he observed only loose material lying on the mine floor. (Tr.I 95, Ex. R-1). Waldroup also stated that he disagreed with the citation because there were no loose bolts, just some loose rock. *Id.*

2. Summary of the Parties’ Arguments

The Secretary argues that the Respondent violated section 75.202(a) by failing to adequately support and control the roof of the Main South between the No. 5 and 6 seals. The Secretary cites Inspector Reeder’s testimony that he observed an area of unsupported roof, large chunks of loose hanging material, and material lying on the mine floor of that area. (Sec’y Br. at 6). The loose hanging material presented a hazard to miners of being permanently disabled if hit by falling rock. *Id.*

The Secretary asserts that the violation was S&S because it met the four elements of the *Mathies* test. There was a violation of the mandatory safety standard, the violation contributed to the discrete safety hazard of material falling from the roof, roof falls are highly dangerous, and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in an injury. Additional factors include the likelihood of loose chunks falling down because the Main South suffers from constant weathering, the chunks of material that fall in this section of the mine are usually large, and the lack of hog paneling between the No. 5 and 6 seals. *Id.*

The Secretary maintains that the violation was the result of Respondent's high degree of negligence because the roof conditions were obvious and extensive and Respondent should have known about them. The Secretary argues that the weekly examiner knew or should have known about the hazardous roof conditions because he had examined the area the previous day and conditions would not have changed. Additionally, at the time the citation was issued the mine had been cited 219 times in the previous two years for violating section 75.202(a).

Respondent argues that the citation should be vacated for the reason that the Secretary did not meet his burden of establishing a violation because the mine examiner did not observe adverse roof conditions at the time of the most recent weekly examination. Leighty's testimony indicated that the Main South is subject to increased weathering that changes roof conditions quickly. Respondent asserts that because no credible evidence exists to suggest that the mine violated section 75.202(a), the citation should be vacated.

Respondent contends that the S&S designation is inappropriate. Very few miners enter the cited area. Therefore, the reasonable likelihood that roof material would fall upon a miner was unlikely. Additional factors include that there has never been a fatality from a rock fall at the Air Quality #1 Mine and the area of unsupported roof was limited to a space between the No. 5 and 6 seals.

Respondent argues that the high negligence designation is inappropriate. The designation is unfounded because the inspector was not present the day of Leighty's examination of the Main South and he guessed that such conditions were present for several days. Because the Main South is subject to constant weathering, it is likely that the roof conditions changed between the examination and the MSHA inspection.

Respondent asserts that the \$50,700 penalty proposed by the Secretary is excessive because the Secretary provided no evidence to support his specially assessed penalty. In the absence of any evidence or rationale for proposing a specially assessed penalty, the Secretary's proposed \$50,700 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the conditions described in Citation No. 8415059 was a violation of section 75.202(a) because the mine roof in the 1 Right, Main South between the No. 5 and 6 seals was not being adequately supported. Credibility determinations for this citation were critical in determining whether Respondent violated the cited standard.

Inspector Reeder has worked for MSHA as a coal mine inspector and ventilation engineer/ventilation specialist for four and a half years and has inspected the Main South for three years. (Tr.I 9-13). Inspector Reeder holds bachelor's degrees in mining engineering and geology from Southern Illinois University. Before becoming an MSHA inspector, he worked in various positions in several underground coal mines including the Air Quality #1 Mine. Additionally, the inspector has an Illinois examiner's certificate.

I credit the inspector's testimony that he observed an area of unsupported roof where he saw large chunks of loose hanging material that had not fallen and multiple cracks in the mine roof. (Tr.I 17). 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 purpose 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). Inspector Reeder has extensive knowledge in the mining industry to accurately determine whether a mine roof is adequately supported. Applying the reasonably prudent person test to the facts, I find that Inspector Reeder correctly concluded that the roof in the cited area was not adequately supported because the lack of hog paneling caused material to fall. (Tr.I 18). The "dozens" of large chunks of rock on the mine floor and loose, unsupported rocks in the roof between the seals that the inspector observed are further evidence of a hazard. (Tr.I 17). I find that the Secretary established that the roof was not adequately supported.

I find that the Secretary did not establish that this violation was S&S. Although the Secretary established the first, second, and fourth elements of the *Mathies* test, evidence presented by Respondent shows that an injury was unlikely. The likelihood of an injury occurring must be evaluated by considering the likelihood of two simultaneous events: a rock or other material falling from the roof and the presence of a miner underneath it. The frequency with which rocks sufficient to cause a serious injury would fall from the inadequately supported area is unknown and unpredictable. Although there is evidence of material falling from the roof, exposure to the hazard was minimal because examinations in the area occurred only once a week and it only took approximately 30 seconds to traverse the cited area each way. (Tr.I 72). The examiner in this case was trained to recognize roof hazards and either flag the hazard or fix it immediately.

The Commission has observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Inspector Reeder qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358 (Aug. 1996) (a showing that an injury producing event could occur is not sufficient to establish that a violation is S&S). Accordingly, I find that the violation was not S&S. The gravity of the violation was serious.

I find that Respondent's negligence was moderate for Citation No. 8415059. In reaching this conclusion, I considered that 219 citations were issued to Respondent for violating section 75.202(a) in the two years preceding this citation. Nevertheless, it is not clear how long the cited condition existed. I credit Leighty's testimony in which he stated that he observed no roof hazards during his weekly examination. (Tr.I 78). It is possible that the adverse roof conditions that the inspector observed on July 31 were not present during Leighty's examination, which occurred over 24 hours before. Accordingly, I find that Respondent's negligence was moderate for Citation No. 8415059.

I find that a penalty of \$10,000.00 is appropriate for this violation given my finding of moderate negligence and the fact that the violation was not S&S.

B. Citation No. 8415060

On July 31, 2010, Inspector Reeder issued Citation No. 8415060 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed on the Main South Roadway between crosscuts 60 to 63 and crosscuts 74 to 75. Loose material that had fallen out between the pins was observed at these locations along the riblines on both sides of the travelway that created areas between 5 and 6 ½ feet where no additional support had been placed

(Ex. G-2). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that two people would be affected. The Secretary proposed a penalty of \$56,900.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

Inspector Reeder testified that during his inspection on July 31, 2010, he determined that the mine roof and rib in the Main South travelway between crosscuts 60-63 and 74-75 were not being adequately supported. (Tr.I 107; Ex. G-2). The inspector observed a large amount of material hanging from the roof and material on the ground that had already fallen. (Tr.I 108). He also observed loose material hanging between the last row of the roof bolts and the ribs on both sides of the travelway. *Id.* In between both crosscuts, the inspector testified that he saw "wide spacing" of up to 6.5 feet between the last bolt in the roof and the rib. (Tr.I 110-111). The inspector believed that because this was a travelway for miners, the unsupported areas created a roof fall hazard.

The inspector testified that he designated the citation as S&S because the roof and rib conditions made it reasonably likely for an accident to occur that could permanently disable a miner hit by falling material. (Tr.I 115). Two miners were affected because this section of the mine was a supply line for miners. (Tr.I 116-17). In addition, the inspector testified that the constant weathering and guttering this section of the mine experiences increased the risk of material falling upon miners. (Tr.I 113-15).

The inspector determined that the violation was the result of Peabody's high negligence. (Tr.I 117; Ex. G-2). He believed that the hazard was obvious and that mine personnel should have flagged the hazard due to the number of miners that travel this section of the mine. (Tr.I 118). The inspector also considered that the mine was cited 219 times in the previous two years for violating this standard; the mine had notice of recurring violations. (Tr.I 119-120).

Jonathan Land was one of the miners who performed a pre-shift examination of the mine roof in the Main South before the citation was issued. (Tr.I 165). Land testified that one of his responsibilities was to examine the width between the bolts and ribs and add additional support for distances in excess of 48 inches. *Id.* He indicated that there were other areas of the South Main travelway that exceeded the 48 inches and additional support was added during his shift. Land also testified that, due to the weathering in the Main South travelway, the roof conditions can change quickly. (Tr.I 168-69).

Todd Waldroup was the safety technician who escorted Inspector Reeder when he inspected the Main South. (Tr.I 90-91). Waldroup testified that he observed loose material along the riblines at the cited areas of the travelway. (Tr.I 141-42). He testified that miners are taught to walk in the middle of the entry, not the riblines. *Id.* Waldroup stated that the middle of the entry of the travelway contained no loose material. (Tr.I 145).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.202(a) by failing to adequately support and control the roof and rib of the Main South travelway between crosscuts 60-63 and 74-75. There was an area of unsupported roof where "massive" rocks hung down from the roof and there was material on the ground that had already fallen. The hanging material presented a hazard to miners of being permanently disabled by a roof fall.

The Secretary asserted that the violation was S&S because Peabody violated section 202(a), the violation contributed to the discrete safety hazard of material falling from the roof, and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in a serious injury. Additional factors include that the cumulative amount of unsupported roof could create a large roof fall, the travelway was a supply road used by many miners daily, and the constant weathering and guttering in the Main South necessitated additional roof support.

The Secretary maintains that the violation was the result of Respondent's high degree of negligence because Respondent should have known about the obvious and extensive roof conditions. Respondent examined the travelway three times a day before each shift. Many miners use this travelway.

Respondent argues that the citation should be vacated because no violation of the cited standard occurred. Respondent asserts that the cited standard only applies “where persons work or travel.” Inspector Reeder testified that the condition was along the ribline. No travel occurred along the riblines of the Main South travelway because miners walk along the center of the entry and travel is not possible along the riblines due to the buildup of material from both guttering and weathering.

Respondent contends that if a violation is found, the S&S designation is inappropriate. Travel did not occur along the riblines of the travelway, so exposure to material falling was minimal. Respondent also maintains that mere the possibility of a roof fall is not S&S because the Secretary presented no evidence as to the likelihood of a roof fall.

Respondent argues that the high negligence designation is inappropriate. A high negligence designation is unfounded because an examiner conducted a pre-shift examination of the Main South travelway and observed no hazards between crosscuts 60-63 and 74-75. Examiners detected and fixed other loose material in the Main South travelway before the citation was issued, which showed that the examiners corrected all the roof hazards in that section of the mine. Respondent contends that the Secretary adduced no qualitative assessment to support his position that Respondent’s previous roof control violations mandate a high negligence finding.

Respondent asserts that the \$56,900 penalty proposed by the Secretary is excessive. Respondent contends that the Secretary provided no evidence to support his specially assessed penalty. The Secretary’s proposed \$56,900 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the Secretary established a violation of section 75.202(a) because the mine roof and rib in the Main South travelway between crosscuts 60-63 and 74-75 was not being adequately supported. Credibility determinations were once again important to determine whether Respondent violated the cited section.

I credit the inspector’s testimony that he observed loose material hanging between the last row of roof bolts and the ribs on both sides of the travelway. (Tr.I 108). In between both crosscuts, the inspector testified that he saw “wide spacing” between the last bolt in the roof and the rib. (Tr.I 110-11). In applying the reasonably prudent person test to the facts, I believe that Inspector Reeder correctly concluded that the mine roof in the cited areas was not being adequately supported based upon his extensive experience and his observation of the wide bolt spacing adjacent to the ribs. Inspector Reeder also observed a large amount of material hanging from the roof and upon the mine floor of the cited areas. (Tr.I 108).

I reject Respondent's argument that there was no violation of the cited standard because the cited conditions were primarily located along the ribline and miners do not walk adjacent to the ribs. First, there was nothing to prevent a miner from approaching the ribline, although he might not want to walk along it for a great distance due to the stumbling hazards present. Second, a large rock fall could extend beyond the area immediately adjacent to the ribs. Respondent construes the safety standard too narrowly.

I find that the Secretary established that the violation was S&S. The violation of section 75.202(a) was extensive and dangerous because there were "massive" chunks of material hanging from the roof in the cited areas, which presented a reasonable likelihood that the violation would result in an event in which there was a serious injury. Even though much of the loose material was along the ribline, the potential for loose material hanging from the roof to hit a miner in other areas of the entry warrants an S&S designation. Unlike the conditions in the previous violation, the area cited was a frequently used travelway which greatly increased the likelihood of an injury. The gravity of this violation was serious.

I find that Respondent's negligence was moderate. The cited area was subject to pre-shift examinations three times per day. The violation was extensive because there were large pieces of material hanging from the roof and the space between the last roof bolt and the rib wall in both crosscuts was six feet or more. Peabody was also on notice that it needed to do more to adequately support the roof because the standard had been cited numerous times in the previous two years. I credit Land's testimony that he detected and fixed other areas with poorly supported roof in the Main South travelway before the citation was issued. (Tr.I 165). Although I credit the testimony of the inspector with respect to the conditions he observed, it is not clear that these same conditions existed at the time of the previous pre-shift examination. I also credit the testimony of pre-shift examiner Land that weathering in the Main South travelway can cause roof conditions to change quickly. (Tr.I 168-69). Accordingly, I find that Respondent was moderately negligent with respect to this citation. I find that a penalty of \$20,000.00 is appropriate for this violation.

C. Citation No. 8415064

On August 6, 2010, Inspector Reeder issued Citation No. 8415064 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed on Unit #1 (MMU-001) in the left hand crosscut adjacent to entry #1. This crosscut was directly adjacent to the working section and had not been re-bolted during the rehab of the unit. An unsupported area approximately 19 feet wide and 20 feet in length was observed where about a dozen or more loose roof bolts were hanging down, Loose material was also observed still hanging in the roof.

(Ex. G-5). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that two people would be affected. The Secretary proposed a penalty of \$56,900.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

Inspector Reeder testified that during his inspection on August 6, 2010, he determined that the roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1 was not adequately supported. (Tr.I 186; Ex. G-5). He observed loose material that hung from the roof and material that had already fallen upon the mine floor. (Tr.I 188-90). The inspector testified that the loose material was "pretty good-sized material," four or five inches thick by one foot long. *Id.* He testified that he observed more than a dozen loose bolts in the cited area of the mine roof. *Id.* He also observed tire tracks under the unsupported area of the mine roof. *Id.* The inspector believed that, because the unsupported area was directly adjacent to a working entry, the hazard exposed miners to falling material or a roof fall. (Tr.I 192).

The inspector testified that he designated the citation as S&S because the conditions he observed made it reasonably likely for an accident to occur that would permanently disable a miner hit by a falling rock or roof fall. (Tr.I 194). Two miners were affected by the violation. (Tr.I 193-94). The tire tracks that the inspector observed demonstrate that the non-working entry was entered by miners. *Id.* The inspector also considered that the unsupported section had no barricade, flagging, danger tape, or any other type of warning signals to prevent miners from entering the left crosscut. (Tr.I 186).

The inspector determined that the violation was the result of Respondent's high negligence. (Tr.I 194-96; Ex. G-5). Inspector Reeder believed that Respondent knew or should have known about the unsupported roof in the left crosscut. *Id.* He determined that Peabody was aware that the left crosscut needed to be rehabilitated before loading coal in Unit Number 1 because he spoke to mine personnel about the matter on August 3, 2010, just three days before he issued the citation. *Id.* Inspector Reeder also considered that the mine had been cited 219 times in the previous two years for violating this standard. (Ex. G-5).

Inspector Reeder also testified that on August 3, 2010, he indicated which sections of Unit Number 1 needed to be rehabilitated. (Tr.I 200). He testified that the left crosscut, adjacent to Entry Number 1, was not flagged, but other sections that needed additional bolts were flagged. (Tr.I 201).

Mathew Carie and Matt Benjamin were two of the section foremen that rehabilitated the areas of Unit Number 1 that needed additional support. (Tr.I 210, 232). Both foremen testified that no mining was occurring in the left crosscut and there was no reason for any miner to enter that section. (Tr.I 231). During rehabilitation and prior to mining, Carie testified that two rows of roof bolts were installed in the cited left crosscut so miners could use the adjacent entry. (Tr.I 217). Both foremen also testified that the left crosscut was not part of Unit Number 1 and that they believed adding additional support to the entire crosscut was not required. (Tr.I 197, 220, 240).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.202(a) by failing to adequately support and control the roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1. There was loose material hanging from the roof, chunks of material that had already fallen upon the mine floor, and more than a dozen loose roof bolts. Additionally, there were tire tracks under the unsupported area of the mine roof. The loose hanging material presented a permanently disabling roof fall hazard.

The Secretary maintains that the violation was S&S because Respondent violated section 75.202(a), which contributed to the discrete safety hazard of material falling from the roof and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in an injury. The unsupported left crosscut posed a hazard to miners because this section was directly adjacent to a working section of the mine. Additional factors include that there was no barricade, flagging, or danger tape to warn miners to stay out of the unsupported left crosscut.

The Secretary maintains that the violation resulted from Respondent's high degree of negligence because the roof conditions were obvious and extensive and Respondent should have known about them. The Secretary argues that Respondent knew of the need to rehab the entire unit before loading coal because the inspector spoke to mine personnel about the matter on August 3, 2010, three days prior to issuing the citation. Additionally, at the time the citation was issued, the mine had been cited over 200 times in the previous two years for violating section 75.202(a).

Respondent argues that the citation should be vacated because it did not violate the cited standard. Peabody maintains that the cited standard only applies to areas "where persons work or travel." Respondent argues that the cited area was not where miners worked or traveled and was not part of Unit Number 1. Respondent maintains that the tracks cited by the Secretary were present due to the installation of the two rows of bolts at the mouth of the crosscut to allow miners to safely use the #1 entry. Therefore, Respondent maintains that the left crosscut was not a location where miners work or travel.

Peabody contends that the S&S designation is inappropriate. In order to establish an S&S violation for section 75.202(a), Respondent argues there must be evidence that miners were exposed to the relevant area on a somewhat regular basis. Respondent maintains that it no work was being performed in the left crosscut and there was no reason for any miner to travel into that crosscut.

Respondent argues that the high negligence designation is inappropriate. The designation is incorrect because Respondent began rehabilitating the unit one week before the citation was issued and the area was extensively rebolted. During Inspector Reeder's August 3 inspection, he flagged hazard areas in Unit Number 1, but did not flag in the crosscut cited in Citation No. 8415064. Respondent asserts that if the crosscut would have been identified as needing rebolting, it would have been rebolted along with other areas that were identified on the August 3 inspection. Respondent believes that mitigating factors show that the negligence designation should be lowered.

Respondent asserts that the \$56,900 penalty proposed by the Secretary is excessive. Respondent contends that the Secretary provided no evidence to support his specially assessed penalty and that the Secretary's proposed \$56,900 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the Secretary established a violation of section 75.202(a) because the mine roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1 was not adequately supported. I credit the inspector's testimony that he observed loose material hanging from the cited area of the roof and material that had already fallen upon the mine floor. (Tr.I 188-90). Inspector Reeder testified that he observed loose bolts in the cited area of the mine roof and that he saw tire tracks under the unsupported area of the mine roof. (Tr.I 188-90; Ex. G-6). The inspector also stated that the hazardous area was immediately adjacent to an active area and was not barricaded or flagged, making it possible that a miner could travel through it by foot. *Id.* In applying the reasonably prudent person test to the facts, I believe that Inspector Reeder correctly concluded that the mine roof in the cited area was not being adequately supported. Although it is a close question, I find that the Secretary established that the cited crosscut was an area where persons work or travel and was therefore subject to the requirements of section 202(a).

I find that the Secretary did not establish that the Citation was S&S because he did not fulfill his burden to show that an injury was reasonably likely. Although there is evidence of material falling from the roof, exposure to the cited roof was minimal because it was unlikely that anyone would enter the crosscut. (Tr.I 231). Given the roof conditions and the material that had fallen on the mine floor in the cited crosscut, it is unlikely that a miner would attempt to cross through the cited area. Although it was possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur. The tire tracks observed by the inspector could have been made when roof bolts were installed in the adjacent entry. Accordingly, I find that the violation was not S&S. The gravity was serious.

I find that Respondent's negligence was moderate because mine personnel installed two rows of roof bolts at the entrance of the left crosscut. (Tr.I 217). This was to protect miners traveling in the entry adjacent to the active mining right crosscut and anyone at the mouth of the cited left crosscut. *Id.* Respondent's belief that no miners would enter the left crosscut was reasonable, but it should have flagged or barricaded the area. I find that Respondent's negligence was moderate for Citation No. 8415064. A penalty of \$10,000.00 is appropriate for this violation.

D. Order Nos. 9425955 and 8425956

On August 19, 2010, MSHA Inspector Ken Benedict issued Order No. 8425955 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. The order states:

The mine operator is not following the roof control plan approved by the District Manager on Unit #1 (MMU-001). The operator's approved plan states that roof bolt spacing shall be 4.5 feet by 4.5 feet. The roof bolt spacing in the #3 and #4 entries and adjoining crosscuts from the faces to the #7 crosscut in both entries exceeded the approved plan from 3 inches to 20 inches in numerous areas along the haul roads where persons are continuously working and traveling during a normal production shift.

(Ex. G-8). Inspector Benedict determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The safety standard requires that each mine operator develop and follow a roof control plan approved by the district manager that is suitable to the prevailing geological conditions and the mining system to be used at the mine. The Secretary proposed a penalty of \$47,200.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

On August 19, 2010, Inspector Benedict also issued Order No. 8425956 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.360(b)(3) of the Secretary's safety standards. The order states:

An adequate preshift examination of the #3 and #4 entries and adjoining crosscuts from #7 crosscut to the faces on Unit #1 (MMU-001) was not performed. There were numerous areas along the haul roads where persons are continuously working and traveling during a normal production shift that the bolt spacing exceeded the allowable limits . . . by 3 inches to 20 inches.

(Ex. G-9). Inspector Benedict determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The safety standard requires, in part, that the person conducting the pre-shift examination in working sections shall examine for hazardous conditions and that the examination should include tests of the roof and rib conditions on these sections. The Secretary proposed a penalty of \$56,900.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

Inspector Ken Benedict testified that during his August 19, 2010, inspection, he determined that the roof bolt spacing in the #3 and #4 Entries exceeded Respondent's Roof Control Plan in violation of section 75.220(a)(1). (Tr.I 271-73; Ex. G-8). The inspector observed a slip above a continuous mining machine in the #3 Entry where the roof had fallen out and the bolt spacing across the slip was off. *Id.* The slip, which is an imperfection in rock where the roof falls out when mined, was ten to twelve feet long and had fallen out up to nine feet high. (Tr.I 274; Tr.II 34). Respondent's Roof Control Plan requires that bolts be no more than 4.5 feet apart, but the inspector measured two rows that were six feet apart or more. (Tr.I 275-77). The inspector also observed another slip in the No. 4 Entry with the same bolt spacing problems. (Tr.I 278-79). Inspector Benedict began measuring the bolt spacing in this entry, but the "rows and rows of over-spaced bolts" became too much for him to measure. *Id.* Section Foreman Matt Carie assisted the inspector in measuring the bolt spacing. They measured over 100 locations that ranged from a few inches to 20 inches over the required 4.5 feet. (Tr.I 282-83). The inspector believed that additional bolts should have been placed in the mine roof of the two entries as a result of the adverse conditions resulting from the slip. (Tr.I 274-75).

The inspector testified that he designated the order as S&S because the conditions he observed made it reasonably likely that a serious rock fall or roof fall would occur because Respondent failed to properly support the roof. (Tr.II 6-7). The inspector believed that, because the hazards were in intersections, a roof fall was more likely. *Id.* Inspector Benedict also testified that the significant number of slips, over-spaced bolts, and miners working directly under these hazards increased the likelihood of injury. (Tr.II 7-10).

The inspector determined that the violation was the result of the operator's high negligence and unwarrantable failure to comply with a mandatory standard. (Tr.II 10, 21; Ex. G-8). The inspector believed that Peabody should have been aware of the condition because there were hundreds of widely spaced bolts found throughout the two entries. *Id.* Additionally, Inspector Benedict considered the fact that the hazard existed for three days, the mine had been cited 50 times for violations of section 75.220(a)(1) in the previous two years, had a history of unintentional roof falls, and had problems with the No. 29 Roof Bolter a few days earlier. (Tr.II 2-7, 10-11, 19, 77-80). Respondent had additional notice when Inspector Reeder issued a similar citation in the same area just three days prior to the issuance of this order. (Ex. G-11). Inspector Benedict testified that Respondent's efforts to correct the problem and ensure that the bolts were properly spaced were insufficient. (Tr.I 282-83).

On August 19, 2010, Inspector Benedict also issued Order No. 8425956 as a violation of section 75.360(b)(3) for failing to conduct an adequate pre-shift examination of the roof bolt spacing in the #3 and #4 Entries. (Tr.II 22; Ex. G-9). Inspector Benedict testified that he reviewed Respondent's pre-shift examination books for the No. #3 and #4 Entries and there were no wide bolting hazards listed for the cited entries. (Tr.II 24-25). The only time that wide bolt spacing was noted on an examination report was during the on-shift examination after the inspector informed Respondent of a violation. (Tr.II 25). The inspector determined that Respondent performed an inadequate examination when the pre-shift examination records failed to identify the over-spaced bolts for the No. #3 and #4 Entries. (Tr.II 26-27).

The inspector testified that he designated the order as S&S because the conditions he observed made it reasonably likely that a serious rock fall or roof fall would occur. (Tr.II 28). The inspector believed that at least one miner would be affected, and most likely the injury would be fatal. (Tr.II 29; Ex. G-9). Inspector Benedict testified that the significant number of over-spaced bolts in a mine entry used by miners is a safety hazard that must be identified and remedied to keep miners safe. (Tr.II 30).

The inspector determined that the violation was the result of the operator's high negligence and unwarrantable failure to comply with a mandatory standard. (Tr.II 30-31, 21; Ex. G-9). Inspector Benedict determined that Respondent knew or should have known about the roof hazard because pre-shift examiners examined the entries before the regular shift. (Tr.II 164). The inspector testified that factors he considered for Order No. 8425955's high negligence and unwarrantable failure designations also apply to this order. He believed that Respondent's examiners should have been aware of the wide-spaced bolts because it was their responsibility to inspect the roof and note where bolts are incorrectly installed. (Tr.II 183). Inspector Benedict testified that the high negligence and unwarrantable failure designations were justified because there were a significant number of over-spaced bolts that had been present for three days and the condition was obvious. (Tr.II 282-83).

Matt Benjamin, the section supervisor, was responsible for overseeing the pre-shift examination of the #3 and #4 Entries. (Tr.II 163). Benjamin testified that pre-shift examiners cannot be expected to measure every bolt spacing to see if the width complies with the roof control plan. (Tr.II 164-65). Benjamin testified that the presence of hog paneling, rock dust, and a line curtain at the cited entries made it difficult to detect excessive bolt spacing. (Tr.II 166-71). Additionally, Benjamin testified that the crosscut between the cited entries was a "slab cut," which occurs when a continuous miner turns from the entry to create a crosscut angle, which can obscure the view of excessive bolt spacing. *Id.*

Joe Biley, the maintenance supervisor, testified that he was assigned the job of correcting the faulty roof bolter three days prior to the issuance of the order. (Tr.II 94-95). Biley testified that he and Evans performed maintenance work upon the roof bolter and had Mike Fox, a production foreman, drill multiple test holes to determine if the machine was operating correctly. (Tr.II 96-97, 71-73). Fox measured several bolts from center to center and testified that "everything measured up good," determining that the machine was functioning properly. (Tr.II 73). Neither of the supervisors testified that they measured any bolt spacing in the #3 and #4 Entries. According to their testimony, it was their belief that the roof bolter was fixed and that if the problem reoccurred, the machine would be taken out of service. (Tr.II 118-19).

Matt Carie, the section foreman who assisted the inspector at the time the order was issued, testified that the slip in the two entries had fallen out at the time of mining, which was prior to roof bolting. (Tr.II 112). Prior to the August 19 inspection, Peabody discovered widely spaced bolts outby Crosscut No. 11. Carie testified that he and other miners flagged off the hazardous areas and added additional bolts to support the roof. (Tr.II 114-15). Carie testified that, prior to adding additional bolts after the order was issued, the inspector instructed him to bring ram cars through the hazard zone in order to run coal so that the inspector could collect a dust sample, which demonstrates that the hazard was not significant. (Tr.II 116-17).

After Respondent added additional bolts in response to Inspector Benedict's order, Superintendent Terry Courtney drilled test holes with the No. 29 Roof Bolter. (Tr.II 143). He testified that the booms on the machine collapsed when the holes were drilled, which demonstrated that the booms were once again spreading too wide and were causing the bolts to be spaced too far apart. (Tr.II 143-44, 153-54). The reoccurring problem with No. 29 Roof Bolter was initially corrected during the machine's maintenance on August 16. It was not until after the issuance of the order that Respondent had knowledge that the problem with the machine had reoccurred. (Tr.II 118-19).

2 Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.220(a)(1) because the roof bolt spacing in the #3 and #4 Entries exceeded the permitted distance in Respondent's Roof Control Plan. The inspector observed wide bolt spacing in the two entries that was five to six feet or more in length, which is longer than the permitted 4.5 feet. Additionally, the Secretary argues that, because there was a slip in the two entries, adequate bolt spacing was crucial for sufficient roof support. The Secretary maintains that failing to adequately support the mine roof in the #3 and #4 Entries jeopardized the safety of the miners who worked in those entries.

The Secretary asserts that the violation was S&S because Respondent violated section 75.220(a), contributing to the discrete safety hazard of material falling from the roof, which created a reasonable likelihood of an injury. The inspector testified that the roof fall hazard was magnified because the bad bolt spacing was located in wide intersections where there were slips. The Secretary argues that the S&S designation is warranted because the vast number of over-spaced bolts in the cited entries was located where miners work.

The Secretary maintains that the violation was the result of Respondent's high negligence and an unwarrantable failure to comply with a mandatory safety standard. The roof hazards were obvious and extensive and Respondent should have known about them. The Secretary argues that Respondent knew of the need to add additional bolts because more than 100 wide-spaced bolts were easily observed by looking at the roof. The Secretary also argues that Peabody knew that there had been problems with the No. 29 Roof Bolter, a similar citation was issued for that area of the mine, the mine was cited 50 times in two years for roof control plan violations, and there were numerous unintentional roof falls.

The Secretary also argues that Respondent violated section 75.360(b)(3) because it failed to conduct an adequate pre-shift examination of the roof in the #3 and #4 Entries. The inspector testified that he reviewed Respondent's pre-shift examinations for the #3 and #4 Entries, but there were no wide bolting hazards listed.

The Secretary contends that the violation was S&S because Peabody violated section 75.220(a) and the magnitude of the cited roof conditions created a reasonable likelihood that the hazard of roof falls would have resulted in an injury. The Secretary asserts that conducting adequate pre-shift and on-shift examinations is crucial to ensure a safe environment for underground coal mines.

The Secretary maintains that the violation was the result of Respondent's high degree of negligence and unwarrantable failure to comply with a mandatory safety standard because Respondent knew or should have known of the hazardous conditions. A pre-shift examiner examined the area prior to the issuance of the order and failed to note the obvious hazard. Additionally, the Secretary argues that the designations were appropriate because the hazards were obvious, mine examiners were trained to spot and correct these types of hazards, and mine examiners were on notice of previous roof bolt spacing violations in the same area of the mine.

Respondent does not dispute that a violation of the cited standard occurred with respect to Order No. 8425955. Respondent contends that Order No. 8425956 should be vacated because no hazard occurred within the meaning of the cited standard.

Respondent argues that the S&S designation for Order Nos. 8425955 and 8425956 is inappropriate. Respondent maintains that the excessive spacing was minimal. According to the inspector's testimony, there was only one location where the spacing between bolts was 20 inches greater than 4.5 feet. Peabody refers to Inspector Reeder's non-S&S determination for Citation No. 8415068, where he concluded that the presence of a series of minimally excessive widths between bolts did not present a condition that is reasonably likely to result in a roof fall. Peabody also relies upon Procedure Instruction Letter No. 110-V-4 (the "PIL"), which states that "bolt spacing in a plan represents nominal dimensions and that reasonable tolerances for instillation are permitted." (Ex. R-37). Respondent maintains that the evidence presented demonstrates that the cited bolt spacing had no detrimental effect upon the integrity of the roof and the chance of an injury-causing event was unlikely.

Respondent contends that the high negligence and unwarrantable failure designations for Order Nos. 8425955 and 8425956 are inappropriate. The wide bolt spacing was minimal and the Secretary did not establish that the condition had existed for a significant amount of time. Respondent maintains that on August 16, the No. 29 Roof Bolter was corrected and the next day it was determined that the machine was functioning properly. If Respondent knew that the wide bolt spacing problem had not been corrected, the No. 29 Roof Bolter would have been taken out of service and replaced. Respondent did not have any knowledge of the wide bolt spacing in the #3 and #4 Entries. Examiners are not expected to measure the spacing between roof bolts while conducting their examinations and excessive bolt spacing would not be readily observable to passing miners. The presence of hog paneling, rock dust, and a line curtain at the cited entries made it difficult to detect excessive bolt spacing. Respondent contends that the cited conditions did not pose the high degree of danger required to maintain a finding of unwarrantable failure or high negligence.

Respondent argues that the \$47,200 penalty proposed by the Secretary for Order No. 8425955 and the \$56,900 penalty for Order No. 8425956 are excessive. The Secretary has provided no evidence to support his specially assessed penalties. In the absence of any evidence or rationale for proposing specially assessed penalties, the Secretary's proposed \$47,200 and \$56,900 penalties against Respondent should be rejected and reduced.

3 Discussion and Analysis

I find that Order No. 8425955 was a violation of section 75.220(a)(1) because the roof bolt spacing in the #3 and #4 Entries violated Respondent's Roof Control Plan. Credibility determinations for this order were critical to determine whether Respondent violated the cited standard.

Inspector Benedict has worked for MSHA for more than five years as a coal mine inspector and health specialist. (Tr.I 266). Prior to MSHA, the inspector had worked for Old Ben Coal since 1972, where he performed jobs such as a mine examiner, electrician, maintenance person, general laborer, longwall shearer operator, and refuge truck driver on the surface. (Tr.I 268). Inspector Benedict holds an Illinois examiner's certificate, dust certification, electrical card, and an associate's degree. *Id.*

The Commission has held that the requirement to develop a roof control plan is a fundamental directive of the Mine Act. *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005). The intent behind the requirement to develop roof control plans was "to afford comprehensive protection against roof collapse the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d at 669 (quoting Roof Support Standards, 53 Fed. Reg. at 2,354). I credit the inspector's testimony that he observed and measured bolt spacing in the cited areas that were six feet apart or more. (Tr.I 275-77). Respondent's Roof Control Plan requires that the bolt spacing be no more than 4.5 feet. (Tr.I 275-77, Ex. G-14 at 5). I find that Respondent violated section 75.220(a)(1) because the bolts that the inspector measured were over the permissible 4.5 feet.

I find that the Secretary also established that the order was S&S. The over-spaced bolts posed a serious rock fall or roof fall hazard because Respondent failed to properly support the roof. The excessive bolt spacing was located in wide intersections and there were slips present in the cited areas. Throughout the #3 and #4 Entries, the wide bolt spacing was more than a slight deviation from the Roof Control Plan. Some of the bolt spacing was only off by one or two inches, but in other areas the deviation was significant. According to the inspector's testimony, there were well over 100 locations throughout the two entries where "row after row" had over-spaced bolts. (Tr.I 278-79). It was reasonably likely that the cited hazard would cause a serious injury assuming continued mining operations.

Respondent argued that the Secretary's PIL should be applied to this situation because there were only occasional instances of excessive roof bolt spacing which did not detrimentally affect support performance. After reviewing the inspector's testimony, it is apparent that the over-spaced bolts detrimentally affected support of the roof. I also credit Inspector Benedict's testimony that he instructed mine personnel to move ram cars in order to take a dust sample, but he did not instruct them to go under the unsupported roof.

I find that Respondent's negligence was high for Order No. 8425955 and that the violation was the result of its unwarrantable failure to comply with the safety standard. The widely spaced bolts were obvious and extensive. Respondent had actual knowledge that the No. 29 Roof Bolter was installing bolts with spacing that was greater than allowed by the roof control plan. Although mine personnel performed repairs in an attempt to fix the problem, Respondent did not measure any bolts in the #3 and #4 entries to determine whether the bolter was working correctly. It installed widely spaced bolts in both entries without measuring to see if the bolter had been completely repaired and was properly spacing the bolts. Although Peabody did drill a few test holes after the attempted repair, it did not take sufficient steps to ensure that the No. 29 Roof Bolter functioned properly after these repairs were made.

The violation was extensive because there were hundreds of widely spaced bolts throughout the two entries from crosscut 7 to the face at crosscut 11. The violation existed for multiple days. Peabody was placed on notice that greater efforts were necessary to comply with the standard because was issued a citation for violating the same standard three days earlier, it had been cited 50 times over the previous two years for violations of its Roof Control Plan, and the mine had a history of 46 roof falls during the previous two years. Even though Peabody had knowledge of problems with the No. 29 Roof Bolter, its attempt to fix it was inadequate and insufficient. The violation was obvious because there were hundreds of widely spaced bolts throughout the two entries and the hazard posed a high degree of danger to miners working in an active area of the mine. Inspector Benedict noticed the problem as soon as he arrived in the area. After reviewing the totality of the evidence presented, Respondent exhibited a serious lack of reasonable care when it failed to adequately support the mine roof in the two entries. The high negligence and unwarrantable failure designations for order No. 8425955 are affirmed.

I find that Order No. 8425956 was a violation of section 75.360(b)(3) because Respondent failed to conduct an adequate pre-shift examination of the roof bolt spacing in the #3 and #4 Entries. I credit the inspector's testimony that he reviewed Respondent's pre-shift examination books for the #3 and #4 Entries and there were no records of the problem with bolt spacing. (Tr.II 24-25). The weekly examiners also failed to record that the No. 29 Roof Bolter was incorrectly spacing bolts. I credit Inspector Benedict's testimony that the condition was both obvious and extensive.

I find that the Secretary established that the violation was S&S. Examiners were not conducting adequate pre-shift examinations of the roof, which created a roof fall hazard. The extensive conditions cited in Order No. 8425955 and the mine's history of roof falls created a reasonable likelihood that the hazard cited by the inspector would contribute to a serious injury, assuming continued mining operations. Failure to perform adequate pre-shift examinations would allow the roof conditions to continue to deteriorate.

I find that Respondent's negligence was high for Order No. 8425956 and that the violation was the result of its unwarrantable failure to comply with the safety standard. Inspector Benedict testified that it was easy to see that the roof bolting pattern was not correct by looking at the roof. (Tr.I 272-78). Respondent's examiners knew or should have known of the hazardous conditions because if the inspector could see the violation from the mine floor, the examiners should have too. Hog paneling, if present, should not have prevented an adequate pre-shift exam. Examiners should be adequately trained to examine mine environments for safety hazards and non-compliance with the Roof Control Plan.

Pre-shift examiners are agents of the operator, so their negligence is attributable to the mine operator. *See, Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-196 (Feb. 1991). A high degree of danger is posed by conducting inadequate pre-shift examinations; such examinations are crucial to maintaining a safe environment in underground coal mines. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The unwarrantable failure factors for this order are very similar to the previous order discussed. Although pre-shift examiners were able to identify and flag off other hazards in the two cited entries, they failed to identify the wide bolt spacing. Peabody's violation of the standard was extensive because there were hundreds of widely spaced bolts which had been present for multiple days. The mine examiners should have been placed on notice that greater efforts were necessary because Respondent had been issued a citation for violating the same standard three days earlier, it was cited 50 times over the previous two years for violations of its Roof Control Plan, and the mine had a recorded history of 46 roof falls during the previous two years. The violation should have been obvious to the examiners. The unwarrantable failure designation for order No. 8425956 is affirmed.

I assess a civil penalty of \$35,000.00 for each order. I have reduced the penalty from that proposed by the Secretary principally because Peabody made an attempt to repair the roof bolting machine. If not specially assessed, the proposed penalty would have been less than \$20,000.00 for each order. Although Peabody demonstrated aggravated conduct constituting more than ordinary negligence, its conduct demonstrated a "serious lack of reasonable care" rather than "reckless disregard," "intentional misconduct," or "indifference."

III. SETTLED CITATIONS AND ORDERS

On May 23, 2012, I granted the Secretary's motion to approve partial settlement in this case. I approved the settlement of two section 104(a) citations and eight 104(d)(2) orders. I ordered Peabody to pay a total penalty of \$34,828.00 for the settled matters.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty.² Peabody's history of previous violations is set forth in Exhibit G-13. During the period between 8/19/2008 and 8/18/2010, Peabody had a history of 1,562 paid violations at the mine of which 340 were S&S violations. At all pertinent times, Respondent was a large operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business. The gravity and negligence findings are set forth 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>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
8415059	75.202(a)	\$10,000.00
8415060	75.202(a)	20,000.00
8415064	75.202(a)	10,000.00
8425955	75.220(a)(1)	35,000.00
8425956	75.360(b)(3)	35,000.00
TOTAL PENALTY		\$110,000.00

² Commission judges assess penalties *de novo*. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). "In determining the amount of the penalty, neither the judge nor the Commission is bound by a penalty recommended by the Secretary." *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). "However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission in *Sellersburg* explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone* at 293. Congress intended civil penalties to provide a "strong incentive for compliance with mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). The penalties I have assessed in this decision provide a strong incentive for compliance taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(c), and my findings and conclusions.

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Peabody Midwest Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$110,000.00 within 40 days of the date of this decision.³

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

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RWM

³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2013

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2009-383-R
	:	Citation No. 8007661; 03/06/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 36-05466
ADMINISTRATION, (MSHA),	:	Mine: Emerald Mine No. 1
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-496
Petitioner	:	A.C. No. 36-05466-183943-02
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	Mine: Emerald Mine No. 1
Respondent	:	

DECISION AND ORDER

Appearances: Patrick W. Dennison, Esq., & Jason P. Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Pamela Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This proceeding is before me on a petition for civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against Emerald Coal Resources, LP (hereinafter "Respondent" or "Emerald") at the Emerald Mine No. 1 pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (hereinafter "the Mine Act" or "the Act"), the Secretary seeks penalties in the amount of \$12, 265 for two alleged violations of the Secretary's mandatory safety standards for underground mines. The Secretary originally charged Respondent with 10 alleged violations. Four were settled prior to the hearing, three were settled during the hearing, and one was

dismissed as the Respondent agreed to accept the violations as written leaving the remaining two alleged violations for decision in Docket No. PENN 2009-496. The three citations that were settled during the hearing were Nos. 8006756, 8006758, and 8006759.¹ The terms of the settlement were set forth in a written motion, which terms were approved by the court. The parties presented testimony and documentary evidence at the hearing conducted on November sixth, seventh, and 8th, 2012 in Pittsburgh, PA.

For the reasons set forth below I affirm Citation Nos. 8006753 and 8007661 and find a non-S&S violation of the latter. I also assess civil penalties of \$3,493.00 and \$5,000.00 respectively.

STIPULATIONS

The Secretary and Respondent agreed that the following stipulations should be included in the record:

1. Emerald is an “operator” as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the coal mine at which the Citations at issue in this proceeding were issued.
2. Operations of Emerald at the coal mine at which the Citations were issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designed Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
4. The individuals whose signatures appear in Block 22 of the Citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Citations were issued.
5. True copies of the Citations at issue in this proceeding were served on Emerald as required by the Mine Act.
6. Emerald demonstrated good faith in the abatement of the Citations.
7. The penalties that have been proposed will not affect Emerald’s ability to continue in business.

¹ A Decision Approving Partial Settlement for these eight settled citations was issued separately.

THE REMAINING CITED VIOLATIONS

1. Citation No. 8007661

This 104(a) citation was issued on March 6, 2009 at 5:53 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. §77.200. This safety standard states:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

In his narrative, the inspector found:

Three structural support columns located on the sixth floor of the prep plant were not being maintained in good repair. The second column in the second row from the MCC room showed approximately 30 percent width loss on the creek side flange were (sic) a seventh floor beam connects to it. The fourth column in the same row was found to have 7 areas of width reduction ranging from approximately 30 to 50 percent. The fifth column in the same row was found to have approximately 30 to 50 percent reduction on all four sides and two holes ranging from ½ inch to 1 inch. 2 previous violations of this standard in the past 2 year.

(Government Exhibit 1).²

The inspector noted that the risk of injury or illness for this violation was "reasonably likely," "fatal," "S&S," and would have affected 10 persons. He further noted that Respondent exhibited "moderate negligence." The proposed penalty for this citation was \$8,209.00. The citation was extended on four occasions and was terminated on April 21, 2009 when the repairs were completed on the three cited columns.³ The inspector also issued a 107(a) imminent danger order which was vacated or terminated following an inspection by an MSHA civil engineer.

ISSUES

Did Respondent violate 30 C.F.R. §77.200 and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

² Hereinafter Government Exhibits will be cited as "GX" followed by the number and Respondent's Exhibits will be cited as "RX" followed by the number.

³ The inspector also noted that, "[t]his citation is a contributing factor to the issuance of the 107(a) Order No. 8007662." This imminent danger Order is no longer in contest, but will be discussed as necessary in this decision.

THE SECRETARY'S EVIDENCE

1. Testimony of Tom McCort

Mr. McCort is an inspector trainee for MSHA having just returned to MSHA after approximately four years as a surface and mine inspector. His second stint with MSHA began approximately one month before this hearing. His private sector experience includes approximately three and a half years doing shaft and slope construction maintenance and underground maintenance and repair. Additionally, Mr. McCort worked for Local 549 of the Ironworkers out of Wheeling for approximately three to three and a half years doing construction and maintenance of steel structure, maintenance on building reinforcing bars and generally anything related to steel and iron. (Tr. 33-37).

Inspector McCort issued this citation because he found some structural columns on the sixth floor that had some severe thinning and holes in them and a general thinning of some of the structural members that he examined. (Tr. 40). The building examined was a prep plant which is a building that is used to clean coal. This prep plant was constructed of steel members, concrete floors, concrete floor beams, and sheeting for siding. He believed the plant had 13 levels. (Tr. 40). The primary focus of the examination was the sixth floor of the prep plant and McCort was accompanied by Floyd Campbell, a union representative, and Tim Drone who the inspector believes was the maintenance manager of the plant at the time. (Tr. 41). Mr. McCort went to the plant on March 6, 2009 in response to a 103(g) hazard complaint.⁴ (Tr. 42).

The examination of columns on the sixth floor eventually focused on three columns and those columns were iron and steel. They were located in the second row and were identified by McCort as the second, fourth, and fifth columns from the plant control room on the creek side of the plant. (GX 3). (Tr. 43-46). In examining the columns, McCort used a hammer to clean off the columns and also to sound the columns.⁵ In one particular instance the column was so thin that the hammer went through it. (Tr. 46). The examination of the three columns continued with the taking of measurements. With the exception of column five, anyplace that McCort saw noticeable thinning of the columns, he measured the thickest part of the column and the thinnest part of the column to determine how much structure was lost on the column. (Tr. 47).

⁴ A 103(g) hazard complaint enables miners to make complaints on safety or health hazards when there are reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists. This section of the Act creates a right to an immediate inspection by the Secretary. 30 U.S.C. §813(g)(1). In this case there were five complaints about conditions on the sixth floor. All five were investigated and four resulted in negative findings. One complaint resulted in a positive finding which noted that seven contractor employees were conducting repairs. (Tr. 109-111). The positive finding concerned three structural support columns located on the sixth floor of the prep plant which were determined to be not maintained in good repair. (Respondent Exhibit 11).

⁵ Sounding the columns is a way to tell if a column is solid or if it is thinning.

On column 2 of row 2, McCort saw section loss on the flange at the top of the column as well as a lot of severe rust. Measurements were taken showing that the flange measured 3/8 of an inch at the bottom and 1/4 of an inch at the connection point. (Tr. 50-51). The quarter inch measurement was taken because it was visibly thinner and appeared to be the thinnest portion in that area. The 3/8 measurement was taken because it appeared to be the thickest part of the column. The amount of loss to the flange at the top of this column was approximately 30%. (Tr. 52).

In the fourth column, McCort observed multiple spots that indicated flange thinning and web thinning. He also sounded this column with a hammer and could hear this difference indicating thinning. Again, McCort took measurements of the thickest and thinnest parts of this column. The thickest part measured 5/8 of an inch and the thinnest part 1/8 of an inch thick, which meant that the measured flange loss was half an inch. McCort also testified from his notes that column five showed significant structural loss in five places and severe structural loss on the hillside above the hub column. (Tr. 53-57).

On the fifth column of row two, McCort observed conditions similar to column four, but there were holes in the base of this column and exceedingly severe web and flange thinning. He observed a 1 1/2 inch hole and a 1/2 inch hole in the web. The measurement of 1/4 inch to 3/8 of an inch would be compared with the 5/8 of an inch thickness which McCort found upon his observation and recollection from earlier measurement. (Tr. 58-60).

If a flange is thinner than it originally was then it is coming out of design specs and indicates weakness in that column. (Tr. 61). Because water all over the sixth floor would have caused the deterioration of the steel columns following his examination of March 6, 2009, McCort issued an imminent danger order.⁶

On the day of his inspection the third column of the row was under construction and being repaired. McCort noted that at the top of that repair that a hole in the webbing could be seen. That hole was 12-14 long and 2-3 inches wide. (Tr. 64).

Later that afternoon following completion of the examination of the sixth floor, McCort requested that an MSHA engineer evaluate the structure. Bob Newhouse, McCort's supervisor, requested the engineer, Jarrod Durig. Durig, appeared and sounded columns, took measurements, and did other things with which McCort was not familiar. Durig concluded that he did not believe there was an imminent danger but that the columns did need repair. (Tr. 69-70).

The hazards created by the condition of the prep plant, according to McCort, were that should the columns fail there would be falling material, falling miners, and multiple injuries, including fatalities. Also, in the event of column failure, the seventh floor could collapse on the sixth floor involving potential injuries to miners on the seventh floor. (Tr. 71). In explaining

⁶ The order was based on his opinion and a few miners who said they had noticed excessive plant shaking and vibration not noticed before. (Tr. 62-65).

why column failure and partial plant collapse was reasonably likely, McCort opined that the specific columns cited were all in the same column line, on the same plane. (Tr. 74-75).

At the request of McCort, an MSHA engineer, Michael Marawski visited the plant in August, 2008, examined the plant and prepared a written report which was admitted as GX 26. Significant section loss was observed in the flanges on the upper column at the common splice connection in the column adjacent to cyclone A-5⁷ – Repairs to the column splice at Cyclone A-5 along with any other column splices on the sixth floor that were in a similar condition were recommended. (GX 26). McCort never saw the plans to repair the columns in the sixth floor, but the plans were explained to him by Tim Drone, maintenance manager of Emerald and McCort saw repair work being implemented. (Tr. 105-106).

2. Testimony of Jarrod Durig

Mr. Durig is a supervisory civil engineer with the Pittsburgh Safety and Health Technology center, or MSHA technical support group, and is the chief of the geotechnical branch overseeing the work of seven other engineers. Included in the types of duties he performs are structural assessments of preparation plants. Mr. Durig has worked for MSHA from 1995-2000 and from 2003 to the present. He has a bachelor's degree in civil engineering from West Virginia University and a master's degree in civil engineering from the University of Pittsburgh. He is licensed as a professional engineer in the Commonwealth of Pennsylvania. (Tr. 124-126).

Mr. Durig was called to the Emerald prep plant on March 6, 2009 to provide an assessment of conditions there and to make a recommendation regarding an imminent danger order. He was asked to look at three columns on the sixth floor and looked at a fourth column after inspecting the first three. They were designated columns 2B, 2C, and 2D. Durig later looked at 3D.⁸ (see GX 5).

⁷ This column is also referred to as the third column in the second row. (Tr. 85).

⁸ The column Durig designated as 2B is McCort's No. 3, 2C is McCort's No. 4, and 2D is McCort's No. 5. (See Tr. 20 opening statement by counsel for the Secretary). However, this statement of explanation does not conform to the citation. The sixth floor of the prep plant was examined by a myriad of individuals who employed their own methods of identifying the columns which were the subjects of this citation. The inspector trainee for MSHA, Tom McCort, identified the columns as being in the second row from the raw coal side, and he numbered the columns as the second, third, fourth, and fifth columns from the creek side. (Tr. 45). The MSHA civil engineer, Jarrod During, identified the columns as 2B, 2C, and 2D. The columns cited in the citation are actually columns 2, 4, and 5 in McCort's version. Yet another numbering system is employed by Emerald and identified as row H that which is McCort's row 2, and listed the columns as 12H, 13H, and 14H. McCort's column 2 is Durig's 2B and Emerald's 12H; McCort's column 4 is Durig's 2C and Emerald's 13H; and McCort's column 5 is Durig's 2D and Emerald's 14H as represented by counsel for the Secretary. (Tr. 269-270). There is a slight variation provided by counsel for Respondent. (see *Amended Post-Hearing Brief* at p. 3).

In his examination of the columns, Durig performed a visual examination, used a chipping hammer for cleaning and sounding purposes, and used a tape measure to try to size the columns and also to measure the thickness of the flanges of the columns. After completing the evaluation he felt that the prep plant was not in imminent danger of collapse. (Tr. 135-136). Durig also felt that the prep plant was not in good repair based on the columns that he evaluated. (Tr. 136). Column 2D was in the process of repair. However, the area above the repair was in very poor shape due to substantial holes in the web along with thinning of the flanges in the same area. Durig would characterize column 2D as failed even with the repair work that was done. (Tr. 139-150).

Insofar as column 2B is concerned, Durig did not see any visible deformation but did recognize thinning of the flanges. He took measurements of that thinning to the bottom of the column. The flange thickness at 6 inches above the floor was between 3/8 of an inch and half an inch thick. Measurements were also taken of the column itself so that by consulting a steel design manual he could determine that the size of the column at the time it was constructed or at the time it was put in place. (Tr. 153). By consulting the manual (GX 13) Durig determined that Column 2B had over a 50% loss in thickness for the flange. (Tr. 161). Durig took four measurements and all fell within this range, except where those locations that measured 3/8 of inch would have indicated over 60% flange loss at that location.

Column 2C was also examined that day and found to be not in good repair due to the thinning of the flange and the condition of the bottom of the column. Again, by consulting manual and his measurements, Durig determined that the percentage loss in thickness of the flanges along the bottom of column 2C would be approaching 40%. (Tr. 164-166)

RESPONDENT'S EVIDENCE

1. Testimony of Ralph Layfield

Mr. Layfield is an operational manager with Alpha Natural Resources and has been at Emerald for 14 years. Prior to Emerald, Layfield was employed for 22 years by Industrial Resources of Fairmont, West Virginia as a field manager and construction manager. His duties as a construction manager included the building of preparation cleaning plants, coal cleaning plants, rebuilding plants, and operations related with coal facilities. As such, he has approximately 35 years experience with preparation plants. (Tr. 222-223).

Mr. Layfield was part of the inspection party that eventually resulted in the issuance of citation No. 8007661. He does not remember seeing any holes in the structure or the beams that McCort was inspecting. He did not see any problems or issues with the structure. (Tr. 225-226).

2. Testimony of Douglas Montgomery

Mr. Montgomery is employed at Emerald as a processing engineer and has been employed there since April 2003. Before that he worked at Cumberland Coal, Peabody Coal Company, American Electric Power, Southern Ohio Coal Company, U.S. Steel, and American Bridge. Over the years his various capacities have included being a foreman, engineer, plant

master's degree in metal process engineering from West Virginia University, a bachelor's degree in mining engineering from the University of Pittsburgh, and an associate's degree in mechanical engineering from Penn State. (Tr. 230-232).

By the time of the inspections which resulted in this citation, Emerald was in the process of repairing columns on the sixth floor.⁹ Lincoln Contracting, whose field man was Mike Yoder, was working with Emerald. (Tr. 235-236). Several exhibits were offered and accepted to show that repairs were underway: RX-6 – materials used; RX-7 – Time sheets; RX-8 – invoice from Lincoln Contracting for work performed; RX-4 – Floor plan; RX-5 – time and materials invoice; summary of time sheets, and a change order; RX-9 – 2009 log book for completed repairs.

3. Testimony of John Leach

John Leach is a project manager, estimator, and engineer for Lone Pine Construction, a construction company that does mine work. He holds a professional engineering license from the Commonwealth of Pennsylvania. On numerous occasions, Emerald Mine has called Lone Pine to do several projects, including prep plant renovations. Lone Pine investigates, prepares an estimate, submits a bid, and is sometimes awarded the job and sometimes not. (Tr. 270-273). Mr. Leach believed that this prep plant was one of the better cleaning facilities that he has seen. (Tr. 273).

On the day the citation was issued, Lone Pine was performing work at Emerald Mine and Mr. Leach was asked to evaluate three columns on the sixth floor of the pre plant, and to prepare a report. He did not believe that the structure was in any imminent danger of collapse. (Tr. 274-279). Column 14H (2D) was under construction at the time Leach performed his examination. The repairs involved adding bent channel plates to form the inside of the flange as well as the web on both sides of the column and flange plates were added on the outside of the flange of the column. Mr. Leach believed that this was an exceptional way to repair that column and the load capacity of that column probably doubled or tripled by the way construction was performed. (Tr. 281-283).

On March 6, 2009, Leach observed a quarter-sized hole in the center of the web on column 12H (2b) and that hole could have been put there for a purpose. While it was possible that the hole was there because it was a loss of thickness of the web, it was not likely. (Tr. 297-298).

4. Testimony of William Schifko

Mr. Schifko works for Emerald Mine, Alpha Resources and began in May or June of 1978. He is currently the manager of compliance. This position involves educating employees about new laws and new regulations for compliance purposes and also education about safety and accident prevention. (Tr. 305).

⁹ Through this witness we learned that a third means of identifying rows and columns was employed. Row H is McCort's row 2.

Mr. Schifko does not believe there was a violation of 30 C.F.R. §77.200 because hitting the columns with a small sledge hammer did not produce any problems and there was no danger of an imminent collapse. Money is budgeted for maintenance and examination by the professionals. (Tr. 319-320). Mr. Schifko fundamentally disagreed with the degrees of gravity and negligence and thought there were considerable mitigating factors which should have affected MSHA's degree of negligence. (Tr. 324).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

- a. Due to the deteriorated columns on the sixth Floor, Emerald failed to maintain the prep plant in good repair and thus violated 30 C.F.R. §77.200
- b. In reaching this conclusion the inspector visually inspected the columns, did sounding tests with a hammer, and performed measurements with a tape measure to determine the extent of column, flange, and web thinning.
- c. Additional confirmation of thinning was provided by an MSHA engineer who contrasted the present condition of the columns with their original construction or installation.
- d. While there were repairs on the inspector's third column, such repairs had not been completed and the column was not in good repair.
- e. The percentage of thinning indicates a column's loss of ability to support its intended weight.
- f. The S&S designation was appropriate because the evidence established that the four core components of S&S had been met, particularly the reasonable likelihood of column collapse resulting in injuries of a reasonably serious nature, and Emerald did not adequately rebut the S&S allegation.
- g. The degree of negligence of Emerald was high with no mitigating circumstances.

2. Respondent's Contentions

- a. There was no violation of 30 C.F.R. §77.200 because there was no evidence of disrepair or that the condition presented a hazard. The conditions of the sixth floor of the plant were a result of normal wear of steel structures and posed no hazard.
- b. Emerald was in the process of retrofitting columns on the sixth floor with one manager, construction estimator, design draftsman, and detail draftsman.

Mr. Montgomery has a column having been retrofitted with other columns having been identified as needing attention, and professional contractors and engineers had been hired to design and complete the work.

- c. The inspector's measurements of the three columns identified in the citation were unreliable.
- d. This case focuses on the conditions on the sixth floor. However, substantial amount of weight had been removed on the seventh floor directly above the area in question and the removed weight was approximately 1,180 tons, less than what had originally existed. Also, smaller columns were used from above the sixth floor because of reduced load. Thus the Secretary fails on the hazard arguments presented.
- e. The S&S designation is inappropriate as the evidence does not establish a hazard, or even meet the test of a reasonable likelihood of an event in which an injury could occur, and reasonable likelihood of injury should be made assuming continued mining operations.
- f. There is no evidence that Emerald was in any way negligent or aware that the condition of the columns on the sixth floor posed a hazard and substantial mitigating circumstances existed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

30 C.F.R. §77.200 requires all mine facilities to be maintained in good repair to prevent accidents and injuries to employees. The evidence in its totality requires a conclusion that the columns on the sixth floor were not being maintained in good repair. Measurements, soundings, and consultation with manuals all confirmed the visual observations of both Tom McCort, the inspector, and Jarrod Durig, a professional engineer, that significant thinning had taken place and in such percentages to indicate that the prep plant was not in good repair.

Documentary evidence also leads to that conclusion. For example, Respondent's Exhibit 11, a 103(g) hazard complaint, states that there were positive findings for the cited areas in that three structural support items were not being maintained in good repair. Also, GX 15, a report prepared by Durig, who was called to evaluate the efficacy of an imminent danger order, noted that the columns in question displayed extensive corrosion, delaminations, and section loss and recommended that they be retrofitted or replaced. The Secretary has established by a preponderance of the evidence that Respondent violated safety standard 30 C.F.R. §77.200.

2. Gravity and S&S Discussion

With respect to gravity, as noted above, the inspector felt that the risk of injury or illness for this violation was "reasonably likely," "fatal," and would have affected 10 persons. However,

I credit the evidence presented by Respondent that showed that the possibility of injury from this condition was unlikely. Three engineers stated that there was no threat of immediate collapse and, further, that weight had been removed from the seventh floor, limiting the possibility of collapse.¹⁰

More importantly, the burden of proving the likelihood of injury was on the Secretary. I do not believe that the incomplete and contradictory evidence regarding the likelihood of collapse provided by the Secretary was sufficient to show that the risk of injury was anything more than “Unlikely.” For example, Durig testified that he believed that collapse would occur if 2B, 2C, and 3D were allowed to deteriorate to the condition seen at the top of 2D. (Tr. 214). However, he did not testify that those three columns definitely, or even probably, would deteriorate in the same way as 2D. McCort testified that the cited conditions were reasonably likely to result in structural failure due to the fact that the specific columns cited were all in the same column line and the thinning and damage were all in the same plane of the column. (Tr. 74). However, he also believed the columns were in imminent danger of collapse, a conclusion that was not only refuted by Respondent’s witnesses but also by Durig, the MSHA civil engineer. (Tr. 117, 135-136). Therefore, I believe that the gravity was more accurately described as possible but “Unlikely.”

However, given the serious danger posed by the collapse of a building, I find that if the unlikely event were to occur, the injuries could be fatal.

In order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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).

With respect to the first factor, it has already been established that there was a violation of a mandatory safety standard. As noted above, Respondent failed to maintain the prep plant in good repair when it allowed three structural support columns to deteriorate.

While the evidence presented by the two witnesses for the Secretary (inspector trainee McCort and civil engineer Durig) established the violation of the safety standard, the S&S requirement that the violation contributed to a hazard has been judged by me and found wanting. Therefore, the Secretary has failed to establish the second factor of *Mathies*.

The evidence presented by the Secretary does not show a realistic hazard existed at the time of the citation. Further, the evidence shows that no hazard would be contributed to in this case because, even before this citation was issued, Respondent had begun repairs on the columns. Respondent’s ability to present evidence in defense of the charge of S&S is not a new and novel development in Commission jurisprudence. For example, in *Secretary v.*

¹⁰ Respondent also argued that it was in the process of retrofitting the conditions to prevent further deterioration.

Consolidation Coal Co., 5 FMSHRC 890, 899 (June 1986), the Commission held that, given the legislative history of the mine Act a presumption of S&S existed when excessive respirable dust exceeded the minimums established by 30 C.F.R. §70.100(a). However, the Commission further held that the presumption of S&S may be rebutted by the operator's showing that miners were not exposed to the hazard of excessive dust through the use of personal protective equipment. In essence, the Commission held that even if there is a presumption of S&S, the details of the specific situation, including preventative measures taken, must be considered. In *Consolidation Coal*, the Commission found S&S was because the operator could not rebut the presumption. Here, however, exposure to a hazard was unlikely because Respondent had already taken preventative measure; specifically it had begun repairs of the cited columns.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1135, 1130 (Aug. 1985) the Commission held that S&S must be resolved in terms of 1) the circumstances as they existed at the time the violation was cited and 2) as they might have existed had normal mining operations continued. Here, as has been shown, on the day Citation No. 8007661 was issued, repairs were underway on one column and planned for the others. Thus, it was not the citation that triggered the repairs and, at the time of the citations, Respondent was already eliminating the possibility of a future hazard. Therefore, the condition was unlikely to lead to any hazard.

Even the hazard suggested by the Secretary shows that it was unlikely at the time of the citation. For example, Inspector McCourt couched his language regarding column failure and its effect on the seventh floor in terms, “*could* collapse on the sixth floor,” and in response to a question of “what *might* happen” if any of the columns failed the answer was, “it *could* potentially be a domino effect.” (emphasis added) (Tr. 71). McCort did testify that it was reasonably likely that a portion of at least some of the columns would fail and a portion of the prep plan would collapse. (Tr. 74). It was clear that the dangers McCort discussed did not consider repairs already underway at the time of the citation. However, McCort was aware of these actions as he characterized the negligence as moderate (or the borderline of high) due to the implementation of a repair schedule and the fact that what he found was not plain to the eye. (Tr. 86-87). Further, in extending the original termination date, Investigator McCort noted that the “operator has a plan in place to repair all of the columns on the sixth floor and evidently has 7 contractor employees conducting the repairs.”

In a report submitted by civil engineer Durig dated April 30, 2009, and introduced and accepted as GX 15, Durig's focus was to evaluate the imminent danger order which he vacated or terminated (he was not sure of the requirements of each). (Tr. 177). But his testimony is related to the S&S issue. In response to the court's question of what could happen, Mr. Durig answered “...ultimately a structure failure,” and “there could be tripping, a fall hazard in the location.” (Tr. 208). Durig further testified that unless conditions were improved, unless a repair was done, it would collapse. And if columns 2B, 2C, and 3D had been allowed to deteriorate to the degree 2D had been allowed to deteriorate it was reasonably likely that over a period of time there would have been some kind of failure. (Tr. 215). However, the reality here is that the cited columns had not been allowed to deteriorate in such a way and were in the process of repair even before the citations were written. Durig stated that “the retrofit that was witnessed on column 2D appeared to be adequate in restoring a sufficient amount of steel to transfer the applied loads through the Column.” (GX 15)

As the Secretary has failed to establish that the condition contributed to a hazard given the repair work already in progress, I do not deem it necessary to consider the third or fourth *Mathies* factors. This citation was not S&S.

3. Negligence

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

In this case, Respondent knew or should have known that it violated C.F.R. §77.200. Respondent was under a continuing obligation to examine working areas of the prep plant and should have seen the deteriorating columns. It could not have been particularly difficult to see that the columns had deteriorated to the point that a hammer could drive through the metal. Furthermore, on September 25, 2008, MSHA engineer Murawski issued a report that found serious structural problems with the columns and Emerald did not adequately correct the conditions before the inspection at issue here. Respondent suggest that this report did not place it on notice of the conditions because the report dealt with splice connections, not flange thinning or holes in webbing. I do not find that argument to be particularly compelling. The report indicated to Respondent that care and attention was needed for the supports on the sixth floor.

The Secretary claimed in his brief that there were no mitigating circumstances in this instance. However, this position is in direct contradiction to the Inspector’s testimony. The Secretary acknowledged that McCort found Respondent guilty of “between” moderate and high negligence, but stated the evidence suggested it was high. However, with respect to negligence, I found the Inspector’s testimony to be credible, including his testimony regarding mitigating circumstances. Specifically, McCort testified that Respondent had implemented a repair schedule and that the conditions were not apparent to the naked eye. As a result of these mitigating circumstances, I cannot find high negligence. With that noted, I would not characterize these mitigating circumstances as “considerable.” Therefore, I find that Respondent exhibited Moderate Negligence.

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$8,209 for Citation No. 8007661. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8007661:

- a. The operator's history of previous violations – Respondent was twice cited under Section 77.200 in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator's business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA's penalty assessment guidelines this gives Emerald Mine No. 1 15 "mine size points" out of a possible 15 and Respondent 10 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation, given the repair work, is unlikely to cause injury, but if it did it could result in permanently disabling or even fatal injuries to ten persons.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith and this was so stipulated.

As I have decided to modify the gravity of this citation from "Reasonably Likely" and "S&S" to "Unlikely" and "Non-S&S," I believe that it is necessary to also reduce the proposed penalty. Considering all of the factors listed above, Respondent is ordered to pay \$5,000.00 with respect to this citation.

CITATION NO. 8006753

This 104(a) citation was issued on March 9, 2009 at 9:15 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. §75.1714-7(a). This safety standard states:

- (a) Availability. A mine operator shall provide an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen, and carbon monoxide to

each group of underground miners and to each person who works alone, such as pumpers, examiners, and outby miners.

In his narrative, the inspector found:

The mine operator failed to provide an MSHA-approved, handheld, multi-gas detector that could measure methane, oxygen, and carbon monoxide to each group of underground miners and to each miner who works alone. Four miners were observed working in C-1 (032-0 MMU) number 2 entry, 184' inby the longwall face without a multi-gas detector. The longwall was operating at the time of my inspection.

(GX 19). The inspector noted that the risk of injury or illness for this violation was reasonably likely, the injury/illness could reasonably be expected to be fatal, the violation was significant and substantial, and it would affected four miners. Negligence was assessed as moderate. The proposed penalty for this citation was \$3,493.00.

This citation was terminated on March 9, 2009 at 9:30 a.m. as a representative of the miners was provided with a multi-gas detector for this group of contractors.

ISSUES

Did Respondent violate 30 C.F.R. §75.1714-7(a) and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

THE SECRETARY'S EVIDENCE

1. Testimony of Charles Reidmann

Reidmann is an underground coal mine inspector employed by MSHA for the past seven years. (Tr. 351). He had over 30 years of experience in coal mining before joining MSHA. (Tr. 351-354).

On the day citations were issued, Reidmann saw four miners working on the No. 2 Entry of the C-1 Longwall. Those miners were employed by High Tech, a contractor that conducted foreman work at Emerald Mine. (Tr. 359-360). Inspector Reidman spoke to the miners who were there to install pumpable supports. They were on the day shift, which began at 8 a.m. An MSHA-approved multi-gas detector was not provided. Inspector Reidmann was told that they usually have a person who traveled with them as an escort but no escort was provided that day. (Tr. 360). When questioned, the miners were located at the No. 2 Entry inby the long wall face. A canvas check was up and the miners were in there about a block, 180 to 184 feet. (Tr. 361).

The hazard that the cited standard was intended to prevent was to protect miners in case of fire or to warn miners in the event of methane or low oxygen. (Tr. 361). A multi-gas detector protects miners who are in the presence of low oxygen, carbon monoxide, or methane. When within a certain range, a light will appear and an audible alarm will sound. (Tr. 361). The

miners would know to come out of the area. Oxygen, carbon monoxide, and methane are odorless. Exposure to low oxygen and carbon monoxide results in the danger of loss of consciousness. The risk provided by the presence of methane is an explosive mix. (Tr. 361-363).

The likelihood of a methane explosion in the mine could have been reasonably likely as Emerald No 1 mine is on a 5-day methane spot and liberates over a million cubic feet of methane in 24 hours. Emerald No. 1 is a gassy mine. Face to face ignitions have occurred before on the longwall. The miners would not have been safe in their location if there had been an explosion at the longwall face, where the methane ignition would have been. The methane ignition could also have been at the head gate. (Tr. 367-368).

Inspector Reidmann further testified in cross-examination that not everyone needs to wear a multi-gas detector. (Tr. 374). Anyone working alone would need a multi-gas detector, but the term “alone” is not defined. Reidmann was instructed in MSHA training that “alone” means “by yourself.”¹¹

Production was occurring on the longwall face and 5 or 6 miners were on the longwall face. There was also a headgate operator who works on the headgate side where the curtain is located. Inspector Reidmann did not check with anyone to see how many had a multi-gas detector. (Tr. 381).

Respondent introduced, through Reidmann, Respondent’s Exhibit 22, which were the field notes Reidmann produced stating that the on the day of the inspection and citation the methane reading was 0, with 20.8% oxygen and that these were good readings. (Tr. 383). However, on re-direct examination, Reidmann testified that the presence of methane at the face or longwall can change in minutes. (Tr. 385). If a person on the longwall had a multi-gas detector that had alarmed, it could not have been heard by the four contract miners. (Tr. 394).

RESPONDENT’S EVIDENCE

1. Testimony of Gary Bochna

Gary Bochna is employed by Emerald Coal Resources as a senior safety representative and has held that position for 32 years. (Tr. 400).

Bochna testified that he accompanied inspector Reidmann on an inspection the day Citation No. 8006753 was issued. The citation was served on Bochna. In the course of the inspection, Bochna observed four working contractors on the C1 section. More specifically, they were working inby the No. 2 Entry, about one block inby the longwall face. It takes a minute to walk one block. Production was occurring at that time and about 12 people were working on the longwall, and various people on that crew would have had a multi-gas detector. (Tr. 401-402). The four contractors came in with the crew and therefore the crew would have known that the

¹¹ The four miners here were working together, none was by himself or in any way “alone.”

contractors were there. (Tr. 402-403). Other miners were near the longwall face in the No. 2 Entry. A headgate operator was in the No. 3 Entry on the face, about 2 blocks away. It would take about two minutes to walk two blocks. Various miners, including the headgate operator, mechanics, and the foreman would have a “gas meter.” (Tr. 403-404).

Bochna went to the area where the contractors were to check for ventilations and insofar as the readings were concerned he “did not think we had anything.” (Tr. 405). It is Emerald’s practice to send a miner with a multi-gas detector along with the contractors depending on where they are working. If they are away from a group of people they would have someone with a detector with the group and would not need one. (Tr. 410-411). But if there was a person on the longwall section with a multi-gas detector, the alarm would not be heard by, in this case, the four contractors. (Tr. 421). This is also true of the MGD that the headgate person used. (Tr. 422).

2. Testimony of William Schifko

Schifko testified for Respondent with respect to Citation No. 8007661 as well.

Schifko decided to contest this citation due to confusion with regulations promulgated by MSHA and the portion of the regulations that caused confusion was the definition of “alone.” Schifko asked for compliance assistance from several people including MSHA field inspectors and from the District Office. (Tr. 434). Someone from MSHA referred to a series of questions and answers prepared by MSHA and specifically question No. 35, which is part of Respondent’s Exhibit 27. Schifko testified that the question stated, “Are several miners who work individually but are normally located within a maximum of five minutes walking distance from all the miners in this group are each required to have a multi gas detector?” And the answer provided is, “No, if it is practical and logical for these miners to quickly assemble prior to evacuation, only one gas detector to (sic) required for this group.” (Tr. 437).

Schifko further testified that that in a policy issued to all contractors, that he expected them to provide their own safety equipment including detectors. In the past, Emerald had lent detectors out to people and not gotten them back, which is expensive. (Tr. 438-439). There are a lot of occasions where miners do not have their detectors or have forgotten them and Emerald has allowed them to borrow the equipment. Schifko makes them sign for the equipment. (Tr. 439). Loaner detectors were available. (Tr. 440).

The High Tech employees typically work at the long wall because that is the only place where pumpable cribs are built. Pre-shift organizational meetings are held where assignments are given and everyone is told where to go. The Emerald “responsible person” knows where everybody is going to go. (Tr. 440-441).

Insofar as a potential ignition on the longwall face is concerned, Schifko testified that they had never had any ignition in the C Block. Further, whether or not there was an ignition would not be influenced based on whether the contractors had detectors.

Schifko disagreed with the testimony attributed to inspector Reidmann that if you cannot see or hear somebody else, that someone was alone. Although he does not believe that Inspector Reidmann was given a lot of guidance from MSHA. (Tr. 445). There is no question in

Schifko's mind that someone with a multi-gas detector was within 900-1000 feet and therefore within five minute walking distance. (Tr. 447-448). Furthermore, it is Schifko's testimony that the four contractors were in the same group as the people working on the longwall. (Tr. 450).

SECRETARY'S ADDITIONAL EVIDENCE

1. Testimony of Robert Newhouse

Following Respondent's Final witness, the Secretary moved to re-open the record, which motion was granted and the Secretary then presented witness Robert Newhouse.

Newhouse is employed by MSHA as the supervisory coal mine inspector for the Ruff Creek Field Office and has been as supervisor since 1985. He has been an inspector of underground coal mines since 1977. (Tr. 501). Newhouse was designated as the Secretary's Representative and sat at counsel table for all proceedings.

Newhouse testified that he read all of the questions and answers regarding multi-gas detectors in RX 27 and had been involved in the issuance and development of the standard. He was familiar with the standards, why they were enacted, and their purpose. In his opinion, the question about distance and a five minute walk is irrelevant. The key is air pressure. A group of miners or an individual miner walking in an area that can have bad air, is being inundated with smoke, needs to be protected with a detector. (Tr. 502-503).

Newhouse testified that due to the check curtain the intake air was split, creating different areas where the air pressure was different. In the longwall mining area, the rock fell back across the shields as mining occurred and normal roof falls occur. The rock displaces air in that area forcing the air to come out through the entries as it has to go somewhere. Thus, there is a buildup of pressure in the areas where there is no fall, creating a void, or a potential void. That void has methane, low oxygen, dust, and other "things" in it. The four contractors and the other people in the mine would not necessarily know. They would know if a roof fall occurred, but their air would not change. That is why they have a union person with a detector normally assigned to the contractors who are inexperienced. (Tr. 503-505).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

The four contract miners working underground were a group and Respondent was therefore obligated to provide a multi-gas detector to the group.

2. Respondent's Contentions

The four contractor miners working underground were not a group, but were instead part of a larger group that was equipped with a multi-gas detector. The fact that the contract miners were within a five minute walk from Respondent's miners satisfies MSHA's question and answer publication which clarifies the requirements of 30 C.F.R. §75.1714-7(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

Respondent was cited because the inspector found four contractors working together in the mine without a multi-gas detector. Furthermore, there were other miners within a five minute walk of the four contractors, though not working directly with them, who had multi-gas detectors. These facts are not in contest. The cited standard, 30 C.F.R. §75.1714-7(a) requires all individual miners or groups to have a working multi-gas detector. Therefore, the primary issue with respect to this violation is whether the four contractors were members of a discrete “group” that were not supplied with a multi-gas detector or were part of a larger “group” that included miners who had the required multi-gas detector. To a large extent, this topic boils down to the definition of the word “group.”

Under well-settled Commission precedent, where the language is clear, the terms of that provision must be enforced as they are written, unless the regulator clearly intended the words to have a difference meaning or unless such a meaning would leave to absurd results. *Sedgman*, 28 FMSHRC 322, 329 (June 2006); and *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *Id.*

Here, the term “group” is not given a statutory definition. The Merriam-Webster dictionary defines a group as, “two or more figures forming a complete unit in a composition” and “a number of individuals assembled together or having some unifying relationship.” *Merriam-Webster Dictionary* (11th Ed. 2003). In the context of the standard, there is no real question as to the meaning of the term. “Group” in the context of §75.1714-7(a) cannot mean anything other than two or more workers acting together as a unit, in a discrete area, with knowledge that they are members of a group. In this situation, the four contractors functioned as a discrete and separate unit. They acted together to perform foreman work. There is no other way to describe the four contractors as anything other than a “group.” At the same time, it would be absurd to consider other employees, even those employees working nearby, to be considered a part of their “group.” There is no evidence in the record that they interacted with Respondent’s direct employees on the Longwall or in any way coordinated their work. The plain meaning of the word “group” will not support such a contention.

Beyond the plain meaning of the word group, considering the four contractors as part of the longwall group would have a negative effect on the safety of miners. The Commission has interpreted that the plain meaning of a term along with the overall purpose of the Act. *Local union No. 5817, District 17, United Mine Workers of America v. Monument Mining Corp. and Island Creek Coal Company*, 9 FMSHRC 209, 211-212 (Feb. 1987); *see also* 30 U.S.C.A. § 801(a) (“the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner.”) I credit the testimony of Inspector Reidmann that the contractors would not have heard the multi-gas detector alarm on the longwall. Furthermore, I credit Newhouse’s testimony that the contractors and the miners on the longwall were breathing different air, meaning that even if the longwall miners’ multi-gas

detector did not go off, the contractors could be experiencing dangerous atmosphere. An understanding that miners breathing different air and outside of the range of the alarm are part of the same “group” as the longwall miners would place a technical reading of the term “group” over the Act’s primary goal of miner safety.

As I have decided to apply the plain meaning of the term “group,” there is no need to consider the level of deference accorded to the Secretary in this instance. Furthermore, there is no need to discuss whether Respondent had “fair notice” of the interpretation because the meaning of the standard was clear.¹²

¹² Respondent presented several arguments to support its claim that the Secretary’s interpretation was not entitled to deference. Specifically, it claimed that the Secretary was inconsistent in his interpretation, that its current interpretation is a post-hoc rationalization, and that the interpretation would be absurd. However, it is only when the meaning is ambiguous that the judge is to consider the reasonableness of the Secretary’s interpretation. *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 LTDA 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 983, 987 (Dec. 2006); *Jim Walter Res.*, 19 FMSHRC 1761, 1765 (Nov. 1997); *Cannelton Indus.*, 26 FMSHRC 146, 151 (Mar. 2004). As I found that the meaning of the word “group” in the context of the standard was not ambiguous, there is no need to consider the deference accorded to the Secretary.

However, even if this definition of “group” simply were the Secretary’s interpretation, I do not believe Respondent’s arguments attacking the reasonableness of that definition are compelling. For example, Respondent’s argument relies on the 2007 Emergency Mine Evacuation Final Rule Questions and Answers. That document included a question asking if individual miners working within a five minute walking distance were each required to carry a detector. The answer said, “No, if it is practical and logical for these miners to quickly assemble prior to evacuation, only one multi-gas detector is required for this group.” Respondent argues that it this means the four miners were part of the longwall group. However, Respondent ignores the fact that individual miners are only considered part of a group if, “it is practical and logical for these miners to assemble quickly prior to evacuation.” As already shown, the Secretary’s witnesses credibly testified that the contractors would not have heard the alarm. Therefore, it would not have been practical for those contractors to quickly assemble in order to evacuate. Instead, miners on the longwall that heard the alarm would have had to immediately act as a rescue crew and go searching for the contractors rather than themselves safely assembling for evacuation. Further, as those miners were in different air, there was no practical way for the contractors to know if they were experiencing dangerous atmosphere and were in need of evacuation.

In a related argument, Respondent contends that the Secretary’s interpretation of the term “group” has been inconsistent in light of the above “answer” and that its use of the interpretation
(continued....)

2. Gravity and S&S Discussion

With respect to the gravity of this citation, I credit the testimony of Inspector Reidmann. He presented evidence that if the four contractors encountered dangerous conditions; they would be unaware of the danger. As a result, those miners could have been trapped in an area with low oxygen and/or carbon monoxide and loss of consciousness or even been injured by a methane explosion. The possibility of low oxygen or carbon monoxide is a real danger in a coal mine. Furthermore, this was a gassy mine on a five-day spot with a history of face ignitions, making a face ignition possible. (Tr. 367-368). As a result, I agree with the Secretary's findings that this hazard was reasonably likely and possibly fatal.

As stated previously, in order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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 at 3-4.

As shown above, there was an underlying violation of the mandatory safety standard.

With respect to the second factor, Respondent argues that the failure to provide the contractors with a multi-gas detector did not contribute to a safety hazard because the contractors

¹²(...continued)

urged at hearing was a post-hoc rationalization. However, as shown above, the Secretary's position at hearing, as well as the 2007 Question and Answer, are consistent with the language of the standard and with one another. If anything, it appears that the Respondent is the party engaging in post-hoc rationalization of its position. The evidence clearly showed that at all other times, Respondent provided an escort with a multi-gas detector to the contractors. (Tr. 360, 410-411). It was only when they were cited in this particular instance that it argued that these miners were part of a larger group.

Finally, Respondent argues that the Secretary's interpretation is absurd because it would be unclear whether a group is determined by "minimum distance" or "common task." It noted that miners working on separate tasks but "within arms reach" might not be considered a group and require a separate multi-gas detectors. I do not believe there is any uncertainty. The issue is not whether "minimum distance" or "common task" denotes a group; those are two equal aspects of the definition of "group." Miners at a distance from other miners are not part of the same "group" for the reasons discussed already, namely different air courses and inability to hear an alarm. At the same time, miners working on a different task, even if close by, are not part of a "group" because, as they are not part of a unit working together, they may leave the area without being noticed or accounted for at any time. In essence, miners working in a group share a known responsibility towards a particular task and also for one another. A miner outside of that shared task could easily be left outside of the group's sense of reasonability as well. That is why a worker conducting an unrelated task, even if close, might be considered outside of a "group." There is nothing absurd about that result.

were not engaged in an activity that risked ignition.¹³ (*Respondent's Post-Hearing Brief* at 48-49). It may be true that the contractors were not engaged in an activity that risked ignition but that does not change the fact that they were near the face where mining activity was taking place. In the event of an inundation of methane, those contractors would have no warning. Further, in order to be S&S, a violation need not be shown to cause a hazard, it need only contribute to a hazard. The fact that the miners did not have a multi-gas detector would contribute to the hazard of explosion in some way, regardless of the possible causes of ignition. Finally, methane ignition is not the only hazard possible. The miners could enter an area with carbon monoxide or low oxygen and lose consciousness, regardless of the presence of explosive gases.

Respondent also argues that, in the event of an incident, the contractors would have been among the first warned of danger because of their location. This would only be true if the contractors happened to be in a location where they could be easily warned. There is no evidence to suggest that evacuating miners would definitely come in contact with the contractors. Even if they would, that protection would only help those contractors if they were in the same atmosphere as the miners with multi-gas detectors. If the contractors were in an area with methane, low oxygen, or carbon dioxide while the other miners were not, there would be no warning. Therefore, the failure to provide multi-gas detectors to the miners contributed to the hazard of exposure to explosion or to asphyxiation.

With respect to the third and fourth factors of *Mathies*, There is no question that an explosion or asphyxiation would cause an injury to the contractors. Furthermore, such an injury would be serious, perhaps even deadly. As a result, I hold that this violation was S&S.

3. Negligence

Respondent knew or should have known that the contractors should have been provided with a multi-gas detector. In fact, the Secretary presented evidence that Respondent had always sent the contractors with an escort in the past equipped with a multi-gas detector. (Tr. 360, 410-411). This shows that Respondent was aware that these miners were a "group" and that they were required to provide a multi-gas detector for them. I credit Reidmann's testimony that Respondent's actions were only moderately negligent because they had attempted to comply with the standard in the past. (Tr. 370-372).

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$3,493.00 for Citation No. 8006753. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made.

¹³ Respondent also argues that there was no danger of ignition because there was no methane was present. (*Respondent's Post-Hearing Brief* at 48). However, as Respondent is apparently aware based on other arguments in the brief, as an emergency standard, an event is assumed when considered the S&S nature of the violation. *Cumberland Coal Resources, LP*, 33 FMSHRC 2537 (Oct. 2011).

I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8006753:

- a. The operator's history of previous violations – Respondent was cited four times under Section 75.1714-7(a) in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator's business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA's penalty assessment guidelines this gives Emerald Mine No. 1 15 "mine size points" out of a possible 15 and Respondent 10 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation was reasonably likely to cause injury, or illness that could reasonably be expected to be fatal.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith.

I **AFFIRM** Citation No. 8006753 as issued as well as the Secretary's proposed penalty assessment of \$3,493.00.

ORDER

Respondent, Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$8,493.00 within 30 days of the date of this decision.¹⁴

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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¹⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004-1710

August 7, 2013

O-N MINERALS (CHEMSTONE) COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. VA 2013-205-RM
	:	Citation No. 8722931;01/28/2013
	:	
v.	:	Docket No. VA 2013-204-RM
	:	Order No. 8722926;01/08/2012
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID: 44-00044
	:	Mine: Winchester Plant
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. VA 2013-288-M
	:	A.C. No. 44-00044-316336
	:	
	:	Docket No. VA 2013-372-M
	:	A.C. No. 44-00044-321898
	:	
	:	
O-N MINERALS (CHEMSTONE) COMPANY, Respondent	:	Mine: Winchester Plant

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

Before: Judge Zielinski

These cases are before me upon Notices of Contest and Petitions for Assessment of Penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that O-N Minerals (Chemstone) Company (“O-N Minerals”) is liable for two violations of the Secretary’s regulations covering Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines,¹ and propose the imposition of civil penalties in the total amount of \$4,447.00. O-N Minerals has filed a motion for summary decision, and in the alternative, partial summary decision. The Secretary filed a response to the motion and O-N Minerals filed a reply to the Secretary’s response. For the reasons that follow, I find that there is no genuine issue as to any material fact and that O-N Minerals is entitled to summary decision as a matter of law.

¹ 30 C.F.R. Part 46.

Summary Decision Standard

Pursuant to the Procedural Rules of the Federal Mine Safety and Health Review Commission (“FMSHRC”), “a motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b) (2004). The Commission has analogized summary decision to Rule 56, Summary Judgment, of the Federal Rules of Civil Procedure. *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). Summary judgment is only appropriate “upon proper showings of the lack of a genuine triable issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Material facts are those that may affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

An opposition to a motion for summary decision “shall . . . include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition.” 29 C.F.R. § 2700.67(d). The inferences drawn from the facts should be “viewed in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), *Jim Walter Resources, Inc.*, 33 FMSHRC at 2255.

Findings of Fact and Conclusions of Law

On January 8, 2013, two employees of a contractor, H&W Crane, Leo Barnes and John Singleton, were operating a mobile crane at O-N Minerals’ Winchester Plant. Ex. R-5.² Both of the men had received site-specific hazard training during the previous year, Barnes on March 1, 2012 and Singleton on October 26, 2012. Ex. R-1, R-2, R-7. Bob Hudson, the employee responsible for training, did not give Barnes or Singleton renewal training on January 8, despite their request, because new hardhat stickers were not available. Ex. R-7, S-A. He was aware that both men had previously received training in 2012. Ex. R-7. In addition, Barnes and Singleton had worked at the mine between the time of their initial training and January 8, 2013. Ex. R-7.

On January 8, 2013, MSHA Inspector Derek Goossens conducted an E01 inspection of the Winchester Plant. Ex. S-A. During the inspection, he observed Singleton and Barnes using a mobile crane, and to his knowledge, without having been given site-specific hazard awareness training. Ex. S-A. As a result, he issued Order No. 8722926 pursuant to section 104(g)(1) of the Mine Act. It alleges a violation of 30 C.F.R. § 46.11(b)(5), which states, “[y]ou must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner . . . but is present at the mine site, including: . . . [c]onstruction workers or employees of independent contractors who are not miners” Ex. R-5. The operator withdrew Barnes and Singleton and provided site-specific hazard training. Ex. S-A. Goossens terminated the order once he received

² Exhibits to Respondent’s motion are designated “R-x,” and exhibits to the Secretary’s opposition are designated “S-x.”

copies of the training certificates. Ex. S-A, S-D. The training given to Barnes and Singleton in January 2013 was the same training that they had previously received. Ex. R-1, R-2, R-3, R-4, R-7.

In conjunction with the above order, Goossens issued Citation No. 8722931 pursuant to section 104(d)(1) of the Mine Act on January 28, 2013. It alleges a violation of 30 C.F.R. § 46.11(a), which states, “[y]ou must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards.” Ex. R-6.

There is no genuine issue as to any of these material facts.

Respondent argues that it is entitled to summary decision because Singleton and Barnes previously received adequate site-specific hazard training, section 46.11 does not contain a requirement for training on an annual basis, and there were no significant changes to the mine conditions between March 1, 2012, and January 8, 2013, that required it to provide refresher training to the contractors. Resp. Mot. at 7; Ex. R-7.

In response, the Secretary argues that the original orientation forms listed a quarry hazard of “overhead hazards are prominent throughout the quarry so be aware of your surroundings” and that the forms stated that the orientation was only valid for the calendar year.

Section 46.11 does not provide for specific intervals in which persons, or employees of independent contractors, are required to receive training. The only requirement is that training must be given to a person before he is exposed to hazards and “that the training be sufficient to alert persons to the hazards they will encounter at the mine.” Ex. R-6 at 29. The regulation does not require additional or refresher training each calendar year. The fact that the orientation forms state that the training is only valid for the calendar year does not alter the requirements of the regulation.

As evidenced by the Secretary’s compliance guidelines, the passage of time or absence from a mine site do not trigger a requirement for additional training under section 46.11. Rather, operators are advised that it “would be prudent” to provide refresher training in such circumstances.³ Changes at the mine site presenting new or different hazards would create a training obligation. However, there were no such changes at O-N Minerals’ mine site. The training given in January 2013 was the same training that had been given to the men months earlier, and was deemed sufficient to satisfy the training obligation and abate the violations.

In an effort to avoid summary decision, the Secretary argues that the contractors’ “testimony at trial will establish how long they had been away from the mine, why they felt additional site-specific training was required, and what site-specific hazards were present at the mine[,]” and later reiterates that “there are issues as to material fact regarding site-specific

³ The Compliance Guide for MSHA’s Part 46 Training Regulations states, “. . . if a person is away from the mine site for a period of time, it would be prudent to provide that person with refresher site-specific training.” Ex. R-6 at 29.

hazards which may be resolved by the testimony of the contractor employees.” Sec’y Rep. at 5, 9. However, a party opposing a properly supported motion for summary decision must do considerably more than suggest that it may be able to demonstrate some, as yet unknown, factual issue necessary for trial. It must come forward with evidence in the form of affidavits or verified documents demonstrating that there is a genuine issue as to a material fact. *Scott v. Harris*, 550 U.S. 372, 379 (2007); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Hanson Aggregates New York, Inc.* at 9. The Secretary’s speculation as to trial testimony falls far short of satisfying that burden.

I find that Singleton and Barnes had received site-specific hazard awareness training as required by section 46.11 in March and October, 2012, respectively. Additional training on January 8, 2013 was not required.

WHEREFORE, Respondent’s motion for summary decision is **GRANTED**.

It is **ORDERED** that Order No. 8722926 and Citation No. 8722931 are hereby **VACATED**.⁴

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

⁴ While it was not necessary to address the issue of duplicative citations in this instance, it should be noted that the citation and order issued by Goossens could be construed as duplicative. The cited standards must impose separate and distinct legal duties on an operator. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008); *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). A charge of violating a specific standard is considered duplicative of a charge of violating a more general standard when identical evidence is used to support each charge. 19 FMSHRC at 1004 n.12. In the above cases, the same evidence is used by the Secretary to establish a violation of section 46.11(b)(5) as its more general standard, section 46.11(a).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2500
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August 7, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2011-194-M
Petitioner,	:	A.C. No. 10-02131-233459
	:	
v.	:	
	:	
NORTH IDAHO DRILLING, INC.,	:	Mine: Crusher #1
Respondent.	:	

DECISION

Appearances: Pamela F. Mucklow, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Eric Lenz, North Idaho Drilling, Inc., St. Maries, Idaho, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against North Idaho Drilling, Inc. (“Respondent”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Coeur D’Alene, Idaho, and submitted post-hearing briefs.

A total of 11 section 104(a) citations were adjudicated at the hearing. Respondent agreed to withdraw its contest of Citation No. 8565189 at the hearing. (Tr. 138-39). The Secretary proposed a total penalty of \$23,692 for these 12 citations. As discussed below, at the time the citations were issued, Respondent controlled a small portable crusher at a pit in Benewah County, Idaho.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial (“S&S”) nature. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete

safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

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

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575.

B. Negligence

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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

30 C.F.R. § 100.3(d).

C. Burden of Proof and Credibility Determinations

In order to establish a violation of a safety standard, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). This same standard applies to the Secretary’s burden to establish that a violation was S&S and was the result of the operator’s high negligence. When determining

whether the Secretary met this burden, I was required to make a number of credibility determinations. Determining the credibility of witnesses is one of the most important and difficult responsibilities that a Commission administrative law judge must complete. Although a judge will occasionally find himself in a situation where he believes that a witness is lying, most of the time resolving credibility issues involves determining whether a particular witness's testimony is worthy of trust. The primary issue is whether the testimony is believable. Often, a judge credits the testimony of witness A over witness B because he believes that the witness A is in a better position to know the particular facts at issue. Credibility determinations involve not only weighing the trustworthiness of a witness but also determining whether a particular witness has the knowledge necessary to give his testimony weight. The witness may be competent to testify about the conditions at a mine but he may not have a complete understanding about factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Credibility can be defined as "that quality in a witness which renders his evidence worthy of belief." *Black's Law Dictionary* 330 (5th ed. 1979). Thus, a witness's experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial in evaluating credibility.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

North Idaho Drilling argues that MSHA lacked the authority or jurisdiction to inspect Crusher #1 at Wemhoff Pit (the "Mine") because the Mine was in maintenance mode due to a planned sale to ACI Northwest ("ACI"). All of the citations in this case were issued at this portable crusher, which was not operating at the time of the inspection. Power to the Mine was locked-out and Respondent maintained that it never planned to operate the Mine again. Indeed, Respondent maintained that, once sold, the crusher was going to be moved to a different pit.

The Secretary argues that MSHA had jurisdiction and the authority to inspect the Mine at the time the inspector issued these citations. The Mine had neither been sold nor leased, Respondent had not completely ruled out continuing operations at the Mine, and Respondent did not provide evidence to prove its sale, lease, or intended use. The Mine, furthermore, qualifies as a "mine" pursuant to 30 U.S.C. 802(h)(1) of the Act, which gives MSHA jurisdiction over "facilities, equipment, machines, tools, or other property...used in, or to be used in" mining.

For jurisdictional purposes, the Mine Act includes the language "used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals" in its definition of a mine. 30 U.S.C. § 802(h)(1). The phrase "the milling of such minerals" includes the crushing and sizing of rock at a portable crusher with the result that a crusher is considered to be a "mine" under the Act. The evidence presented at the hearing establishes that the portable crusher had been used in the milling of minerals and, once certain repairs were made, would again be used for that purpose. A portable crusher that is being maintained or worked upon with the aim of becoming active in the future, even if it is inactive at the time, is subject to being inspected by MSHA. Congress made clear that the definition of "mine" in the Mine Act, furthermore, "[shall] be given the broadest possibl[e] interpretation, and ... doubts [shall] be resolved in favor of ...

coverage of the Act.” *Shamokin Filler Company, Inc.*, 34 FMSHRC 1897, 1902 (Aug. 2012) (citing S. Rep. No. 95-181, at 14 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)).

I find that North Idaho Drilling, Inc., and the Mine were subject to the Act because the Mine’s “workings, structures, facilities, equipment, machines, tools, or other property” were “to be used in” mining. Respondent had a mine I.D. number with MSHA, did not change the mine’s status with MSHA, did not provide any proof that it no longer owned the mine, and did not raise its jurisdictional concerns in its answer. Even if Respondent planned to sell the Mine, its efforts were still undertaken with the aim of allowing the Mine to resume operations, which becomes even more evident because after the eventual sale of the mine, which occurred months after the inspection, Respondent allowed Donald Burton, its mine manager, to temporarily work for the new owner.¹ Mines that are “closed” for maintenance are still subject to the Act.

B. Citation No. 8565186

On August 11, 2010, Inspector Randall Kalita Urnovitz issued Citation No. 8565186 under section 104(a) of the Mine Act, alleging a violation of section 56.4101 of the Secretary’s safety standards. The citation states, in part:

The electrical van had oil and grease stored inside and no warning signs were posted. There were 5 five-gallon plastic containers of lube oil and a partial box of grease that contained 3 full tubes.

(Ex. G-1). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator’s negligence was moderate and that one person would be affected. Section 56.4101 of the Secretary’s safety standards requires that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” 30 C.F.R. § 56.4101. The Secretary proposed a penalty of \$108.00 for this citation.

¹ If Respondent had already agreed to sell the Mine to ACI at the time it received the citations, Respondent would still be liable under the Act based upon the maintenance work it was performing upon the Mine as an “operator” of the mine. Under the Mine Act, the term “operator” is defined as “any owner, lessee, or other person *who operates, controls, or supervises* a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). (emphasis added). Respondent clearly operated and/or controlled the Mine when the inspector issued the citations at issue in this case: Respondent was performing work upon the crusher and Donald Burton was supervising the work at the mine. In any event, the Mine Act would also have jurisdiction over Respondent as an “independent contractor” because, at the time of the inspection, it was working on the crusher and refabricating guards for the alleged benefit of ACI.

1. Summary of Evidence

Inspector Urnovitz testified that on August 11, 2010, he issued Citation No. 8565186 as a violation of section 56.4101 because Respondent did not have warning signs where a danger of fire or explosion existed. (Tr. 27; Ex. G-1). Five buckets of lube oil as well as three tubes of grease lubricant were located in an electrical van. (Tr. 28-29). The buckets had lids. (Tr. 37). Inspector Urnovitz believes that grease and lube oil are combustible. (Tr. 29).

A fire is likely to cause injuries resulting in lost workdays and restricted duty, including burns and smoke inhalation, according to the inspector. (Tr. 30-31). Inspector Urnovitz testified that these injuries were unlikely to be suffered because the van was not near an open flame or any individuals who were smoking and there were multiple escape routes. (Tr. 32).

Inspector Urnovitz testified that Citation No. 8565186 was the result of Respondent's moderate negligence. Respondent knew or should have known of the violation because it had a van with a posted sign. (Tr. 33). Donald Burton, the supervisor of the Mine who accompanied the inspector, was aware that the grease and lubricants were in the van. (Tr. 34). The grease and lubricant were only in the van temporarily. (Tr. 34). The condition was obvious. (Tr. 34). Inspector Urnovitz believed that the flammable materials were located in the van for a "couple of weeks." (Tr. 43). The inspector did not know the ignition temperature of the substances. (Tr. 46).

Eric Shawn Lenz, the owner and president of North Idaho Drilling, testified that Burton was in charge of the site whenever Lenz was not present. (Tr. 247). Lenz testified that the Mine was connected to the power grid, but was locked out at the time of the inspection and there were no other ignition sources. (Tr. 249-50).

Donald Burton² testified that the electrical van is not used as storage for the materials cited; they were placed in the van temporarily to remove them from other areas. (Tr. 354). The van was never used as storage while the Mine was operating. (Tr. 359). There were no ignition sources around the van and the van was locked out. (Tr. 355). None of the miners smoked. (Tr. 356). Burton was unsure how many days the grease and oil were stored in the van, but guessed the duration was only one or two days. (Tr. 358). He also corroborated that he told the inspector that the materials were placed in the van for convenience. (Tr. 358).

2. Discussion and Analysis

I find that Respondent violated section 56.4101 because the oil and grease in the electrical van presented a fire or explosion hazard, but there were no signs prohibiting open flames or smoking. The parties' arguments center around whether the electrical van was used for storage of flammable materials and how long the grease and oil were in the van. Whether the van was the usual storage place for the cited materials is, however, immaterial concerning a

² Donald Burton was absent from the hearing due to the inability to travel after a long-scheduled surgery. He testified via telephone the second day of the hearing; before testifying, Lenz related at least some of the testimony from the previous day to Burton. Tr. 292.

violation of section 56.4101. Section 56.4101 requires the posting of signs where a fire or explosion hazard “exists,” not where the hazard regularly exists or exists for a certain period of time. The cited flammable materials, furthermore, were in the van for at least several shifts. The cited grease and oil presented a fire hazard, but were being kept in a van that did not have visible warning signs at the time of the inspection; Respondent violated section 56.4101. The violation was not S&S and the gravity was low.

I find that Citation No. 8565186 resulted from Respondent’s moderate negligence. Operators are responsible for the negligence of their managers, foremen and supervisory employees for purposes of violating the Mine Act, but also for the purpose of determining negligence findings and penalty amounts. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Burton, who supervised the Mine, moved materials for a temporary time to clean the work area and did not realize the need to post a warning sign to prohibit open flames and smoking. Respondent should have known to either post warning signs or return the materials to an area where warning signs were already posted.

A penalty of \$100.00 is appropriate for this violation.

C. Citation No. 8565187

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565187 under section 104(a) of the Mine Act, alleging a violation of section 56.12004 of the Secretary’s safety standards. The citation states, in part:

The 220 volt power cord for belt #3 had two areas that were damaged, apparently by mechanical action, exposing the inner conductors. One area was approximately 1.5 inches long and the second area was 0.75 inches long, with copper showing on the ground (green) wire.

(Ex. G-3). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that one person would be affected. Section 56.12004 of the Secretary’s safety standards requires that “[e]lectrical conductors exposed to mechanical damage shall be protected.” 30 C.F.R. § 56.12004. The Secretary proposed a penalty of \$1,795.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz testified that he issued Citation No. 8565187 as a violation of section 56.12004 because a 220 volt power cord had mechanical damage. The exterior protective layer of the power cord had two damaged areas that exposed inner conductors. (Tr. 47). The damaged areas measured 1.5 inches and .75 inches long. (Tr. 48). Copper wire of the ground wire was visibly exposed. (Tr. 48,63). The cited cord was connected to the electrical system but was not energized at the time because the crusher’s power was locked out. (Tr. 53, 63). The cited

condition created a fatal hazard of electrocution if the insulated inner conductors were further damaged to expose copper wires. (Tr. 54).

The inspector testified that the cited condition was reasonably likely to cause an injury because the damage to the cord would get worse and miners worked in the cited area every day. (Tr. 59). He believed that the cord had been handled since the damage occurred. (Tr. 62).

Inspector Urnovitz testified that Respondent's moderate negligence caused Citation No. 8565187 because Respondent should have known about the cited condition through workplace exams. (Tr. 61). The condition existed for at least two weeks. (Tr. 61-62). The inspector believed that the cord was damaged by chaffing over time and not by being dragged or cut. (Tr. 67). He testified that the damage occurred before the plant was shut down. (Tr. 66-67).

Lenz testified that the damage to the power cord did not occur while the plant was operating. (Tr. 259). Respondent checked all cords before use; Lenz believed that the cord damage occurred during a dig-out that involved moving the cone crusher and screen. (Tr. 259). Burton also believed that the damage to the cord was likely caused during the dig-out. (Tr. 363). Burton would have inspected the cord when the cone was replaced, before the Mine was reenergized. (Tr. 363). Burton did not recall the appearance of or damage to the cited cord at the time of the hearing. (Tr. 366).

2. Discussion and Analysis

I find that Citation No. 8565187 was a violation of section 56.12004 because the cited electrical conductors were exposed to mechanical damage. The inner conductor of the cited cord was exposed in numerous areas and the inspector testified that copper ground wire was exposed. Respondent's argument that the mine was not in operation and therefore conductors were permitted to be damaged fails. Although the Mine was locked out, which deenergized the cited conductor, the Act does not require that a violation of a safety standard impose a hazard. *Allied Products Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982).

I find, however, that Citation No. 8565187 was not S&S because it was not reasonably likely to contribute to an injury. The entire mine was locked and tagged out, which means that the cited violation could not cause an injury until the mine was reenergized. The conductor was most likely damaged during the period of time that the mine was deenergized, given the work that was being performed. Although the Secretary argues that the conductor would be likely to cause an injury once the Mine was reenergized, both Burton and Lenz testified that it was Respondent's policy that all the conductors would be checked before being used and before the plant was reenergized. Under continued normal mining operations, therefore, the conductor would likely be repaired or replaced before being reenergized and was not reasonably likely to cause an injury. The Secretary did not meet his burden of proof on this issue. The gravity was low.

I also find that Respondent's negligence was low. The conductor was likely damaged after the Mine was locked out. Respondent should have removed the conductor from its power connection and repaired or disposed of it.

Citation No. 8565187 is hereby **MODIFIED** to a low negligence designation. A penalty of \$50.00 is appropriate for this violation.

D. Citation No. 8565188

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565188 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. The citation states, in part:

The 12 inch diameter head pulley on belt 118 was not guarded. The north side was completely open and the south side was partially guarded by the drive motor and belt, which did have a guard. The center of the pulley shaft was approximately 4 feet above the ground. The unguarded area was approximately 40 inches long and 30 inches high. The condition had existed for approximately 2 weeks following a plant reconfiguration that included lowering this head pulley.

(Ex. G-8). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 56.14107(a) of the Secretary's safety standards requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The Secretary proposed a penalty of \$13,268.00 for this citation.

1. Summary of Evidence

The inspector testified that Citation No. 8565188 was a violation of section 56.14107(a) because Respondent failed to guard a head pulley. The cited head pulley was approximately 3.5 to 4 feet from a walkway and was completely unguarded on its north side. (Tr. 78-81). Respondent stipulated that the cited condition existed, could cause serious injuries, was S&S, and was the result of high negligence if the plant operated with it in the cited state. (Tr. 84, 87, 88).

Inspector Urnovitz testified that he believed that the plant operated while the violation existed. The inspector testified that Burton told him the plant operated while the pulley was in the cited condition. (Tr. 89). The inspector also testified that the pulley had accumulated material or product on the equipment, especially the cribbing. (Tr. 91). In the inspector's experience, these accumulations showed that the pulley had operated since it was last moved and that the pulley had been set-up 4 feet from the ground when it was last run. (Tr. 91, 93; Ex. G-9). During the close-out conference concerning this condition, Burton told the inspector that the plant had operated with the head pulley 4 feet from the ground. (Tr. 94). The inspector acknowledged there were pieces of wire and rubber attached to the head pulley, admitting that

they could have held a guard; he testified that he did not inspect them closely because he did not believe that they were relevant at the time he issued the citation. (Tr. 108, 128-129).

Lenz testified that the cited guard was removed after production had ceased at the Mine. (Tr. 289). Several other guards were also removed. (Tr. 290). The guards were removed to be modified to meet ACI's requests. (Tr. 290, 303-04). Following modifications, Respondent would replace the guards. (Tr. 290). The inspector acknowledged that the crusher looked different when he viewed it prior to Respondent's sale to ACI. (Tr. 294). Burton testified that the pulley did not operate without a guard and that all the head pulleys at the Mine were guarded when the Mine operated. (Tr. 374, 399)

Inspector Urnovitz testified that the screen that Respondent used to cover the head pulley to terminate the citation required five or six bolts and bolt holes to secure, none of which existed during the inspection. (Tr. 440). The inspector did notice other guards missing, but did not issue citations because he could see the areas were being serviced. (Tr. 441).

2. Discussion and Analysis

I find that Respondent did not violate section 56.14107(a). The Secretary argues that the cited pulley operated without the presence of a guard, evidenced by Burton's confirmation that it did so and the debris viewed by the inspector. Burton's testimony conflicted with the account he gave to the inspector. Lenz and Inspector Urnovitz both testified that several guards were missing in the Mine but not cited because those guards were being refabricated. I credit the testimony of Lenz that the guard was removed after the plant was shut down so that work could be performed and the guard refabricated.

Citation No. 8565188 is hereby **VACATED**.

E. Citation No. 8565190

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565190 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(c) of the Secretary's safety standards. The citation states, in part:

The CAT 988B loader had not been marked with a tag after being taken out of service for a safety defect (bad parking brake). The key was also in the ignition switch. . . . Loaders are used every shift to load customer trucks and to feed the plant when it is running.

(Ex. G-16). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.14100(c) of the Secretary's safety standards requires:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c). The Secretary proposed a penalty of \$807.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565190 as a violation of section 56.14100 because the Cat 988B loader was taken out of service for a defective parking brake, but was not tagged out. (Tr. 139). The equipment's key was in its ignition and the door was unlocked. (Tr. 142). Burton informed the inspector of the defective parking brake. (Tr. 141). The inspector did not test the parking brake himself. (Tr. 151). The inspector testified that he designated the likely injury resulting from the cited condition to be permanently disabling because the defective parking brake could cause the large, heavy machine to strike or over-travel a miner. (Tr. 145).

Although Inspector Urnovitz designated the citation as reasonably likely to lead to an injury and S&S at the time he issued it, he reconsidered and testified that it was unlikely to cause an injury and was non-S&S. (Tr. 147). The inspector testified that the small crew working at the Mine was informed of the cited condition and the work area was relatively flat. (Tr. 147-148).

The inspector designated Citation No. 8565190 as the result of Respondent's moderate negligence because Respondent was aware of the defective parking break for two days before the inspection. (Tr. 149).

Lenz testified that the cited piece of equipment had a new, functional parking brake. (Tr. 312). He feared that the parking brake would freeze, which is why the machine was not being used. (Tr. 312). He requested that a mechanic come to the Mine to inspect the accumulators of the cited equipment. (Tr. 310). Lenz believes that Burton and Inspector Urnovitz miscommunicated, which led the inspector to believe that the parking brake would not hold the loader when it did. (Tr. 312).

Burton testified that the loader was out of service because the accumulators on the parking brake had to be examined by mechanics. (Tr. 406, 414). He testified that the parking brake on the equipment was not defective. (Tr. 407). He worried that the parking brake was dragging and "working too well." (Tr. 414-15). The inspector did not test the brake. (Tr. 420).

2. Discussion and Analysis

I find that Respondent did not violate section 56.14100 because continued operation of the cited equipment was not hazardous to persons. Section 56.14100 requires that defects pose a hazard to persons to violate its standard. Although the Secretary argues that the cited loader violated section 56.14100 based upon the testimony of Inspector Urnovitz, I agree with

Respondent's assertion that the inspector issued the citation due to a miscommunication. The parking brake may have been defective, but the Secretary did not establish that it posed a hazard to miners. Inspector Urnovitz based this citation upon Burton's comments at the time of the inspection that the parking brake was "defective," but Burton and Lenz testified that the brake held the vehicle. The Secretary bears the burden of proof and the inspector did not test the parking brake. The Secretary did not meet his burden of proving a violation.

Citation No. 8565190 is hereby **VACATED**.

F. Citation No. 8565191

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565191 under section 104(a) of the Mine Act, alleging a violation of section 56.14132(a) of the Secretary's safety standards. The citation states, in part:

The horn on the Komatsu WA-450-3 loader (serial # 53324) was not maintained in a functional condition. The horn button was broken and the metal contact spring and the cover were kept in a storage cubby, so the horn could not be sounded. The loader operator could hold the parts in place to sound the horn, but could only do so when the loader was parked.

(Ex. G-19). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was high and that two persons would be affected. Section 56.14132(a) of the Secretary's safety standards requires "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The Secretary proposed a penalty of \$392.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565191 as a violation of section 56.14132(a) because the horn on a Komatsu Loader did not function. (Tr. 154). The inspector saw that the horn button was not attached to the vehicle; Burton admitted that the horn did not function and Burton also tested the horn to show the inspector that it did not function. (Tr. 155)

The Inspector designated Citation No. 8565191 as the result of Respondent's high negligence because Burton was aware of the cited condition but continued to use the equipment. (Tr. 158). Inspector Urnovitz also testified that Burton told him that the condition had existed for about two weeks and the equipment was used intermittently during that time. (Tr. 158). Lenz testified that Respondent's miners were properly trained and should not have removed the horn. (Tr. 318).

2. Discussion and Analysis

Respondent stipulated to the violation, but disputes the high negligence designation. (Tr. 157). I find that Respondent's high negligence caused the cited condition in Citation No. 8565191. Although its employees may be properly trained, its management knew of a violation but did not abate it. The Secretary argues, and I agree, that because Burton, Respondent's manager, knew that the horn was broken for 2 weeks but did not fix it, that Respondent was highly negligent. The gravity was serious.

A penalty of \$400.00 is appropriate for this violation.

G. Citation No. 8565192

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565192 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(c) of the Secretary's safety standards. The citation states, in part:

The left front outrigger float on the P&H 15 ton crane (serial #808703) was defective due to damage. One bolt approximately 7/8 inch in diameter on the upper saddle that held the float to the outrigger boom was sheared off and the second bolt was bent. The 20 x 20 inch float was only held loosely on the outrigger pin due to this damage and could not resist lateral forces as effectively as intended by the manufacturer.

(Ex. G-20). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of \$807.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565192 as a violation of section 56.14100(c) because Respondent's P&H 15-ton crane had a defective outrigger float. (Tr. 141). Outrigger floats are used to stabilize the crane; the cited piece of equipment had a defective left, front float. (Tr. 164). One bolt that secured the float to the outrigger was missing and the other was bent. (Tr. 168). The inspector testified that accepted industry standards classify equipment damaged in the cited manner to be unsafe to use. (Tr. 170-171). If the remaining bolt were removed or destroyed, the float could fail, causing the crane to tip. (Tr. 171). If the crane tipped, its operator or miners on the ground were likely to receive permanently disabling or fatal injuries. (Tr. 172-73).

The inspector testified that the cited condition was reasonably likely to cause an injury. (Tr. 177). Respondent used the crane the day of the inspection for a period of about 45 minutes. (Tr. 177). The operator intended to use the crane again that day. (Tr. 178). The use of the crane required a miner to be stationed near the crane as a guide. (Tr. 179).

Inspector Urnovitz designated Citation No. 8565192 as the result of moderate negligence. Although Burton told the inspector that he knew of the cited condition, Burton also said that the owner of the crane assured Respondent that the condition was not a safety hazard. (Tr. 180).

Lenz acknowledged that “it looks like . . . the rule was broken,” but argued that if the second bolt broke the outrigger would still prevent the crane from tilting or tipping. (Tr. 320). Lenz testified that not all cranes have pinpoints connecting floats. (Tr. 321). Burton testified that the float required repairs due to a broken bolt, but it still functioned properly. (Tr. 421).

2. Discussion and Analysis

I find that Citation No. 8565192 was a violation of section 56.14100(c). Respondent argues that the cited float was a vertical stabilizer and the inspector referred to it as a horizontal stabilizer and did not show that the condition presented a hazard. Respondent’s arguments fail. Although vertical and horizontal stabilization are not the same function, the inspector’s confusion of the two does not undermine the citation. Destabilized cranes can capsize and crush miners. The float and outrigger stabilize a crane while it lifts loads and the failure of one could lead to a crane capsizing and crushing a person while lifting a load that the outrigger is otherwise rated to lift. Simply viewing a crane in action leads to this logical conclusion, but I also credit the inspector’s testimony that a damaged outrigger can cause an accident.

I find that Citation No. 8565192 was S&S because the cited condition was reasonably likely to lead to a serious injury. The violative damage to the float and outrigger created a crushing hazard for miners that could cause injuries that would be at least permanently disabling. The cited condition is reasonably likely to lead to an injury. One bolt that held the float in place completely failed, while the other was damaged, making the destruction of the connection between the outrigger and the float likely. Respondent used the crane while the damage to the float and outrigger existed and planned to use the crane again. Both the crane operator and the miner who worked closely to help the operator were likely to be hurt in such a situation. As stated above, it is the *contribution* of a violation to the cause and effect of a hazard that must be considered when evaluating whether a violation is S&S. The condition cited in Citation No. 8565192 was reasonably likely to contribute to a serious injury and was therefore S&S. The gravity was serious.

I find that Respondent’s low negligence caused Citation No. 8565192 because it reasonably relied upon the representations of the crane owner that the crane was safe to operate. Citation No. 8565192 is hereby **MODIFIED** to a low negligence designation. A penalty of \$600.00 is appropriate for this violation.

H. Citation No. 8565193

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565193 under section 104(a) of the Mine Act, alleging a violation of section 56.19024(e) of the Secretary’s safety standards. The citation states, in part:

The 7x7 wire rope that was approximately 9/16 inch in diameter used on the P&H 15 ton crane (serial #808703) had damage that exceeded retirement criteria. At least 2 kinks (dog-legs) were observed, as were three spots with multiple broken strands (3-6) in each area that had unraveled approximately 2 to 3 inches from the wire rope.

(Ex. G-23). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 56.19024(e) of the Secretary's safety standards requires that "[u]nless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs . . . [d]istortion of the rope structure." 30 C.F.R. § 56.19024(e). The Secretary proposed a penalty of \$6,624.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565193 as a violation of section 56.19024(e) because three out of six wire ropes on the same crane cited in Citation No. 8565192 were damaged. (Tr. 187-88; Ex. G-24). The ropes had three broken strands and numerous areas with various rope defects including doglegging, kinking, and birdcaging. (Tr. 192; Ex. G-24,25). There were 19 total strands, each of which had seven individual wires. (Tr. 196). Distorted wire ropes cause weight to be distributed unevenly throughout the length of the rope, which can break a rope. (Tr. 199). Broken ropes lead to the hazards of miners being crushed by a dropped load, struck by the rebounding rope, or hit by flying debris. (Tr. 199-200). The inspector designated the likely injury as a result of the cited condition to be fatal. (Tr. 201).

The inspector testified that an injury was reasonably likely to result from the cited condition because the operator planned to use the crane in an area where workers were present. (Tr. 202). The inspector also believed that the crane wires were highly likely to snap because they were extensively compromised. (Tr. 203). Inspector Urnovitz testified that Burton knew of the damage to the wire ropes, but believed that they did not present a hazard. (Tr. 205). Burton was also the operator of the crane. (Tr. 205).

Lenz testified that he objected to the violation because the inspector inaccurately described the number of strands and braids in the rope. (Tr. 326). Burton also testified that there was not a wire rope with seven strands and seven wires that supported loads on the crane. (Tr. 422). He did not dispute the doglegging or birdcaging. (Tr. 326).

2. Discussion and Analysis

I find that Respondent violated section 56.19024(e). Respondent claims that Citation No. 8565193 is invalid because the citation addresses a 7x7 wire rope while the cited crane has a 9x21 wire rope. Despite his testimony that the cited rope did not exist, Lenz does not dispute the damage to the rope, stating that he "was aware of the conditions." (Tr. 326). The inspector further undermines this argument by testifying that he based the citation upon incorrect

information provided by Burton and at the time of the hearing he believed that the wire rope was not 7x7. Miscalculating the number of strands in a wire rope does not eliminate the fact that the rope contained “distortion of the rope structure” in violation of section 56.19024(e). Respondent’s employee, moreover, was responsible for that miscalculation. The cited rope, based upon the inspector’s testimony and photographs, clearly existed and violated section 56.19024(e), regardless of the number of strands it contained.³

I also find that Citation No. 8565193 is an S&S violation of section 56.19024(e). The wire rope had broken wires, kinks, and other distortions. (Ex. G-24). Each individual defect of the rope created the hazard of a miner being fatally crushed if a wire rope broke during crane operation, likely dropping large loads onto miners. It is reasonably likely that such a hazard could contribute to an injury considering each distortion and damage to the rope increased and multiplied the likelihood of an accident occurring, the crane was used close to a miner on the ground, and the crane was scheduled to be operated again. Respondent’s management failed to identify the damage to the wire ropes and the float outrigger, which suggests that Respondent used the equipment carelessly, increasing the likelihood of an accident occurring. Citation No. 8565193 was reasonably likely to contribute to a fatal injury and was an S&S violation of section 56.19024(e). The gravity was serious.

I find that Citation No. 8565193 was the result of Respondent’s moderate negligence. Although it was reasonable to believe that the damage to the outrigger float was not hazardous, the damage to the cited wire ropes was obvious. The rope was badly frayed and distorted. Both Lenz and Burton were aware of these conditions but did not correct them because they believed the conditions did not pose a hazard. Respondent should have known of and corrected the hazardous condition. The facts do not support a high negligence finding.

Citation No. 8565193 is hereby **MODIFIED** to a moderate negligence designation. A penalty of \$1,000.00 is appropriate for this violation.

I. Citation No. 8565194

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565194 under section 104(a) of the Mine Act, alleging a violation of section 56.12028 of the Secretary’s safety standards. The citation states, in part:

The documentation for the most recent continuity and resistance testing could not be provided by the operator when requested. The grounding systems had been checked as required, but the record had been misplaced or lost.

(Ex. G-26). Inspector Urnovitz determined that there was no likelihood that an injury would occur and that injury was likely to cause no lost workdays. Further, he determined that the

³ Although subsections (a),(c),(g),and (h) of section 56.19024 require the calculation of the percentage of damaged strands in a wire rope to establish a violation of the standard, subsection (e) does not. 30 C.F.R. § 56.19024. Thus, the size of the rope is not crucial here.

operator's negligence was moderate. Section 56.12028 of the Secretary's safety standards requires "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter." 30 C.F.R. § 56.12028. It also requires that a "record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." *Id.* The Secretary proposed a penalty of \$100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565194 as a violation of section 56.12028 because Respondent did not provide documentation for its most recent continuity and resistance testing of its grounding system. (Tr. 208). Operators must test grounding systems anytime a plant is moved or subjected to an event that may disrupt the system. (Tr. 211). The portable crusher was recently torn down and moved. (Tr. 211). Respondent produced documentation of its previous system tests, but could not locate documentation of its most recent tests. (Tr. 210, 212). Burton did inform the inspector that Respondent performed a test upon the grounding system approximately two weeks prior to the inspection. (Tr. 211). Inspector Urnovitz called Citation No. 8565194 a "paperwork violation" that had "no likelihood" of causing an injury because he credited Burton that Respondent performed the tests. (Tr. 213). The inspector designated the citation as the result of moderate negligence because Burton performed and recorded the test, but could not provide it to the inspector. (Tr. 214).

Lenz testified that he exported the records to an office to make copies without informing Burton. (Tr. 329). Respondent did not produce a copy of the records before or during the hearing and stated that they may no longer exist. (Tr. 330).

2. Discussion and Analysis

I find that Respondent violated section 56.12028 because Respondent failed to keep a record of its most recent grounding tests available to the inspector upon request. Respondent argues that the inspector never requested paperwork from the office. The inspector did request paperwork from the supervisor of the mine, who was responsible for creating and providing that paperwork. The supervisor informed the inspector that he could not produce the records and did not do so, which was a violation of the standard upon its face. The inspector must simply request the records, not make efforts to contact various members of the Mine's management to obtain them, especially after being told that the records were lost. Respondent, furthermore, could not produce the records at hearing. Citation No. 8565194 is a violation of section 56.12028.

I find that Citation No. 8565194 resulted from Respondent's low negligence. Respondent failed to produce the records due either to misplacing them or a miscommunication amongst Respondent's management as to where the records were stored. The violation posed no danger to miners and Respondent's older records were available to show that it normally kept such records. The violation was not serious.

Citation No. 8565194 is hereby **MODIFIED** to a low negligence designation. A penalty of \$50.00 is appropriate for this violation.

J. Citation No. 8565195

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565195 under section 104(a) of the Mine Act, alleging a violation of section 56.18002(b) of the Secretary's safety standards. The citation states, in part:

The documentation for the work place exams conducted during the past 12 months could not be provided by the operator when requested. The exams had been done as required, but records were not consistently kept. The operator could not produce any records for this operating season, which began approximately 6 weeks ago.

(Ex. G-27). Inspector Urnovitz determined that there was no likelihood that an injury would occur and that injury was likely to cause no lost workdays. Further, he determined that the operator's negligence was high. Section 56.18002(b) of the Secretary's safety standards requires "[a] record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative." 30 C.F.R. § 56.18002(b). The Secretary proposed a penalty of \$100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565195 as a violation of section 56.18002 because Respondent could not produce records of workplace exams that occurred after the most recent move. (Tr. 222). Respondent did have past exam records and the inspector believed that Burton did perform the exams. (Tr. 222). The inspector believed that there was no likelihood of injury as a result of this violation because it was a "recordkeeping" violation. (Tr. 223).

Inspector Urnovitz designation Citation No. 8565195 as the result of Respondent's high negligence because Burton clearly knew that records of workplace exams were required, but he told the inspector that he did not create the records. (Tr. 223, 228).

Lenz testified that the records of the workplace examinations were also removed from the Mine site to make copies. (Tr. 332). Respondent did not produce workplace examination documents at any time. (Tr. 333-34).

2. Discussion and Analysis

I find that Citation No. 8565195 is a violation of section 56.18002 because Respondent failed to produce records of its workplace examinations. The parties' arguments concerning Citation No. 8565195 mirror those made concerning Citation No. 8565194. Although the standards relate to different records, each requires that the operator make those records available to the inspector. Citation No. 8565195 is a violation of section 56.18002 for the same reasons that Citation No. 8565194 violated section 56.12028

I find that Respondent's high negligence caused Citation No. 8565195. Although Lenz testified that the workplace examination records were available at the time of the inspection, he could not prove the truth of this statement because he could not produce those records at the hearing. Burton, furthermore, was responsible for creating the records of the workplace examinations and knew that those records should be created and presented to inspectors upon demand; Burton, however, told the inspector that he had not created the records. Therefore, I find that Citation No. 8565195 resulted from Respondent's high negligence because the supervisor of the Mine, who was responsible for examination records, failed to produce or generate the records despite knowing that they were required.

A penalty of \$125.00 is appropriate for this violation.

K. Citation No. 8565196

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565196 under section 104(a) of the Mine Act, alleging a violation of section 56.4201(a)(2) of the Secretary's safety standards. The citation states, in part, "[a]ll of the four fire extinguishers at the site had not . . . received a maintenance check since 07/2007." (Ex. G-28). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.4201(a)(2) of the Secretary's safety standards requires that:

Firefighting equipment shall be inspected according to the following schedules . . . [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

30 C.F.R. § 56.4201(a)(2). The Secretary proposed a penalty of \$100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565196 as a violation of section 56.4201(a)(2) because Respondent had not performed a maintenance check upon four fire extinguishers at the Mine in the previous 12 months. (Tr. 229). The tags affixed to the extinguishers indicated that the last maintenance check that Respondent performed upon them occurred in July 2007. (Tr. 299). Most operators hire contractors, who always affix date tags, to inspect extinguishers. (Tr. 230). Burton indicated to the inspector that he was not aware that yearly maintenance checks are required for extinguishers. (Tr. 231). Respondent did include extinguishers in its monthly visual checks and previous workplace exams. (Tr. 231).

Failing to conduct maintenance checks upon extinguishers could cause those extinguishers to malfunction if their use was required, according to the inspector. (Tr. 232). Miners could enter confined areas to fight fires with the extinguisher. (Tr. 233). Failure or

malfunction of extinguishers in a confined space could lead to lost day workday or restricted duty injuries in the form of smoke inhalation or burns. (Tr. 232-33).

The inspector testified that the cited condition was unlikely to lead to an injury because the Mine had few confined areas. (Tr. 234). He designated the negligence as moderate because Respondent should have known to perform yearly maintenance checks upon extinguishers. (Tr. 234). An independent contractor working at the Mine had an extinguisher that satisfied section 56.4201(a)(2). (Tr. 237).

Lenz testified that Respondent sent 10 to 12 fire extinguishers to be inspected and that the cited extinguishers were temporary replacements that came from Lenz's personal shop. (Tr. 335). Lenz testified that Respondent sent its extinguishers to Fleet Parts and Service, which could not supply Respondent with a record documenting the service of the fire extinguishers due to the passage of time. (Tr. 337). Lenz could not find any record either. (Tr. 337). Lenz was "100% sure [Burton] was aware the fire extinguishers were getting charged." (Tr. 336).

2. Discussion and Analysis

I find that Respondent violated section 56.4201(a)(2) by failing to inspect four fire extinguishers. Even if Respondent had 10 to 12 extinguishers being serviced off the Mine site, the four that were there did not meet the standard. Although the presence of expired extinguishers may be safer than the complete absence of extinguishers, I agree with the Secretary's argument that welding was being done at various parts of the mine to restore guards and a miner attempting to use a fire extinguisher to fight a fire in an enclosed space could be harmed if the extinguisher malfunctioned. The extinguisher brought to the Mine by a contractor does not abate this condition, as Respondent argues, because the uninspected extinguishers still present a hazard. The difference between the hazards of the absence of extinguishers and presence of expired extinguishers accounts for the fact that this citation is non-S&S.

Respondent's argument that fire extinguishers are only used in case of emergency goes to the likelihood of an injury, not the fact of violation, because the violation of a safety standard does not require the showing of a hazard. *Allied Products Inc.*, 666 F.2d at 892-93. The occurrence of an emergency, furthermore, would be assumed when evaluating the S&S nature of a condition. *Cumberland Coal Resources, LP*, 717 F.3d 1020 (D.C. Cir. 2013).

I find that Citation No. 8565196 was the result of Respondent's moderate negligence. A penalty of \$100.00 is appropriate for this violation.

L. Citation No. 8565197

On August 12, 2010, Inspector Urnovitz issued Citation No. 8565197 under section 104(a) of the Mine Act, alleging a violation of section 56.20008(a) of the Secretary's safety standards. The citation states, in part:

There were no toilet facilities at the mine site, or readily accessible to the miners. The closest toilet was at a gas station that was over 1 mile away from the mine.

(Ex. G-29). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that three persons would be affected. Section 56.20008(a) of the Secretary's safety standards requires that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." 30 C.F.R. § 56.20008(a). The Secretary proposed a penalty of \$138.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565197 as a violation of section 56.20008(a) because there were no toilet facilities at the Mine. (Tr. 240). The inspector did not observe any toilets and Burton told the inspector that miners were using toilets that were one mile away. (Tr. 240-41). Three miners were at risk of contracting intestinal illness from unsanitary conditions, which was likely to result in lost workdays or restricted duty according to the inspector. (Tr. 241-42). The inspector testified that an injury was unlikely because the Mine had water available. (Tr. 243). There was no hot water available. (Tr. 243).

The inspector designated the citation as the result of Respondent's moderate negligence. Burton was aware that there were no toilets at the Mine, but he believed that being able to drive a mile fulfilled the requirement. (Tr. 243). The condition existed for an extended period of time; there had never been toilets or sanitary facilities at the Mine. (Tr. 243).

Lenz testified that Respondent provided restroom or toilet facilities in an adjacent lumber mill as well as at the scale shack where Respondent would supply customers with gravel. (Tr. 338-39). Burton testified that the lumber mill and scale shack had restrooms that were 200 and 400 yards away. (Tr. 424-25). Burton also testified that he told the inspector that they used the toilets at the gas stations. (Tr. 425).

2. Discussion and Analysis

I find that Respondent did not violate section 56.20008(a) because it did provide toilet facilities. I credit Lenz's testimony that miners used the toilet facilities located at the adjacent scale shack. These facilities were "compatible" with the mine site because the Mine used the scale shack when customers wanted to buy gravel. Lenz testified that the facilities were about 200 and 400 yards from the Mine. The Secretary argues that these toilets were not readily accessible because they were 200 yards away, but the scale shack was accessible to miners to fill customers' orders, which means it was also accessible for the use of toilets. Burton's testimony that employees drove to a gas station to use the bathroom does not change the existence of the available facilities. The Secretary failed to meet his burden of proof. Citation No. 8565197 is hereby **VACATED**.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty.⁴ Respondent's history of previous violations is set forth in Exhibit G-30. During the period between 5/11/2009 and 8/10/2010, Respondent had a history of 22 paid violations at the Mine of which 13 were S&S violations. At all pertinent times, Respondent was an extremely small operator. Information at MSHA's Mine Data Retrieval System ("MDRS") shows that Respondent employed three miners during the third quarter of 2010 and no miners after that. The MDRS also shows that the total hours worked at the Mine in 2010 was 417. A major reason I reduced the penalties in this case is Respondent's very small size. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business.⁵ The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
8565186	56.4101	\$100.00
8565187	56.12004	50.00
8565188	56.14107(a)	Vacated
8565189	56.9300(a)	108.00
8565190	56.14100(c)	Vacated

⁴ Commission judges assess penalties *de novo*. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). "In determining the amount of the penalty, neither the judge nor the Commission is bound by a penalty recommended by the Secretary." *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). "However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission in *Sellersburg* explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone* at 293. Congress intended civil penalties to provide a "strong incentive for compliance with mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). The penalties I have assessed in this decision provide a strong incentive for compliance taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(c), and my findings and conclusions.

⁵ The MDRS indicates that the Mine began operations July 19, 2007, and that the Mine was "abandoned" on or about August 10, 2011. This notation may reference the sale of the crusher.

8565191	56.14132(a)	400.00
8565192	56.14100(c)	600.00
8565193	56.19024(e)	1,000.00
8565194	56.12028	50.00
8565195	56.18002(b)	125.00
8565196	56.4201(a)(2)	100.00
8565197	56.20008(a)	Vacated
TOTAL PENALTY		\$2,533.00

For the reasons set forth above, the citations and orders are **AFFIRMED, MODIFIED,** or **VACATED** as set forth above. North Idaho Drilling, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,533.00 within 40 days of the date of this decision.⁶

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

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⁶ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1331 Pennsylvania Avenue N.W., Suite 520N
Washington, D.C., 20004-1710
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August 7, 2013

SECRETARY OF LABOR,	:	DOCKET NO. WEVA 2011-283
MINE SAFETY AND HEALTH	:	A.C. No. 46-09231-235522-01
ADMINISTRATION (MSHA),	:	
Petitioner,	:	
	:	
v.	:	
	:	
NEWTOWN ENERGY, INC.,	:	Mine: Coalburg No. 2
Respondent.	:	

DECISION

Appearances: Benjamin D. Chaykin, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Christopher D. Pence, Allen, Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: L. Zane Gill, Administrative Law Judge

This case involves a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Newtown Energy, Inc. at its Coalburg No. 2 mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (2012) (the "Mine Act" or "Act"). The case comprises a single 104(d) (1) citation written on May 25, 2010, Citation No. 8110086. The parties presented testimony and documentary evidence at the hearing held in Charleston, West Virginia, on April 24, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

In their pre-hearing reports, the parties submitted the following stipulations:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 ("the Act").

2. Newtown Energy, Inc. was an "operator" as defined in Section 3(d) of the Act at the coal mine at which the citations and orders at issue in this proceeding were issued.
3. The products of the mine at which the citations and orders at issue in this proceeding were issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.
4. Operations of Newtown Energy, Inc. at the coal or other mine at which the citations and orders at issue in this proceeding were issued are subject to the jurisdiction of the Act.
5. The maximum penalty which could be assessed for these violations pursuant to 30 U.S.C. 820(a) will not affect the ability of Newtown Energy, Inc. to remain in business.
6. The individual or individuals whose signatures appear in Block 22 of the citations and orders that are at issue in this proceeding were each acting in their official capacity and as an authorized representative of the Secretary of Labor when each citation and order was issued.
7. None of the exhibits that the parties intend to offer into evidence and that were exchanged prior to the hearing will be subject to objection as to authenticity, and the authenticity of all such documents is specifically stipulated.
8. True copies of each of the citations and/or orders that are at issue in this proceeding, with any and all modifications and abatements, were served on Newtown Energy, Inc. or its agent as required by the Act.
9. Exhibit A to the Secretary's Petition for Assessment of Civil Penalty in WEVA 2011-283 accurately sets forth the number of inspection days, size of the mine, mine operator and history of violations at issue in this proceeding.
10. Each citation or order at issue in this proceeding was timely abated, and the Respondent demonstrated good faith in achieving rapid compliance.

(Gov't Pre-hearing Rept. 3-4; R. Pre-hearing Rept. 2)

Findings and Discussion

MSHA Inspector Russell Richardson (“Richardson”) issued Citation No. 8110086 during his regular inspection of the Newtown Energy, Inc. (“Newtown”) Coalburg No. 2 mine (“the mine”) on May 25, 2010. (Tr. 26:10-12) Richardson wrote the citation for Newtown’s alleged failure to properly lock/tag out the “cathead” power cable connector for the Number 34 shuttle car in the Number 2 section of the mine. (Tr. 31:20-23; 36:8-10; 53:18-54:3)

Citation No. 8110086¹

On May 25, 2010, Richardson issued Citation No. 8110086 to Newtown for a violation of 30 C.F.R. § 75.511. The citation alleges that:

Proper lock out and tag out was not being practiced on the #2 Section. The Mine Superintendent had locked out the cathead for the #34 shuttle car and left the key in the lock while repairing the trailing cable.

“This violation is an unwarrantable failure to comply with a mandatory standard.”

(Ex. G-3)

The inspector alleged that a fatal injury was reasonably likely to occur, that the violation was significant and substantial (“S&S”), that one person would be affected, and that the violation was the result of high negligence on the part of the operator. (Ex. G-3) The Secretary proposed a civil penalty of \$7,578.00. (Pet. Assessm’t. Civ. Pen. Ex. “A”)

The Violation

Newtown argued (Tr. 10:20-24) that Citation No. 8110086 should be vacated because the type of repair done on the power cable is not “electrical work” as contemplated in 30 C.F.R. § 75.511 and does not trigger an obligation to de-energize the power cable. Before I reach that issue, I must resolve a factual dispute stemming from Citation No. 8110085, issued the same day, but not part of this case: Did Richardson find two separate defects in the power cable that had to be repaired in order for Citation No. 8110085 to be abated?

¹ Richardson issued another citation on May 25, 2010, that is not at issue in this case. Citation 8110085 (Ex. G-2) alleged that Richardson found two defects in the No. 34 shuttle car power cable that had to be repaired. It was during the repair that the circumstances underlying the citation at issue here occurred. (Tr. 40:15-41:20) Citation No. 8110085 is relevant to establish why Richardson wrote Citation No. 8110086 the way he did. It will be mentioned in the discussion below for its relevance to the contents of Citation No. 8110086.

Robert Herndon, who served as superintendent of the Coalburg No. 2 mine when the citation was issued (Tr. 93:12-13), testified that Richardson found only one defect, and that it was so minor that repairing it (to abate Citation No. 8110086) only required Herndon to apply a new exterior wrap to the cable. (Tr. 105:15-108:15) Newtown argues that such a minor repair is not “electrical work” and, as a result, there was no need to de-energize the power cable, making any failure on Herndon’s part to hew exactly to the lock and tag-out procedure in 30 C.F.R. § 75.511 immaterial. Richardson, on the other hand, testified that he found two defects in the power cable – the selfsame two he cited in Citation No. 8110085 – and that one of them was a breach in the cable jacket deep enough and serious enough to expose one of the energized wires.² (Tr. 40:2-41:20)

Citation No. 8110085 alleged the following:

The trailing cable on the #34 Shuttle Car operating on the #2 section was not adequately insulated or sealed so as to exclude moisture. There was one splice in the cable that had the outer jacket busted and was exposing the enter [sic] insulated power conductors and one splice had the outer jacket busted and was exposing the copper of the black power conductor.

(Ex. G-2)

There is no reason to doubt the accuracy of Richardson’s testimony that he found two separate defects in the shuttle car power cable. (Tr. 40:2-14) His contemporaneous field notes confirm this (Ex. G-1 17), as does the text of Citation No. 8110085 (Ex. G-2), and his description of the repair done to abate Citation No. 8110085. (Tr. 44:19-45:6) In contrast, Herndon testified that he repaired only one break in the cable’s protective sheathing and merely applied a new surface wrap. At the close-out conference with Richardson, however, Herndon failed to contest the accuracy of the citation itself, which he personally received and which clearly states that two defects were found and repaired. (Ex. G-2) Herndon testified in response to questioning by the judge that he was aware that Richardson’s citation claimed that there were two defects in the power cable that had to be repaired. (Tr. 125:14-126:18) He equivocated about whether he protested to Richardson about the discrepancy at any time while the two of them were together. (Tr. 126:23-127:11) Herndon’s failure to notice or raise the obvious discrepancy while Richardson was present undercuts his credibility on this point. (Tr. 65:6-23) Moreover, Newtown apparently paid the penalty for Citation No. 8110085 without contesting the accuracy of its allegations, central to which was the claim that two defects were found and repaired. I credit Richardson’s testimony and find that there were two defects in the cable jacket, one of

² In addition to being key to deciding whether there was at least one cable defect serious enough to require “electrical work” to repair, the existence and severity of the defects cited in Citation No. 8110085 would be relevant to the evaluation of the gravity, negligence, S&S designation, and unwarrantable failure determination in Citation No. 8110086.

which exposed an energized inner wire. I further credit Richardson's testimony that repairing the more serious defect required Herndon and Joey Benedict (Tr. 70:20-72:1) to cut into the power cable to expose the copper power lead in order to repair it.

Whether Benedict (Tr. 70:24-71:5) was a certified electrician or otherwise qualified to assist Herndon, who was a certified electrician (Tr. 97:17-20), is a point that could bear on the question of whether the repairs done on the power cable were significant enough to constitute "electrical work" under the standard. With my finding that two defects were found and repaired, one of which required cutting into the cable to expose a copper power lead, Benedict's qualifications are a loose end that needs to be addressed. According to Newtown's theory, Benedict's lack of formal qualifications is indirect proof that there was only one relatively minor defect in the cable that did not require a lock or tag-out to de-energize the cable. Had the defect actually required "electrical work" to repair, it would have been improper and a separate violation of another standard (30 C.F.R. § 75.153) for Benedict to have assisted Herndon.³ (Tr. 107:7-110:1) Since Richardson was in the vicinity during the repair and did not cite Newtown for allowing a non-qualified person to assist with "electrical work", Newtown argues that Richardson was wrong about there being two defects in the cable. His failure to cite for having an unqualified person do "electrical work" proves, according to Newtown's argument, that there was only one defect and that it was so minor as to not require "electrical work" to repair. (Resp. Post-Hearing Brief 9) However, there is another more plausible and cohesive explanation for Richardson's failure to cite Newtown for Benedict's role in this scenario, i.e., Richardson simply made a mistake. Perhaps he could have, or even should have, issued a citation for Benedict's involvement, but he did not. I find this to be the more compelling probability. In sum, I conclude that the work done by Herndon and Benedict to repair the power cable was "electrical work" as contemplated by 30 C.F.R. § 75.511 and that Citation No. 8110086 will not be vacated under this theory.

The Standard

Citation No. 8110086 was issued under 30 C.F.R. § 75.511, which reads as follows:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall

³ Herndon conceded under questioning that leaving the key in the lock on the cathead would violate federal law if "electrical work" were being done (Tr. 119:20-24) because someone could remove the lock and re-energize the line. (Tr. 120:24-121:3)

be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

30 C.F.R § 75.511.

The standard requires any disconnecting device, such as the cathead in this instance, to be locked out, if possible, and/or suitably tagged by the person performing electrical work. Where it is not possible to lock out the connector, it must be opened and suitably tagged to prevent its being energized.

The Secretary argues that Herndon's decision to leave the key in the only lock he could locate at the time, having been directed by Richardson to lock the power cable out to assist in his inspection activity, violated the standard. There is no dispute that Herndon's choice of options was less than perfect and no dispute that leaving the key in the lock made it at least theoretically possible that someone other than Herndon would see the lock on the cathead, misinterpret the situation, remove the lock, re-energize the power cable, and create the possibility of an electrocution. Setting aside for the moment the likelihood of such a chain of errors actually happening, and the fact that Richardson superceded the normal mining process by deputizing Herndon to assist in his inspection, the strict liability nature of the standard requires a finding that there was a violation. Herndon's attempt to comply with the standard's requirements while also following Richardson's directions resulted in a failure to adequately prevent inadvertent re-energization of the power cable, which is the *sine qua non* of the standard.

This citation leaves a bad taste in the mouth. As discussed below, Richardson cited a condition that arose solely from Herndon's efforts to assist him with his inspection. It is tempting to vacate the citation on the basis of the precedent in *Freeman United Coal Mining Co.*, but there is an essential difference between the crux of that case and this one. 11 FMSHRC 161 (Feb. 1989). In *Freeman*, an inspector ordered that work cease immediately to rehang a ventilation curtain that had just been torn away from its attachments as he was conducting his inspection. 11 FMSHRC at 162-63. The event occurred in the normal course of mining operations, but the inspector ordered that the curtain not be repaired immediately, which would have been done in the normal flow of mining operations and was already underway. *Id.* at 162. He wanted to measure airflow inby the face before the curtain repair was done, even though the condition had existed only minutes and it would take only a few minutes to complete the repair and restore airflow. *Id.* at 162-63. The inspector issued a 104(d) (2) citation alleging S&S and unwarrantable failure. *Id.* at 163. Once he determined to issue the citation, he allowed the repair work to proceed. *Id.* at 163. It took only minutes and immediately abated the violation. *Id.* at 163.

In *Freeman*, the operator asked the ALJ to vacate the citation, arguing that the inspector had interfered with the normal mining cycle by halting the repair, which created or at least prolonged the violative condition. *Id.* at 163-64 The ALJ held that the interference was immaterial because a shuttle car tearing down a ventilation brattice cannot be considered part of

the normal mining cycle. *Id.* at 164. The Commission reversed and vacated the citation. *Id.* at 166. There is no doubt that the air flow was below standard and no doubt that such a violation fits comfortably within the strict liability regimen contemplated by the Mine Act.⁴ Despite that, in this and presumably other factual circumstances, the Commission recognized that a temporary deviation from a standard can occur without constituting a violation. Things occasionally happen that inevitably cause results below a standard. The key to compliance lies in expeditiously taking effective steps to come back into compliance.

I will not vacate this citation, because following the *Freeman* decision would seriously undercut the concept of strict liability without offering a satisfactory justification. Doing so would also improperly focus on the inspector's interference with the normal course of mining operations. There is a logical parallel, however, between the facts underlying *Freeman* and those in this case. In both instances, it is an act of the inspector that either creates (in this case) or exacerbates (in *Freeman*) the violating condition, but in this case, the inspector did not interfere with normal operations. Deputizing Herndon to assist with his inspection set in motion an event that was not part of the normal mining process. This *ad hoc* deputization further deviated from normal mine operations by making Herndon the inspector's factotum for a few moments, blurring the normal lines of authority and responsibility.⁵ Strict liability requires adherence to the letter of the standard for the sake of uniformity and in the interest of maximum protection of miners. Rather than vacate this citation, which *Freeman* appears to support, I believe the wiser course is to find a violation of the standard, which preserves the notion of strict liability, and to deal with the "but for" aspects of the inspector's involvement during the discussion of negligence, likelihood, S&S, and unwarrantable failure. Accordingly, I conclude that Herndon's use of the defective lock constituted a technical violation of the standard.

Negligence

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

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the

⁴ The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (*citing Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)).

⁵ Herndon, and other similarly situated mine officials, face a Hobson's choice. If he had foreseen that helping the inspector would lead to a serious violation, he might have been prompted to refuse assistance and thereby face the potential of civil or criminal liability for obstructing the inspection. 18 U.S.C. § 111 (2012); 30 U.S.C. § 813(a) (2012); *Topper Coal Co.*, 20 FMSHRC 344, 347- 49 (Apr. 1998).

operator was negligent.” 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

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

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

Citation 8110086 alleges high negligence. (Ex. G-3) For the reasons that follow, I conclude that the negligence underlying this violation is low.

Table X of 30 C.F.R. § 100.3(d) links an allegation of high negligence with the absence of mitigating circumstances.⁶ Several factors mitigate significantly against a finding of “high” negligence.⁷ First, and most importantly, the violation underlying this citation was a direct result

⁶ Richardson did not consider there to be any mitigating circumstances when he wrote the citation. (Tr. 87:2-8)

⁷ Newtown’s counsel suggested several other elements of possible mitigation in his cross-examination of Richardson, including the fact that the power cable was actually de-energized (Tr. 87:22-88:1), the defective lock was on the cathead for only a short time (Tr. 88:11-18), the cathead was the only one of many others at the power center that was not effectively locked out (Tr. 88:23-89:20), all catheads and receptacles at the power center were labeled (Tr. 89:21-24), the section was not producing coal at the time (Tr. 90:1-3), the miners knew the inspector was on the section (Tr. 90:4-8), the miners had all received annual refresher training on proper regard

(continued...)

of the inspection process, not the normal mining cycle. But for Richardson's direction to Herndon to lock out the power cable cathead to facilitate his thorough inspection of the weak splice, there would have been no reason to lock it out. (Tr. 111:2-17) Second, Richardson's failure to recognize the interplay of his direction to Herndon and the resulting violation mitigates against Newtown's negligence in that it overstates Newtown's contribution to the violation and ignores his own. Herndon's choice of means to comply with Richardson's directive was wrong under the circumstances. (Tr. 119:15-120:12) Based on his experience and training⁸, he could have done something different that would have facilitated the inspection without creating a potential hazard. (Tr. 138:4-18) He chose a method that increased the likelihood of an injury-causing event. (Tr. 120:18-121:3) He cut corners⁹ in an attempt to facilitate Richardson's inspection (Tr. 115:4-21), and thereby gave the inspection higher priority than the degree of safety contemplated by the standard. On the other hand, Richardson failed to factor his own role into his response to Herndon's mistake. Third, Herndon's attempt to lock out the cathead by using the lock with the key still in it was, notwithstanding its flaws, a good faith attempt to comply with Richardson's directive.¹⁰ Fourth, the standard allows for alternate methods to satisfy its safety-promoting purpose:

Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons.

30 C.F.R. § 75.511 (Emphasis added). It expressly contemplates situations in which it is not possible to lock out effectively, and allows for the alternative of suitably tagging. What constitutes suitable tagging is not specified in the standard, nor was I able to find any direct explanation of what that term means in practice. Counsel for Newtown did not argue this point directly (Tr. 88:5-10), and I do not consider it a basis to vacate the citation, but it should be considered an element of mitigation. Though I do not vacate the citation on the theory that

⁷(...continued)

for locking and tagging (Tr. 90:9-13), or that the citation was terminated in five minutes (Tr. 90:24-91:3).

⁸ Herndon was a qualified mine electrician with the same basic training as Richardson. (Tr. 30:15-31:5; 76:3-16)

⁹ Herndon could have broken the key off in the lock, thereby making it less likely that anything untoward could happen. (Tr. 85:30-86:15) Richardson testified that Herndon chose not to because he would have had to cut the lock off the cathead later, which would have taken additional time. (Tr. 55:22-56:6)

¹⁰ Herndon testified that he did not have a lock with him during the inspection, and had to ask several miners for a lock before he was able to acquire the one he used on the cathead. (Tr. 101:13-102:5)

Herndon's leaving the lock with the key still in it on the cathead satisfied the "suitable tagging" alternative mentioned in the standard, it did act as a signal to anyone seeing it that something out of the ordinary was going on.¹¹ This is better than no signal at all, though far short of an actual lock out. I conclude that leaving the lock and key on the cathead is at least some evidence of Herndon's attempt to signal to other miners that extra caution was in order, even if it did not make it physically impossible to re-energize the cable. It is an element of mitigation that bears on my assessment of Newtown's negligence. Fifth, the faulty lock was on the cathead for a short amount of time.¹² These elements constitute considerable mitigation, which make a finding of "high" negligence unsupportable and justify a finding of "low" negligence.

Gravity ("Seriousness")

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Citation 8110086 categorizes the gravity of an event arising from this violation as potentially fatal for a single miner, and alleges that such an event would be reasonably likely to occur. (Ex. G-3; 84:16-85:3) From the following, I conclude that any event arising from this violation would be unlikely to occur. However, I agree with the Secretary that such an event would be potentially fatal and would involve a single person.

First, it is unlikely that a miner who is reasonably aware of his surroundings (Tr. 11:8-15) and trained to the contrary (Tr. 61:21-62:16; 80:6-81:13; 112:15-113:11) would re-energize the power cable by removing the lock and plugging the cathead back into the power center (Tr. 64:9-20; 111:22-112:14) if he sees a cathead lying on the ground with a lock and key in it (Tr. 54:22-55:1). If he did, however, it could cause an electrocution. (Tr. 41:12-20; 43:12-19; 58:11-24) The

¹¹ Whether Herndon actually used a tag with the defective lock is not clear in the record. (Tr. 55:7-15)

¹² There are conflicts in testimony concerning the amount of time that the lock was on the cathead. Based on the estimates the witnesses gave in their testimony, the lock was in place for between ten and thirty minutes. (Tr. 56:24-57:21; 105:5-8; 108:3-9; 110:3-18)

power cable carried 480 volts. (Tr. 17:15-24) Second, although there were several miners in the area (Tr. 58:2-10), and according to the testimony of Inspector Richardson, three persons were exposed to the electrocution hazard (Tr. 59:1-5), I see no reason or basis to deviate from Richardson's allegation that a single miner would be potentially exposed to the hazard. (Ex. G-3) Third, as to likelihood, I conclude that under the circumstances it was unlikely that the power cable would be inadvertently re-energized. Despite the obvious problem of using a defective lock to mechanically prevent the cathead being re-inserted into the power center, the lock did provide a visual cue to any miner seeing it that the cathead should not be plugged back in, perhaps similar to the visual cue a proper tag used to tag out a cable like this would provide.

It is of some importance to me in this regard that the standard itself creates a substitute for mechanically locking out, i.e., it is acceptable to "suitably" tag a cathead when an actual lock-out is not possible. It is not necessary to ponder too long about whether the facts of this case line up sufficiently with the intent of the suitable tagging proviso. Contrary to what the Commission did in *Freeman*, I am not vacating the citation on that basis. I am convinced, however, that the tagging effect of finding a lock of any sort on a cathead mitigates against a finding of greater likelihood. In light of the absence of evidence or argument of what constitutes a suitable tag, it suffices to recognize in this manner the tagging-only alternative found in the standard.

Significant and Substantial

In *Mathies Coal Co.*, 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

In *U.S. Steel Mining Co.*, the Commission held:

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." [. . .] 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."

7 FMSHRC at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *see also Youghioghny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

The underlying violation of a safety standard is dealt with above. It is a discrete safety hazard to perform electrical work on equipment without locking or tagging it out. An ineffective lock-out violates the standard. The likelihood that an injury caused by the violation would be of a reasonably serious nature is also discussed above. Here, I focus on the likelihood that the hazard arising from failing to properly lock or tag out will result in an injury.

It appears that Richardson issued this 104(d) citation due to the confluence of two factors: (1) the degree of certainty that an incident would occur and (2) the potential of devastating injury. The former is consistent with the third *Mathies* S&S element and is central to this portion of the analysis; the later corresponds roughly to the gravity assessment common to all citations, which was discussed above, and the fourth *Mathies* S&S factor relevant in more egregious cases.

The key to my assessment of the likelihood of an incident arising from these facts is the interplay between three factors. The first two factors, the options for effective locking and tagging found in the standard and the deterrent effect of putting a lock, albeit defective, on the cathead, were discussed above. The third factor is the setting in which this violation occurred.

Richardson did his inspection of the shuttle car power cable splice at entry No. 4. (Tr. 63:3-7; 99:2-7) At this distance from the power center, a visual observation of the cathead was arguably possible, and a shout from a miner inquiring about why there was a lock on the cathead or warning another miner working around the cathead not to tamper with the lock could be heard. (Tr. 34:21-35:4)¹³ Herndon testified that because the mining machine was turned off and no coal was being produced, it would be much quieter than normal where the violation occurred. (Tr. 128:9-129:2) As a result, and premised on his statement that the power center was only 55 feet from the shuttle car (Tr. 102:22-24), anyone working on the de-energized cable would be able to see anyone approaching the power center and shout to them to leave the shuttle car cathead alone.¹⁴ The defective lock was on the cathead for only a few minutes before Herndon told

¹³ Richardson testified that the power center was about 115 feet from his location and not visible. (Tr. 36:22-37:15; 46:6-9) Herndon testified that the distance was only 55 feet. (Tr. 102:14-24)

¹⁴ This is contradicted in part by Richardson's testimony that the distance was about 115 feet. (Tr. 36:22-37:1) It is not necessary to reconcile whether there was a line of sight from the
(continued...)

Richardson about it, during which time no work was done on the power cable. (Tr. 104:23-105:11) The shuttle car's lights had been left on, which served as a secondary indicator of the power state of the system. (Tr. 49:24-50:16) The lights were out during Richardson's inspection, indicating that the power cable was de-energized. (Tr. 49:8-50:24) There were eight to ten men working in the No. 2 section on May 25, 2010 (Tr. 31:20-23; 98:11-14), who were aware that an MSHA inspector was doing an inspection in the area. (Tr. 77:5-11; 100:24-101:2)

The consequences of an unlikely concatenation of failures would be potentially fatal (Tr. 41:12-20; 43:12-19; 58:11-24), so one must be sober and realistic in evaluating the likelihood of the necessary chain of events. There are several systemic checks designed to prevent an electrocution. They are interrelated in purpose and effect. The degree of causal likelihood decreases with each additional link in the chain. All miners are initially trained and subsequently re-trained never to remove a lock placed by someone else. (Tr. 61:21-62:16; 80:6-81:13; 90:9-13; 111:22-112:14) In order for this element to fail, a miner must forget or ignore that training (Tr. 79:12-15), something that happens all too frequently. Nonetheless, several factors decrease the likelihood of that happening in this case. There was less than normal pressure to keep to a production pace, which as a matter of common sense might reduce a miner's incentive to cut corners. No coal was being mined during the time relevant to this violation because the mining machine was down for maintenance. (Tr. 75:6-9; 90:1-3; 99:2-7) There was no known impetus to re-energize a cable with a lock on it. The miners were aware that the MSHA inspector was on premises (Tr. 77:5-11; 90:1-8), which is far enough out of the ordinary to override a miner's being "on auto-pilot" while doing his job and to motivate him to be a bit more perspicacious and cautious than normal. This decreases the likelihood that a miner would carelessly and mindlessly do something as extraordinary as removing a lock someone else had put on a cathead without first finding out the reason it was there. Giving full weight to the fact that a lock with a key that cannot be removed should never be used to lock something out, the presence of the lock is nonetheless a visual cue, much the same as a tag, that should dovetail with the miners' training about never removing someone else's lock to prompt significant caution. Finally, the lock was on the cathead for only a short time. (Tr. 38:7-16) It stands to reason that a reasonably prudent miner seeing a lock with key on a power cable cathead would take steps to learn what was going on before removing it. This would take some time, making it less likely that the power cable would be inadvertently re-energized.

In sum, I am convinced and conclude that there was so little likelihood that all of the various catalysts needed to cause the cable to re-energize would coincide as to make the evaluation of it almost speculative. *Texasgulf*, 10 FMSHRC at 501-03 (The improbability of a chain of events is a proper basis not to find "reasonable likelihood" under the third prong of the *Mathies S&S* test.) As a result, I conclude that the violation was not significant and substantial.

¹⁴(...continued)

shuttle car to the power center. There is no dispute that the noise level was much less than normal, which is of some probative value.

Unwarrantable Failure

The term “unwarrantable failure” comes from section 104(d) of the Act. 30 U.S.C. 814(d) (2012). Taken together with “significant and substantial,” it creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp.*, the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure has been paraphrased 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 Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). In *Gatliff Coal Co.*, the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. 14 FMSHRC 1982 (Dec. 1992). Consistent with the discussion of enhanced enforcement above, the Commission stated that an unwarrantable failure may trigger the “increasingly severe enforcement sanctions of section 104(d)” whereas “[n]egligence [. . .] is one of the criteria that the Secretary and the Commission must consider in proposing and assessing [. . .] [all] civil penalt[ies].” *Id.* at 1988 (quoting *E. Assoc’d Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991)). Further, “[h]ighly negligent’ conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if 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.” *Gatliff Coal*, 14 FMSHRC at 1989 (quoting *E. Assoc’d Coal*, 13 FMSHRC at 186).

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time 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. *Mullins & Sons Coal Co.*, 16 FMSHRC 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, 1243–44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also considered an operator’s knowledge of the existence of the dangerous condition. *See, e.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator was aware of a brake malfunction failed to remedy the problem); *Warren Steen*, 14 FMSHRC at 1126–27; 1129 (knowledge of a hazard and failure to take adequate precautionary measures support unwarrantable determination). *See also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as something more than ordinary negligence. They are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable

failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009).

Was the use of a defective lock aggravated conduct constituting more than ordinary negligence? The traditional factors used to determine unwarrantable failure do not lend themselves well to the facts of this case. For instance, most of them include a temporal element. The extent of a violative condition can be seen as an expression of how long a condition has existed as well as how widespread it is. The former formulation duplicates or supplements the inquiry into how long a violative condition has existed, which is often formulated as a separate factor. Whether an operator has been actually or constructively placed on notice that a violating condition or practice exists or that it should be more diligent in its compliance is also largely an expression of how long the violation has existed. Finally, the operator's effort to abate a violating condition is most meaningful in light of how long the condition has existed. Unfortunately, these time-based factors are of little analytical assistance in a situation such as this where the violation arises from an act carried out in the presence of the MSHA inspector.

Another complication arises from the overlap between the high-degree-of-danger element of the traditional unwarrantable failure test and the negligence and gravity elements of the basic, underlying violation. They can both be proved by facts showing the relative seriousness and likelihood of an injury causing event. The distinguishing element is the weight given in the analysis.

Considering the traditional elements of the unwarrantable failure test set out in *IO Coal Company*, I am convinced that because this was an isolated, *ad hoc* event, noteworthy primarily because of the potential severity of consequences from an unlikely event - factors that have been given decisive weight in my analysis of negligence, gravity, and S&S - Herndon's actions were not an unwarrantable failure to comply with the relevant safety standard. 31 FMSHRC at 1350. The factors discussed above do not support a finding of aggravating circumstance or intentional misconduct.

Penalty

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

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the

effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Applying the 30 C.F.R. § 100.3 penalty calculation to the findings and conclusions above, the penalty recommended by the matrix is \$207.00. I accept the Secretary's evidence regarding the mine size, the size of the controlling entity, the ratio of violations per day, the number of persons involved, and the severity of a potential event. I adjust the calculation to reflect my findings of low negligence and unlikely gravity, and I apply the percentage point reduction for good faith abatement¹⁵ to come to that figure. After considering all of the penalty criteria, I assess a penalty of \$207.00 for this citation.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a total penalty of \$207.00. Newtown is hereby ORDERED to pay the Secretary of Labor the sum of \$207.00 within 30 days of the date of this decision.

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

¹⁵ Herndon immediately remedied the violating condition by finding and using a functioning lock on the cathead. (Tr. 46:1-23) The parties stipulated that the violation was timely abated in good faith. (Stip. No. 10; Tr. 7:11-18)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (“MSHA”),	:	Docket No. KENT 2010-159
Petitioner,	:	A.C. No. 15-08079-198829-01
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: No. 3
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky, for Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

On November 24, 2009, the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), filed a Petition for the Assessment of Civil Penalty (“Petition”) against Excel Mining, LLC (“Respondent” or “Excel”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended, 30 U.S.C. §§ 815, 820 (2006). Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty (“Answer”) on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (“Commission”), dated December 1, 2010, this case was assigned to the undersigned for adjudication.

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The Petition alleges two violations described in Citation Number 8236517 and Order Number 8236518, both of which were issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and for which the Secretary seeks penalties totaling \$28,133. In particular, Order Number 8236518 alleges a violation of 30 C.F.R. § 75.360(b) for failure to conduct an adequate preshift examination. Respondent disputes both liability and the penalty proposed by the Secretary for Order Number 8236518. In turn, Citation Number 8236517 alleges a violation of 30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan. Respondent acknowledges liability but disputes the penalty proposed by the Secretary for Citation Number 8236517.

A hearing was held on the charged violations in Pikeville, Kentucky, on October 18, 2011. At the hearing, the Secretary introduced the testimony of one witness, Billy Ray Meddings, and proffered five exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1–5. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 98–99. Respondent, in turn, introduced the testimony of one witness, Jimmy Rowe, and proffered three exhibits that were admitted into evidence and marked as Respondent's Exhibits ("R's Ex.") 1, 5, and 6. The Secretary stipulated to these exhibits at the hearing. Tr. 98–99. The Secretary and Respondent subsequently filed post-hearing briefs on January 9, 2012 and February 6, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS

Before the hearing, the parties entered into the following stipulations ("Stip."):

1. Respondent is subject to the Mine Act.
2. Respondent has an effect upon interstate commerce within the meaning of the Mine Act.
3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Respondent operates the No. 3 Mine, I.D. No. 15-08079.
5. The No. 3 Mine produced 1,789,927 tons of coal in 2008, and had 655,991 hours worked in 2008.
6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be “significant and substantial” or to involve “unwarrantable failure,” enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under [this Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, “Section 104(d)(1) distinguishes as more serious any violation that ‘could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,’ and establishes more severe sanctions for any violation that is caused by ‘an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.’” *Wolf Run Mining Co.*, 2013 WL 1249150, at *2 n.4 (Mar. 20, 2013) (alteration in original). This mechanism for enhanced

enforcement serves as a “forceful incentive for the operator to exercise special vigilance in health and safety matters.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)).

A. GRAVITY

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider “the gravity of the violation,” among other criteria. 30 U.S.C. § 820(i). Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if the event has occurred or was to occur; and (3) the number of persons potentially affected if the event has occurred or were to occur.

B. SIGNIFICANT AND SUBSTANTIAL

As discussed in greater detail below, the Secretary alleges that the charged violations were of a significant and substantial (“S&S”) nature. As defined by Section 104(d)(1) of the Mine Act, 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)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (April 1981), holding that a violation is properly designated as 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.” *Nat’l Gypsum Co.*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*:

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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted).

The S&S nature of a violation is distinct from the violation’s gravity. As noted by the Commission, “[t]he 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 at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from “a reasonable likelihood that the [cited] condition . . .

could contribute, significantly and substantially, to the cause and effect of a safety hazard.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, “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 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider “whether the operator was negligent.” 30 U.S.C. § 820(i). Thus, “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence as follows:

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

30 C.F.R. § 100.3(d). When analyzing an operator’s negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

D. UNWARRANTABLE FAILURE

As discussed in greater detail below, the Secretary alleges that the charged violations resulted from Respondent’s unwarrantable failure to comply with the cited standards. The Commission has described an unwarrantable failure 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,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002–04; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure analysis). The Commission has explained the role of Administrative Law Judges in determining whether conduct is “aggravated” in the context of the unwarrantable failure analysis:

[W]hether 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. . . . While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.

IO Coal Co., Inc., 31 FMSHRC 1346, 1350–51 (Dec. 2009). Repeated similar violations are relevant to the unwarrantable failure analysis to the extent that they serve to notify the operator that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261–62 (Aug. 1992).

IV. SUMMARY OF THE EVIDENCE

At the hearing, in support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Billy Ray Meddings and copies of Citation Number 8236517, Order Number 8236518, the field notes of Inspector Meddings, a document entitled “Assessed Violation History Report,” and the revised basic ventilation plan for Respondent's Number 3 Mine. Respondent, in turn, offered the testimony of Jimmy Rowe and copies of a written statement by Mr. Rowe regarding the alleged violations, a document entitled “Pre-shift Examiner's Report,” and a document entitled “Power Move.”

Inspector Meddings has been a member of the coal mining industry for over 30 years, including an unspecified period of time as a miner in Respondent's Number 3 Mine and four and a half years as an inspector for MSHA. Inspector Meddings testified that he issued Citation Number 8236517 and Order Number 8236518 during the course of an “E01 inspection”² which he performed at Respondent's Number 3 Mine on August 28, 2009. Tr. 100–02, 133. As part of that inspection, Inspector Meddings testified that he traveled to the Number 3 entry of the Number 4 section of the mine. Tr. 133, 136. While there, he observed “[t]he operator's date, time, and initials . . . written on the rib just right there outby the face,” which indicated to Inspector Meddings that an agent of Respondent had performed a preshift examination of the area 22 minutes prior to his arrival at that location. Tr. 106–07. Admitted into evidence as Secretary's Exhibit 3 and Respondent's Exhibit 1, respectively, the field notes of Inspector Meddings and written statement of Mr. Rowe reflect that the precise time of the preshift examination of the Number 3 entry, as recorded on the rib, was 4:55 a.m. S's Ex. 3; R's Ex. 1. The copy of the Pre-Shift Examiner's Report proffered by Respondent and admitted into evidence as Respondent's Exhibit 5 confirms that a preshift examination of the Number 4 section was performed by Rick Wright between 4:48 and 5:37 a.m. R's Ex. 5. Notably, Mr. Wright

² Inspector Meddings explained that an E01 inspection is performed at a given mine on a quarterly basis and requires an inspection of “every piece of equipment, all the records, everything at that mine.” Tr. 102–03; *see also* Tr. 114 (“Before we start an E01 inspection, we review all the documents. Ventilation plan[,]. . . the roof control plan, training plans.”).

recorded in the Pre-Shift Examiner's Report that he detected a concentration of methane of 0.35 percent in the Number 3 entry at the time he performed the preshift examination. *Id.*

In contrast, when Inspector Meddings proceeded to the face of the Number 3 entry and climbed on top of a "gob"³ in order to measure the level of methane by the roof at approximately 5:15 a.m., he found a concentration of at least five percent.⁴ Tr. 103–05, 136–38, 151; S's Ex. 3. Inspector Meddings testified that this particular level of methane created a risk of explosion and serious injury for the 11 miners working elsewhere in the Number 4 section at that time. Tr. 103–05, 110–12, 123–24. While Inspector Meddings acknowledged that power to the Number 4 section was shut down at the time of his inspection, he identified other ignition sources for an explosion, such as battery-operated scoops and four-wheelers that were "tramping across the section." Tr. 103–04, 111, 123, 134, 156–57; S's Ex. 3. He conceded, however, that he did not observe any equipment in the Number 3 entry at the time he took his reading, that four-wheelers were not permitted to travel in by the last open crosscut, and that battery-operated scoops were not permitted to travel in by the last open crosscut unless Respondent first tested for the presence of methane. Tr. 134–36.

Upon finding the elevated level of methane in the Number 3 entry, Inspector Meddings notified Jimmy Rowe, the chief electrician on the third shift who was accompanying him at the time, of the need to gather any miners in the Number 4 section at the power center and to correct the condition.⁵ Tr. 107, 140–41, 162–64; S's Ex. 3; R's Ex. 1. At the hearing, Inspector Meddings could not recall whether he showed Mr. Rowe his multi-gas detector at that time, but he testified that he normally would do so. Tr. 140. He acknowledged, however, that he failed to take a bottle sample to confirm the concentration of methane that he measured. Tr. 150–51; *see also* R's Ex. 1; Tr. 182. Mr. Rowe claimed that he did not see the reading taken by Inspector Meddings but that he heard the detector emit an audible alarm when Inspector Meddings climbed on top of the gob that had been pushed against the face. R's Ex. 1; Tr. 169–74, 185.

³ As described by Mr. Rowe, a "gob" is essentially a pile of loose waste. Tr. 170–71.

⁴ Inspector Meddings testified that he took the measurement using a Solaris multi-gas detector, which measures concentrations of methane up to five percent and thereafter "goes into OR, which is out of range." Tr. 103. He also testified that the detector sounds an audible alarm when it measures a concentration of one percent. Tr. 140.

⁵ Inspector Meddings also notified Mr. Rowe of the need to deenergize the section, to which Mr. Rowe responded that the power was already shut down. Tr. 140, 169, 174–75; R's Ex. 1. Mr. Rowe testified that he shut down the power at least one hour prior to Inspector Meddings' arrival at the Number 3 entry because miners were performing a power and belt move in the section. Tr. 165, 182; *see also* R's Ex. 1.

Inspector Meddings subsequently attempted to measure the air velocity behind the “line curtain” in the Number 3 entry,⁶ using first a calibrated anemometer and then chemical smoke,⁷ but he was unable to detect any movement. Tr. 115, 142; S’s Ex. 2, 3. Consequently, at 5:19 a.m., Inspector Meddings issued Citation Number 8231517 to Respondent for failure to comply with the requirement set forth in Respondent’s revised basic ventilation plan that Respondent maintain a minimum air velocity of 1000 CFM at the “[i]nby end of line curtain[s] in idle places.” S’s Ex. 2, 3, 6.

Inspector Meddings testified that the line curtain in the Number 3 entry appeared to have been hung improperly by Respondent, resulting in the lack of air flow and accumulation of methane at the mine face. Tr. 116–20, 145–46. Mr. Rowe observed the condition of the line curtain as well, testifying that the portion of the line curtain that extended into the intersection of the Number 3 entry and the last open crosscut appeared to have ripped away and fallen from the first bolt pinning it to the roof. Tr. 175–77. According to the field notes of Inspector Meddings, neither he nor Mr. Rowe observed a rock in the vicinity of the line curtain that could have dislodged it. S’s Ex. 3.

Upon being notified of the level of methane found by Inspector Meddings, Mr. Rowe retrieved Mr. Wright, who informed Inspector Meddings that he had not detected any excessive concentrations of methane and that the line curtain had been properly hung when he performed his preshift examination of the Number 3 entry. Tr. 107–08, 141, 143; S’s Ex. 3. According to Inspector Meddings, Mr. Wright extended the length of the line curtain “to catch more air and shove it up into the entry” and “tied the curtains up,” which restored the air flow and diluted the methane. Tr. 126, 147–48; S’s Ex. 3. The field notes of Inspector Meddings reflect that Mr. Wright performed this action at 5:21 a.m. and that Inspector Meddings found that the concentration of methane decreased to 1.8 percent by 5:38 a.m. and to 0.3 percent by 5:50 a.m. S’s Ex. 3.

Mr. Wright also demonstrated the manner in which he measured levels of methane in the mine, but according to Inspector Meddings, he failed to take the readings at an acceptable distance from the face. Tr. 108, 143–45; S’s Ex. 3. Mr. Rowe testified that he also observed Mr.

⁶ When questioned by counsel for Respondent, Inspector Meddings affirmed that Respondent’s Number 3 Mine utilizes a ventilation system that draws air through the mine by way of two fans. Tr. 129. According to Inspector Meddings, “line curtains” aid in maintaining the movement of air, which serves to dilute any methane released at the mine face. Tr. 114, 118. Admitted into evidence as Secretary’s Exhibit 6, Respondent’s revised basic ventilation plan requires Respondent to maintain a minimum air velocity of 1000 cubic feet per minute (“CFM”) at the “[i]nby end of line curtain[s] in idle places.” S’s Ex. 6; *see also* Tr. 115, 117, 142; S’s Ex. 2.

⁷ The field notes of Inspector Meddings do not reflect whether he performed this testing in the presence of any of Respondent’s agents, and Inspector Meddings testified at the hearing that he could not recall that particular information. S’s Ex. 3; Tr. 141–43. Mr. Rowe testified that he did not remember Inspector Meddings using an anemometer and that Inspector Meddings did not perform any testing with chemical smoke in his presence. Tr. 175.

Wright's demonstration and that he appeared to take a valid measurement, at least "to the extent that he . . . didn't climb up on the gob and get as close to the face as Mr. Meddings did" Tr. 178. Inspector Meddings thereafter issued Order Number 8236518 to Respondent at 5:24 a.m. for failure to perform an adequate preshift examination. S's Ex. 1, 3. Noting the absence of any cutting activity in the Number 3 entry on the date of his inspection, Inspector Meddings opined that such an excessive level of methane could not have accumulated in the Number 3 entry in the short amount of time that elapsed between Mr. Wright's preshift examination and his own testing. Tr. 122. Accordingly, Inspector Meddings testified, he believed that the high concentration was present at the time Mr. Wright performed his preshift examination and that Mr. Wright would have detected it had he performed an adequate examination. Tr. 110, 122, 124. Inspector Meddings explained his belief that Mr. Wright hurried through the preshift examination in order to complete a belt move, as evidenced by Mr. Wright ordering more employees to help with the task:

[B]ecause when he pulled more men off of an outby to come up there to try to help -- get the belt move finished, I believe he was in a hurry and came up there and put his gas test and put his date, time, and initials because he knew that each inspectors [sic], they look at each heading for date, time, and initials So he just kind of rushed across and was taking his date, time, initials, make sure they was in the face, and didn't take a proper gas test as he should have done, was trying to hurry up and get back to continue his belt move.

Tr. 125; *see also* Tr. 152–53. In order to abate the alleged violation, Inspector Meddings conferred with Mr. Wright about the proper method of measuring levels of methane at the mine and then observed Mr. Wright conducting such testing in accordance with his instructions. Tr. 113, 126–27; S's Ex. 3.

When questioned by Respondent's counsel as to whether he would find it "surprising" for the level of methane to increase over a 20-minute period given the conditions at the Number 3 entry, Inspector Meddings responded, "To me it would be." Tr. 148. He maintained that the elevated level of methane was present during the preshift examination performed by Mr. Wright and that Mr. Wright simply failed to detect it because of the improper technique that he used to conduct the preshift examination. Tr. 148–49.

Finally, Inspector Meddings explained that he designated the violations alleged in Citation 8236517 and Order 8236518 as "significant and substantial" based upon the presence of an explosive level of methane and ignition sources in the Number 3 entry, the ignorance of the miners in the section to the hazardous conditions, and the likelihood that an explosion would cause serious injury to those miners. Tr. 112, 123–24. He further explained that he found the alleged violations to have resulted from an "unwarrantable failure" to comply with the cited standards because of Number 3 Mine's history of liberating excessive amounts of methane and its history of violations for failure to comply with the approved ventilation plan, which should have put Mr. Wright on notice that he needed to exercise greater care to ensure compliance. Tr. 109–13, 120–22, 124–25.

Mr. Rowe countered that no equipment or miners were located by the face of the Number 3 entry at the time Inspector Meddings measured the concentration of methane there, and that the closest miners were those working at the power center approximately 175 feet outby the face. Tr. 167, 169. He further testified that Respondent would have no reason to move equipment to the face during the power move and that it would be required to measure methane levels prior to moving equipment to the face or reenergizing the section once the power move was concluded. Tr. 166, 183–84. He also challenged the manner in which Inspector Meddings took his reading, explaining that he observed Inspector Meddings climb to the top of the gob and hold the multi-gas detector in a “domed out area” of the roof, where a void had been created by falling rock. Tr. 170–74; R’s Ex. 1. Mr. Rowe testified that Inspector Meddings “probably” took the reading less than 12 inches from the mine roof and that he had never before witnessed an inspector climb all the way to the top of a gob to measure levels of methane. Tr. 173–74.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. ORDER NUMBER 8236518: ALLEGED VIOLATION OF 30 C.F.R. § 75.360(b)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 5:24 a.m. on August 28, 2009, Inspector Meddings issued Order Number 8236518 to Respondent pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging in the “Condition or Practice” section as follows:

The operator failed to conduct adequate preshift exam on the active working section 035-0/040-0 MMU⁸ where 11 miners were working. An explosive range of methane of 5% or above was detected using a calibrated and approved Solaris multi-gas detector in the No. 3 entry “Face.” The foreman’s Date, Time, and initials are in the face area within 22 minutes of this inspection. This mine has a history of methane and liberates over 1.2 Million cubic feet in a 24 hour period. This mine has also been issued 49 violations of failing to follow the approved ventilation plan within the past 24 months. This violation is an unwarrantable failure to comply within a mandatory standard.

107(a) imminent danger order was also issued in connection with this citation.

S’s Ex. 1. The Order further alleges that Respondent’s failure to conduct an adequate preshift examination constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.360(b), which requires the operator’s agent responsible for conducting preshift examinations to perform the following actions at certain locations within the mine: 1) examine for hazardous conditions and violations of certain enumerated mandatory health or safety standards, 2) test for methane and oxygen deficiency, and 3) determine if the air is moving in its proper direction.

Inspector Meddings determined that Respondent’s alleged violation of 30 C.F.R. § 75.360(b) was reasonably likely to cause injury, that such injury could reasonably be expected to

⁸ Inspector Meddings later amended this reference to 035-0/039-0 MMU. S’s Ex. 1.

be permanently disabling, and that 11 people would be affected. S's Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposes the assessment of a civil penalty in the amount of \$12,563.00.

2. REGULATORY STANDARDS

The regulations promulgated to implement the Mine Act can be found at Chapter I of Title 30 of the Code of Federal Regulations, which sets forth in Part 75 "safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977." 30 C.F.R. § 75.1. Of particular relevance to the present proceeding, the regulations at 30 C.F.R. § 75.360 govern the performance of preshift examinations at underground coal mines. More specifically, the regulations at 30 C.F.R. § 75.360(a)(1) require "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The regulations at 30 C.F.R. § 75.360(b) describe the particular actions this person is required to perform as part of the preshift examination, including testing for methane and oxygen deficiency.

According to the regulations at 30 C.F.R. § 75.323(a), "[t]ests for methane concentrations . . . shall be made at least 12 inches from the roof, face, ribs, and floor." When such tests detect concentrations of methane at certain threshold levels, the regulations at 30 C.F.R. § 75.323 direct operators to take precautionary measures to reduce the concentration of methane and ensure the safety of employees. For example, when testing detects concentrations of methane between 1.0 and 1.5 percent in a working place, intake air course or area where mechanized mining equipment is being installed or moved, operators are required to deenergize electrically powered equipment in the affected area, immediately adjust the ventilation system to reduce the level of methane, and prohibit any other work from being performed in the affected area until levels fall below 1.0 percent. 30 C.F.R. § 75.323(b)(1). In turn, when testing detects concentrations of methane at 1.5 percent or more in a working place, intake air course or area where mechanized mining equipment is being installed or removed, the operator is required to disconnect electrically powered equipment in the affected area at the power source and withdraw from the affected area all persons not exempt by Section 104(c) of the Act, 30 U.S.C. § 814(c). 30 C.F.R. § 75.323(b)(2).

Finally, the regulations at 30 C.F.R. § 75.360(g) require the certified person performing the preshift examination to record the results of the examination, including the results and locations of air and methane measurements, on the surface before any other persons enter any underground area of the mine. The regulations further require a mine foreman or equivalent mine official to countersign these records. 30 C.F.R. § 75.360(g).

3. LIABILITY

a. Arguments of the Parties

To support the alleged violation, the Secretary cites the testimony of Inspector Meddings that he detected an explosive level of methane in the Number 3 entry merely 22 minutes after a preshift examination had been performed in that location and that he determined, based upon his experience, that such an excessive level of methane could not have formed during that period. S's Br. 5–6 (citing Tr. 106). Accordingly, Inspector Meddings concluded, the violative condition was present at the time Mr. Wright performed the preshift examination, and Mr. Wright failed to detect it because he was not properly performing the testing for methane. *Id.* at 6 (citing 108, 122). The Secretary also points to evidence of Respondent's history of violations stemming from its failure to control levels of methane at its Number 3 Mine. *Id.* (citing Tr. 109).

In its defense, Respondent disputes the precise concentration of methane in the Number 3 entry. R's Br. 6–8. While Respondent "acknowledge[s] the presence of an amount of methane sufficient to cause Meddings' multi-gas detector to alarm," Respondent contends that that "the amount could have been as low as 1%" based upon the testimony of Inspector Meddings "that his multi-gas detector makes an audible alarm upon encountering 1% methane." *Id.* at 6 (citing Tr. 140). Respondent notes that the reading taken by Inspector Meddings was not corroborated by any of Respondent's personnel or a bottle sample. *Id.* at 6–7 (citing Tr. 150–51, 174, 182). Moreover, Respondent claims, the testimony of Mr. Rowe demonstrates that Inspector Meddings improperly measured the concentration of methane closer than 12 inches from the mine roof. *Id.* at 7 (citing Tr. 173–74).

Finally, Respondent cites a number of legal authorities for the proposition that the Secretary is required to demonstrate not whether the violative condition existed at the time Inspector Meddings conducted his inspection but, rather, whether it existed at the time Mr. Wright performed the preshift examination. R's Br. 5 (citing *Energy Fuels Coal, Inc.*, 18 FMSHRC 171, 176 (Feb. 16, 1996) (ALJ); *Enlow Fork Mining Co.*, 1997 WL 14346, at *6 (Jan. 15, 1997); *Shelby Mining Co., LLC*, 31 FMSHRC 1501, 1510 (Dec. 31, 2009) (ALJ)). Respondent argues that even if Inspector Meddings properly measured the level of methane and found a concentration of five percent at the Number 3 entry, the record lacks sufficient evidence to demonstrate that this level of methane existed at the time Mr. Wright performed the preshift examination at that location. *Id.* at 8.

b. Discussion

Order Number 8236518 alleges that Respondent failed to perform an adequate preshift examination of the Number 3 entry of the Number 4 section of Respondent's Number 3 Mine on August 28, 2009, in violation of 30 C.F.R. § 73.360(b). S's Ex. 1. As the condition underlying this alleged violation, the Order cites the explosive range of methane detected by Inspector Meddings and notes that a preshift examination of the cited area had been performed only 22 minutes prior to Inspector Meddings' inspection. *Id.*

As a preliminary matter, the undersigned rejects Respondent's contention that Inspector Meddings improperly measured the level of methane present in the Number 3 entry and that the concentration did not exceed five percent, as determined by Inspector Meddings. Given his considerable experience in the mining industry, the undersigned accepts the assessment of Inspector Meddings as accurate and reliable. The absence of corroborating evidence in the form of a bottle sample or observations by Respondent's personnel does not cast sufficient doubt on his assessment to discredit it. Further, the countervailing evidence offered by Respondent fails to establish that Inspector Meddings improperly measured the level of methane, as claimed by Respondent. Respondent bases its argument on the observations of Mr. Rowe, who testified that Inspector Meddings "probably" took the reading less than 12 inches from the roof of the mine. Tr. 173-74. Standing alone, this equivocal testimony is not enough to establish that Inspector Meddings measured the level of methane at an improper distance from the roof. Mr. Rowe also testified that he had never observed an inspector measure the level of methane from atop a gob, as Inspector Meddings did. Tr. 172-73. This testimony also is not persuasive to establish that Inspector Meddings measured the level of methane incorrectly. Finally, when asked about a particular feature of the roof, Mr. Rowe admitted that he "didn't get close enough to see that much of it, because I didn't travel all the way to the face of the entry with him." Tr. 172. While Mr. Rowe did not specify his precise location in the entry as Inspector Meddings took readings at the face, he noted that the entry was 95 feet deep at that time. Tr. 171. Thus, Mr. Rowe could have been a significant distance from Inspector Meddings, which casts some doubt on the reliability of his observations. Accordingly, the weight of the evidence supports a finding that Inspector Meddings properly measured the level of methane present in the Number 3 entry and that the concentration was at least five percent.

The undersigned now turns to the alleged violation of 30 C.F.R. § 73.360(b). Among the ways of establishing that an operator has failed to perform an adequate preshift examination, the Secretary can show that the violative condition cited by the inspector existed at the time of the preshift examination and that the examiner failed to document it in the examination records or otherwise report it. *See Twentymile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). Upon consideration of the evidence presented by the parties, the undersigned finds that the Secretary has failed to satisfy this burden. Based at least in part on the absence of any cutting activity in the Number 3 entry on the date of his inspection, Inspector Meddings opined that the excessive level of methane did not form there in the short span of time between Mr. Wright's preshift examination and Inspector Meddings' inspection but, rather, that it was present during

the preshift examination and Mr. Wright failed to detect it.⁹ Tr. 110, 122, 124, 148–49. While the significant experience of Inspector Meddings lends credibility to this determination, it is undermined by the evidence in the record that the methane dissipated in an equally short period. Approximately 20 minutes elapsed between Mr. Wright’s preshift examination, at which time he measured the concentration of methane to be 0.35 percent, and Inspector Meddings’ inspection, at which time he measured the concentration to be at least five percent. S’s Ex. 3; R’s Ex. 5; Tr. 103–05. Once Mr. Wright remedied the improperly hung line curtain, however, the concentration of methane dropped to 1.8 percent within 17 minutes and 0.3 percent within 29 minutes. S’s Ex. 3. The rate at which the concentration of methane decreased when the curtain was properly hung supports a finding that the excessive level measured by Inspector Meddings could have formed after Mr. Wright conducted a preshift examination of the entry, contrary to Inspector Meddings’ determination.

Inspector Meddings recognized that an improperly hung ventilation curtain causes methane to accumulate in a mine, testifying, “I can jerk that curtain down and [methane will] start building up . . . immediately.” Tr. 122. However, he maintained that the ventilation curtain in the Number 3 entry had been hung improperly by Respondent’s agents “from the get-go, from oncoming shift or the pre-shift on the second shift after production.” Tr. 117. The undersigned disagrees with this conclusion as well. The field notes of Inspector Meddings reflect that Mr. Wright informed him that the curtain had been properly hung at the time Mr. Wright performed the preshift examination, and Mr. Rowe testified that a falling rock or the movement of air through the last open crosscut could have dislodged the curtain between the preshift examination and Inspector Meddings’ inspection. S’s Ex. 3; Tr. 177, 179. While Inspector Meddings explained that neither he or nor Mr. Rowe observed any debris in the vicinity of the curtain that could have dislodged it, he acknowledged the plausibility of such an occurrence, testifying that a piece of the curtain “probably” had been pulled from the bolt pinning it to the roof in the intersection of the entry and the last open crosscut. Tr. 117, 146–48; S’s Ex. 3. He also affirmed that he has “crossed the mining section before and come back to find that a curtain has fallen off a bolt.” Tr. 148. Thus, the explanation offered by Mr. Rowe for the curtain’s condition appears reasonable.

⁹ Specifically, Inspector Meddings testified:

By my experience, the buildup of methane to 5 percent, it was there when that boss went through. There’s no way, you know, like I said, my experience, that that methane, if no one’s cutting, there’s no machine in it, you know, if the miner is not cutting, it’s just an out-of-place. I can jerk that curtain down and it’ll start building up, yes, immediately. But I don’t believe that it would build up to explosive mixture in 22 minutes, especially with that curtain. And, you know, it was there, but like I said, I could have -- moving at the end, you know, to me I believe that it was there.

Tr. 122. The reasoning of Inspector Meddings is not entirely clear from this testimony, but he appears to have based his determination that the excessive level of methane was present during the preshift examination, at least in part, on the absence of cutting activity in the entry at the time of his inspection.

Given the likelihood that the ventilation curtain was dislodged after Mr. Wright performed a preshift examination of the entry, the impact that an improperly hung ventilation curtain has on the level of methane in a mine, and the rate at which the concentration of methane in the Number 3 entry decreased once the ventilation curtain was restored to its proper position, the undersigned finds that the Secretary has failed to establish by a preponderance of the evidence that the excessive level of methane found by Inspector Meddings existed at the time of the preshift examination and that Mr. Wright, therefore, performed an inadequate examination in violation of 30 C.F.R. § 73.360(b). This finding does not end the inquiry into Respondent's liability for the charged violation, however. According to the field notes and testimony of Inspector Meddings, he issued the Order to Respondent after Mr. Wright demonstrated the technique he used to measure the level of methane in the Number 3 entry during his preshift examination, and although he scaled a few feet of the gob as part of his demonstration, he still appeared to take readings several feet from the face, which Inspector Meddings considered too great a distance. S's Ex. 3; Tr. 108, 143–45. Inspector Meddings emphasized that Mr. Wright was required to take any steps necessary, including using a probe or climbing to the top of the gob, to take a reading "next to the face." S's Ex. 3; Tr. 144. Mr. Rowe confirmed that Mr. Wright did not climb to the top of the gob as Inspector Meddings had, but he claimed that Mr. Wright appeared to take a valid measurement. Tr. 178.

Upon consideration, the undersigned finds that the foregoing evidence also fails to establish that Respondent performed an inadequate preshift examination in violation of 30 C.F.R. § 73.360(b). While the evidence that Mr. Wright measured the level of methane several feet from the face of the Number 3 entry is deemed credible, this distance seemingly complies with the regulations at 30 C.F.R. § 75.323(a), which require that "[t]ests for methane concentrations . . . be made at least 12 inches from the roof, face, ribs, and floor." The Secretary failed to move into the record any written policy, guidance document, or other evidence setting a maximum distance at which measurements could validly be taken, which would have substantiated the conclusion of Inspector Meddings that Mr. Wright performed the testing at an improper distance. Based upon the evidence of record, the undersigned is constrained to find that Mr. Wright measured the level of methane in the entry in accordance with applicable regulations and that this consideration cannot form a basis for liability.

In accordance with the foregoing discussion, the undersigned finds that the Secretary has failed to satisfy her burden of establishing a violation of 30 C.F.R. § 73.360(b) by a preponderance of the evidence. Accordingly, Order Number 8236518 is vacated.

B. CITATION NUMBER 8236517: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

In conjunction with Order Number 8236518, Inspector Meddings issued Citation Number 8236517 to Respondent at 5:19 a.m. on August 28, 2009, pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging in the "Condition or Practice" section as follows:

The approved ventilation plan is not being followed on the active 035-0/040-0 MMU¹⁰ (#4 Section). No measurement could be obtained behind the line curtain in No. 3 heading using a calibrated anemometer. Also no positive air movement could be detected using chemical smoke. The approved ventilation plan requires 1,000 CFM be maintained in all idle/bolted faces. This entry is approximately 95 Feet deep and 8.5 to 9.5 Ft. in height and the immediate roof consist of sandstone and laminated shale. An explosive range of methane was detected using a calibrated and approved Solaris Multi-gas detector in this heading during this inspection. This mine has a history of methane and liberates over 1.2 Million Cubic feet in a 24 hour period according to the last total liberation bottle samples. This mine has also been issued 49 violations for failing to follow the approved ventilation plan within the last 24 months. The foreman's Date, Time and initials are in the face area within 24 minutes of this citation being issued. This violation is an unwarrantable failure to comply with a mandatory standard.

S's Ex. 2. The Citation further alleges that this condition constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.370(a)(1). This standard provides:

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. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. §75.370(a)(1) was reasonably likely to cause injury, that such injury could reasonably be expected to be permanently disabling, and that 11 people would be affected. S's Ex. 2. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposes the assessment of a civil penalty in the amount of \$15,570.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged in the Citation. As noted above, the revised basic ventilation plan governing Respondent's Number 3 Mine requires Respondent to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of the line curtain[s] in idle places." S's Ex. 5. Inspector Meddings presented ample evidence

¹⁰ Inspector Meddings later amended this reference to 035-0/039-0 MMU. S's Ex. 2.

that he was unable to detect any air velocity behind the line curtain in the Number 3 entry of the Number 4 section of the mine on August 28, 2009, in contravention of the plan. While Respondent questions the failure of Inspector Meddings to measure the air flow in the Number 3 entry in the presence of any of its agents, it ultimately does not dispute the alleged violation. As Respondent asserts in its Post-Hearing Brief:

Excel acknowledges that, at the time of the Ventilation Plan Citation's issuance, the wing of a line curtain had torn down from the nail on which it was hung, resulting in a volume of less than 1,000 cubic feet per minute ("CFM") of air flowing toward the idle face of the No. 3 entry on the No. 4 Section. To that extent, and that extent only, the No. 3 Mine was in violation of its approved ventilation plan at the time of Meddings' inspection.

R's Br. at 4 (footnote omitted). The uncontroverted evidence presented by the Secretary is adequate to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.370(a)(1) by failing to maintain an air velocity of 1000 CFM in the Number 3 entry of the Number 4 section on August 28, 2009, as required by its approved ventilation plan.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i) Arguments of the Parties

Citing the testimony of Inspector Meddings, the Secretary argues that Respondent's violation of 30 C.F.R. § 75.370(a)(1) was significant and substantial in nature because the explosive level of methane found by Inspector Meddings, together with the ignition sources present, created a safety hazard that was reasonably likely to result in serious or even fatal injuries for the 11 miners working in the area. S's Br. at 7–8 (citing Tr. 111–12, 122, 157). With respect to the ignition sources, the Secretary points to "the battery-operated equipment working in the area and possible arcing." *Id.* (citing Tr. 157). According to the Secretary, "[a]nything that can create a spark, whether it is friction or electrical, can cause the methane to ignite." *Id.* at 8 (citing Tr. 157).

Respondent counters that no ignition sources were present in the Number 3 entry at the time of Inspector Meddings' inspection and that Respondent would have measured the concentration of methane prior to any ignition sources being introduced, as required by regulation, under continued normal mining operations. R's Br. at 10–11. Respondent notes that the parties do not dispute that power to the Number 4 section was deenergized and that no mobile equipment or workers were present in the face of the Number 3 entry. R's Br. at 10 (citing Tr. 134, 136, 165, 169). Respondent argues that "the Secretary's case is predicated on 'possible arcing,' a 'chance' of bolt heads popping, and anything that can theoretically create a spark such as friction." *Id.* at 11 (citing Tr. 157) (footnote omitted). Relying upon various legal authorities to support the notion that the Secretary is required to demonstrate that "a confluence of factors" existed to create a reasonable likelihood that an explosion or ignition would occur,

and that the risk of ignition was not merely a theoretical possibility, Respondent contends that the Secretary fails to satisfy that burden. *Id.* at 9, 11 (citing *Zeigler Coal Co.*, 15 FMSHRC 949, 953–54 (June 1993); *Sidney Coal Co., Inc.*, 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ)). Accordingly, Respondent claims, the Citation was improperly designated as S&S. *Id.* at 11.

ii) Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) violation of a mandatory safety standard occurred; 2) the violation contributed to a discrete safety hazard; 3) the hazard in question is reasonably likely to result in an injury; and 4) the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). The first element of *Mathies* is satisfied since the fact of the violation has been established. With respect to the second element, the Commission has long recognized the hazards associated with inadequate ventilation as “among the most serious in mining.” *Monterey Coal Co., Inc.*, 7 FMSHRC 996, 1000 (July 1985). In support of this statement, the Commission referred to the findings of Congress that “[v]entilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive” and, thus, “the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the . . . Act.” *Id.* at 1000–01 (quoting S. Rep. No. 95-181, at 41 (1977)). While the Commission stressed the dangers associated with inadequate ventilation particularly in reference to working faces, such dangers undoubtedly exist at idle faces as well, as demonstrated by the accumulation of methane at issue in this proceeding. Inspector Meddings testified that the inadequate ventilation of the Number 3 entry contributed to the excessive level of methane that he detected, an assertion that Respondent does not dispute. Tr. 116–17. Thus, the violation clearly contributed to the discrete safety hazard of an accumulation of methane.

The undersigned now turns to the third element of *Mathies*. The critical question is whether the accumulation of methane in the Number 3 entry was reasonably likely to trigger an injury-causing event, such as an ignition or explosion, had normal mining operations continued. In considering the likelihood of such an occurrence, the Commission has provided the following framework:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990) (“UP & L”); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997) (“*Enlow*”).

The presence of methane at the face of the Number 3 entry is uncontroverted. The Commission has held that methane is ignitable at concentrations of one to two percent and

explosive at concentrations of 5 to 15%. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). By Respondent's own admission, the concentration of methane in the Number 3 entry was at least one percent and, therefore, ignitable. The undersigned found above, however, that Inspector Meddings measured the concentration of methane to be in excess of five percent. Therefore, sufficient quantities of methane existed in the Number 3 entry to fuel an explosion.

As instructed by *Enlow*, another factor to consider is the potential source of an ignition. Indeed, the reasonable likelihood of an ignition is a "necessary precondition" to the reasonable likelihood of an injury in this context. *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993) (citing *U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The parties dispute this factor. In particular, Inspector Meddings acknowledged that power to the Number 4 section was shut down at the time of his inspection and that he did not observe any equipment in the Number 3 entry at the time he took his reading. Tr. 104, 111, 123, 134, 136; S's Ex. 3. He identified other potential ignition sources, however, including battery-operated scoops and four-wheelers that were "tramping across the section," "a bolt head popping," and "anything that can create a spark, whether it's friction, electrical, anything like that." Tr. 103-04, 111, 123, 156-57. Respondent counters that such theoretical sources are insufficient to demonstrate a reasonable likelihood of ignition. R's Br. at 9, 11 (citing *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993); *Sidney Coal Co., Inc.*, 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ)). Respondent also disputes the likelihood that the methane in the Number 3 entry would encounter any ignition sources if normal mining operations had continued, arguing that the applicable regulations require its agents to measure the concentration of methane in the entry before relocating equipment to the face or reenergizing the section, a point that Inspector Meddings conceded. *Id.* at 10-11 (citing Tr. 134-36, 149-50, 165-66, 169, 183-84).

Upon consideration, the undersigned finds Respondent's position persuasive. While Inspector Meddings noted that battery-operated scoops and four-wheelers were "tramping across the section," the parties agree that none of these pieces of equipment were located in the Number 3 entry at the time of his inspection and that they would not be permitted to travel in by the last open crosscut until Respondent's agents had first tested for the presence of methane. Tr. 134-35, 149-50, 165-66, 169, 183-84. Thus, had normal mining operations continued, Respondent reasonably could have been expected to detect the elevated concentration of methane in the Number 3 entry prior to introducing these potential ignition sources to the area. In addition, the other potential sources of ignition identified by the Secretary appear to be only speculative, as argued by Respondent. The Secretary pointed to "a bolt head popping" as a potential source but failed to present any evidence demonstrating the reasonable likelihood that such an incident would occur and spark an ignition. Inspector Meddings testified simply, "[y]ou do have, I guess, a chance of a bolt head popping, even in sandstone, or that nature." Tr. 157. This testimony is hardly compelling. While the Secretary suggests that an ignition could also result from "anything that can create a spark, whether it's friction, electrical, anything like that," she fails to specify other equipment or materials present in the Number 3 entry that could provide the potential sources of friction or electrical charges. S's Br. at 8 (citing Tr. 157). Inspector Meddings explained, "[t]he friction part would be maybe if they had -- if there was a bearing down, or bad, on a scoop or a dry shaft, that when it was ran it would glow red, that nature."

Tr. 158. As noted above, however, scoops were not present in the Number 3 entry at the time and would not have been relocated to the entry until Respondent had first tested for the presence of methane.

In relying upon such speculative sources of ignition, the Secretary demonstrates only that an ignition could occur, not that it was reasonably likely to occur. As pointed out by Respondent, the Commission has held that statements that certain events “could” occur are insufficient to support a finding that an ignition of methane was reasonably likely to occur in determining the significant and substantial nature of a violation. *Zeigler Coal Co.*, 15 FMSHRC at 953–54. Accordingly, the undersigned finds that the Secretary has failed to carry her burden of proving that an ignition of the methane present at the face of the Number 3 entry was reasonably likely to occur and, likewise, that an injury-causing event was reasonably likely to occur. Thus, the violation was not significant and substantial in nature.

Nevertheless, the violation was serious. As noted above, the Commission has advised that “[t]he 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 parties agree that miners were not present at the face of the Number 3 entry at the time of Inspector Meddings’ inspection but, rather, were completing a belt move elsewhere in the section. Tr. 104–05, 112, 136, 169. According to Mr. Rowe, these miners were located at least 175 feet from the face of the entry. Tr. 169. Inspector Meddings also testified that a crew of repairmen was attending to a continuous miner machine “just outby” and “around the corner,” an assertion that Respondent did not challenge. Tr. 104, 123. The fact that these groups of miners were not located in the immediate face of the Number 3 entry does not necessarily diminish the severity of the injuries they could sustain in the event that an ignition of methane propagates an explosion in the entry. Thus, the undersigned accepts as credible Inspector Meddings’ conclusion that permanently disabling injuries were reasonably likely to result should an explosion occur. Inspector Meddings reached this conclusion by weighing “[t]he best case scenario,” which would be that the methane “ignites and it burns one person,” and “[t]he worst case [scenario],” which would be that it “would kill everybody on the section.” Tr. 123–24. Accordingly, the undersigned finds the proper characterization of the violation to be serious.

b. Negligence and Unwarrantable Failure

i) Arguments of the Parties

Citing the testimony of Inspector Meddings, the Secretary argues that Respondent exhibited a high degree of negligence on the grounds that Mr. Wright measured the concentration of methane in the Number 3 entry only 22 minutes prior to Inspector Meddings’ inspection and Mr. Wright bore the responsibility of taking “extra precautions” to ensure that the concentration fell within a safe range because of the mine’s history of liberating excessive levels of methane. S’s Br. at 8 (citing Tr. 113; S’s Ex. 1). The Secretary also notes that Respondent has been issued 49 violations related to its failure to abide by its approved ventilation plan within the 24 months preceding the Citation. *Id.* at 8 (citing S’s Ex. 2). Finally, the Secretary contends that the violation resulted from Respondent’s unwarrantable failure to comply on the grounds that the cited conditions were extensive, the cited conditions existed for a period of time that

would cause severe injuries to the miners, Respondent was placed on notice that greater efforts were necessary to ensure compliance because of the amount of methane liberated by the mine and the number of previous violations issued to Respondent, and agents of Respondent reasonably should have known of the cited conditions. *Id.* at 10–12 (citing Tr. 107, 109, 110, 124, 126; S’s Ex. 1, 2).

Respondent challenges the Secretary’s position that the violation resulted from an unwarrantable failure to comply with the cited standard, arguing that the aggravating factors that warrant such a finding were not shown in the present proceeding. R’s Br. at 11–15. Specifically, Respondent contends that the Secretary failed to establish the length of time that the concentration of methane detected by Inspector Meddings was present in the Number 3 entry. *Id.* at 12–13 (citing Tr. 122, 181–82). Respondent next argues that the alleged conditions were not extensive, given that the concentration of methane measured by Inspector Meddings was never verified or encountered by Respondent and he detected it only upon climbing atop the gob. *Id.* at 13–14 (citing Tr. 138, 172–74). Thus, Respondent asserts, the excessive level of methane was located in a “limited area close to the roof.” *Id.* at 13. Based upon Mr. Rowe’s estimate that the cited conditions had existed for less than 20 minutes, and the fact that miners had not entered the Number 3 entry for at least that amount of time, Respondent argues that the cited conditions were not obvious. *Id.* at 14. Respondent also disputes that the cited conditions posed a high degree of danger, arguing that the lack of ignition sources in the entry weighs against such a finding. *Id.* Finally, Respondent claims that it lacked any knowledge of the cited conditions. *Id.* at 14–15. According to Respondent, “nothing in the record supports Meddings’ contention that Wright did not perform his pre-shift examination correctly at the time that it was completed[,] and the mere fact that methane existed at the time of Meddings’ inspection does not prove that Excel had knowledge of this allegation twenty-minutes earlier.” *Id.* at 15. Respondent notes that Inspector Meddings verified Mr. Wright’s lack of awareness of the excessive level of methane in the Number 3 entry when he testified, “[n]o, I don’t believe [Mr. Wright] knew it was there.” *Id.* at 14 (citing Tr. 149).

ii) Discussion

Upon consideration of the evidence presented, the undersigned finds that Respondent was only moderately negligent in violating 30 C.F.R. § 75.370(a)(1). On one hand, the undersigned is mindful that Respondent’s Number 3 Mine is known to be gassy. As noted by Inspector Meddings, the mine “has a history of methane and liberates over 1.2 Million Cubic feet in a 24 hour period according to the last total liberation bottle samples,” an assertion that Respondent did not challenge. S’s Ex. 2. Respondent also did not dispute Inspector Meddings’ observation that Respondent had been cited for 49 violations of the approved ventilation plan governing Number 3 Mine within the 24 months preceding the issuance of Citation Number 8236517, which, according to Inspector Meddings, ought to have alerted Respondent that it needed to exercise greater care in complying with the plan. S’s Ex. 2; Tr. 121–22. On the other hand, as discussed above, the Secretary failed to establish by a preponderance of the evidence that Mr. Wright performed an inadequate preshift examination of the Number 3 entry or that the ventilation curtain could not have been dislodged, through no fault of Respondent, between the performance of the preshift examination and Inspector Meddings’ inspection, resulting in the lack of air flow to the face of the entry. Thus, the record supports a finding that the violative

condition had existed for only about 20 minutes before it was detected by Inspector Meddings and that Respondent did not possess actual knowledge of it. These considerations undoubtedly mitigate Respondent's degree of negligence in violating 30 C.F.R. § 75.370(a)(1).

Consistent with the foregoing discussion, the undersigned further finds that the violation did not result from an unwarrantable failure to comply with the cited standard. An unwarrantable failure is aggravated conduct amounting to "reckless disregard" or "intentional misconduct." The record lacks sufficient evidence that Respondent engaged in such conduct here. While Respondent may have been aware that greater efforts were needed in order to comply with its ventilation plan, this factor alone does not outweigh the other elements of an unwarrantable failure that have not been satisfied.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 718 days of inspection. Of those 334 violations, 20 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 4. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in

2008, the year preceding that in which Citation Number 8236517 was issued.¹¹ Stip. 5. Finally, the regulations promulgated by MSHA provide for a “10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.” 30 C.F.R. § 100.3(f). The Secretary found that Respondent’s agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the levels of gravity and negligence, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236517 to be \$3500. Further, this Citation shall be modified to a 104(a) citation, moderate negligence, injury unlikely, and non-S&S.

¹¹ As described by the regulations promulgated by MSHA for the purpose of implementing its penalty assessment scheme, the appropriateness of the penalty to the size of the mine operator’s business is calculated as follows:

The appropriateness of the penalty to the size of the mine operator’s business is calculated by using both the size of the mine cited and the size of the mine’s controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms “annual tonnage” and “annual hours worked” mean coal produced and hours worked in the previous calendar year.

30 C.F.R. § 100.3(b). In the proposed penalty assessment form attached to the Petition, the Secretary accounted for both the size of the Number 3 Mine and the size of Respondent’s controlling entity. While the Assessed Violation History Report reflects that Respondent’s controller is Alliance Resource Partners LP (“ARPL”), the Secretary failed to introduce any evidence into the record concerning the coal production of this entity. S’s Ex. 4. Respondent contends that it is “an independent operating subsidiary of ARLP” and that “ARLP – itself – has no ‘coal produced’ for which ‘annual tonnage’ can be measured, as described by the plain language of 30 C.F.R. § 100.3(b).” R’s Br. at 15–16.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Order Number 8236518 is **VACATED** in all respects.
2. Citation Number 8236517 is modified to a 104(a) citation, moderate negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of **\$3500**.
3. Respondent shall pay the aforementioned penalty amount within 30 days of the date of this Order.¹² Upon receipt of payment, Citation Number 8236517 is **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Distribution:

LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 420, Nashville, TN 37219-2456

Gary McCollum, Esq., 771 Corporate Drive, Suite 500, Lexington, KY 40503

¹² Payment shall be sent to the following address: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

August 14, 2013

HIBBING TACONITE COMPANY,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2013-231-RM
	:	Order No. 8665965; 12/15/2012
	:	
	:	Docket No. LAKE 2013-232-RM
v.	:	Order No. 8665968; 12/15/2012
	:	
	:	Docket No. LAKE 2013-233-RM
	:	Order No. 8665969; 12/15/2012
	:	
	:	Docket No. LAKE 2013-234-RM
SECRETARY OF LABOR,	:	Order No. 8665970; 12/15/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Hibbing Taconite Company
Respondent,	:	Mine ID: 21-01600
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2013-348-M
Petitioner,	:	A.C. No. 21-01600-312719
	:	
v.	:	
	:	
HIBBING TACONITE COMPANY,	:	
Respondent.	:	Mine: Hibbing Taconite Company

DECISION

Appearances: James Peck, CLR, Duluth Minnesota and Barbara Villalobos, Office of the Solicitor, Chicago, Illinois for Petitioner;
Dana Svendsen, Jackson Kelly, Denver, Colorado for Respondent.

Before: Judge Miller

These cases are before me on four notices of contest filed by Hibbing Taconite Company (“Hibbing”) and a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Hibbing, 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”). Hibbing operates the Hibbing Taconite Company mine (the “mine”) located in St. Louis County, Minnesota. These cases involve twelve 104(a)

citations, four of which, along with four related 104(b) orders, remain for decision. The parties presented evidence and testimony at a hearing in Carlton, Minnesota on June 19, 2013.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hibbing Taconite Company is a large mine operator located in St. Louis County, Minnesota. The parties stipulated at hearing that Hibbing is engaged in mining operations that affect interstate commerce, is the owner and operator of the mine, is subject to the jurisdiction of the Act, and that the Commission has jurisdiction in this matter. Jt. Ex. 1. The parties further agreed that the penalties, as proposed, will not impair Hibbing's ability to continue in business. The history of assessed violations, Sec'y Ex. P12, accurately reflects the history of violations at this mine.

At hearing, the parties agreed to resolve eight of the alleged 104(a) violations. The settlement and proposed modifications are set forth at the end of this decision. Of the four citations remaining for hearing, three were issued to Hibbing for allegedly failing to keep areas of the mine clean. Specifically, the citations allege that the mine failed to clean up taconite pebbles that, in the past, had caused slip and fall injuries at the mine. The fourth violation involves the condition of a fan. At hearing, Hibbing indicated that it does not take issue with the fact of violation, or the designations of the gravity or negligence, for those four 104(a) violations. Rather, it contests the issuance of the 104(b) orders associated with each of the four 104(a) citations.

Each of the citations and orders was issued by MSHA inspector Thaddeus Sichmeller, who has been a mine inspector since 2003 and is also trained as an accident investigator. (Tr. 24-25). Sichmeller traveled to the mine on December 12, 2012 to conduct a general inspection. (Tr. 25). Prior to beginning the inspection he had a pre-inspection conference with Andrea Bakk, the head of the mine's safety department. (Tr. 5, 25-26). During the conference, and as a result of reviewing reports of the mine, Sichmeller expressed his concern regarding the mine's history of slips and falls. (Tr. 26); Sec'y Ex. P9. Further, Sichmeller discussed the several 104(b) orders that were issued during a previous inspection in 2008, daily closeout conferences, termination times, and explained that the mine must inform him of any mitigating factors that may justify an extension of time to terminate a citation. (Tr. 27).

The mine operates 24 hours a day, but has less of a crew in the evening and on weekends. (Tr. 53, 71, 103). Of the four 104(a) citations that remain at issue, Sichmeller issued one on December 12, 2012, and three on December 14, 2012. All four of the 104(b) orders were issued on December 15, 2012. Sichmeller was accompanied by someone from the safety department, as well as mine managers and a miner's representative, each day of the inspection.

a. Citation No. 8665946

On December 12, 2012 Inspector Sichmeller issued Citation No. 8665946 to Hibbing for an alleged violation of section 56.20003(a) of the Secretary's regulations. The cited standard requires that "[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service

rooms shall be kept clean and orderly[.]” 30 C.F.R. § 56.20003(a). The citation described the alleged violative condition, in pertinent part, as follows:

The entire bottom level inclined walkway north side of the P2 pellet conveyor to the north wall was not being maintained in a clean orderly condition. Wet slurry, entangled wash down and fire hoses, along with round, cured, marbled-shaped taconite pellets were built up on the walkway, creating slip/trip fall hazards to persons accessing this area. This condition affected the floor from the 505 door eastward 50’, affecting heating units, operating pumps and access to the P2 conveyor. There were no persons in the area at the current time of the inspection, but footprints in the material indicate that persons were accessing this area prior to cleaning. These conditions were easily seen from the main travel route when accessing this area. Company has reported to MSHA multiple slip/fall accidents resulting in injury.

Sichmeller determined that an injury resulting in lost workdays or restricted duty was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$3,784.00 has been proposed for this violation.

The time for abatement was originally scheduled for 8:00 a.m., December 13, 2012, but was subsequently extended to 8:00 a.m., December 14, 2012, and then extended again to 8:00 a.m. December 15, 2012. On December 15, 2012, Section 104(b) Withdrawal Order No. 8665965, was issued at 1:58 p.m. The order states as follows:

Efforts were not being made to ensure the entire bottom level inclined walkway north side of the P2 pellet conveyor to the north wall was being maintained in a clean, orderly condition. Wet slurry, entangled washdown hoses, along with round, cured, marble-shaped taconite pellets were again built up on the walkway. Conditions at this time were as bad or worse than the original cited issuance. There were no persons observed conducting cleanup in this area at the present time for compliance to the original citation. MSHA has granted multiple extensions to the company for the company for compliance to the original citation.

The order was terminated on December 18, 2012, after the “entire affected area was cleaned at the P2 to north wall eastward from the 505 man door[.]”

Hibbing agrees that the original 104(a) citation accurately reflects a violation of the mandatory standard and that the violation was significant and substantial with moderate negligence. The mine takes issue with the 104(b) failure to abate order, Order No. 8665965. Hibbing argues that the order should have been further extended to allow the mine more time to abate the violative condition. Hibbing asserts that, at the time the underlying citation was issued

on December 12, 2013, it was not told when the citation needed to be abated by. Further, it argues that the area had been satisfactorily cleaned. Hibbing also avers that the inspector did not consider the degree of danger, the diligence of the mine in cleaning the area and the disruptive effect of the cleaning on all shifts. Finally, Hibbing argues that Sichmeller granted an extension of time to clean up an area subject to a separate citation based upon similar mitigating circumstances and abused his discretion in not granting an extension for abatement in this instance.

The pellet plant filters fine powder material, forms the material into small green balls, and prepares the pellets for transportation to customers. (Tr. 166). The facility is large with an annual production of 8 million tons. (Tr. 167). The plant consists of five levels with some sublevels. (Tr. 167). Some of the floors on the various levels are grates, while others are plates on top of grates. The floors on the bottom levels are cement. (Tr. 167). There is regular material spillage. Miners sweep and clean the spillage as they are able to do so. (Tr. 167). Most areas are hosed down to wash the material from the upper levels to the lower levels, including the lower level where Sichmeller issued this citation and order. (Tr. 168-16). When a citation is issued at the plant, the safety department prepares a report that is provided to Tim Angelo, the manager of the plant, and other managers. (Tr. 173-174). Angelo then determines how and when the abatement will be done. (Tr. 174). During nights and weekends a small operating crew of approximately nine miners is responsible for regular production duties as well as cleaning. (Tr. 172). According to Angelo, if he is not able to allocate the resources necessary to abate a citation, he discusses the matter with the MSHA inspector and asks for more time. (Tr. 174).

On December 12, 2012, Sichmeller was accompanied by Stephanie Bigelow, a safety representative at the mine, during his inspection. Sichmeller testified that, as they came in the 505 mandoor from outside of the pellet plant, he saw that the floor in area was “riddled in pellets,” that there were entangled hoses in the walkway, and that there was a slurry on the floor. (Tr. 28). As a result, Sichmeller issued Citation No. 8665946 to Bigelow. (Tr. 28). Sichmeller testified that the cited area, which was approximately 25 feet wide by 50 feet long, includes electrical equipment, pumps and heating units, all of which require maintenance and routine checks. (Tr. 29). The area requires labor for cleanup purposes. (Tr. 29). He explained that the taconite pellets on the floor are hard and marble shaped, and created a slip and fall hazard on the concrete floor in the area. (Tr. 30). Sichmeller testified that the mine had a history of slip and fall injuries. (Tr. 30-31); Sec’y Exs. P9-2 through P9-9. Given the extent of the violation, Sichmeller believed that it would take some time to clean the area. He understood that the mine worked 24 hours a day and, as a result, set the abatement time for the following morning, the 13th, at 8:00 a.m. (Tr. 36). Sichmeller recalled discussing the termination due date with Tim Angelo, one of the operations managers at the mine. (Tr. 36). While Angelo agreed that a discussion took place, he believed that it occurred at a later date, and not on December 12th. When Sichmeller returned to the pellet plant on the 13th, he observed miners cleaning the cited area and learned that they needed additional time to finish. (Tr. 37). As a result, he extended the abatement time until the next day, December 14th, to complete the task. (Tr. 37). Sichmeller testified, after reviewing his notes from December 13, 2012, that he spoke with Angelo about the conditions and was assured that work would be done to terminate the violation. (Tr. 85-86).

Sichmeller returned again on December 14th, saw that the mine had made some progress with the abatement since the prior day, but still needed additional time. (Tr. 38). As a result, he extended the time for abatement an additional day. (Tr. 38-39). Sichmeller testified that he routinely discusses the termination times with the mine during the preshift inspection conference and at the end of each day. (Tr. 39). Sichmeller testified that, on the 14th, he had a discussion with Angelo regarding how “rapid [his] termination times were being set” and that he was not going to extend the time beyond 8:00 a.m. the following day without seeing that efforts had been made to warrant an extension. (Tr. 69, 89). At some point during Sichmeller’s inspection of the mine, he had a conversation with Angelo where they discussed the 2008 inspection, during which other orders were issued, Angelo’s concern regarding the termination times being set, and what was needed to extend termination times. (Tr. 70).

Sichmeller returned on Saturday, December 15th and found that the conditions he cited on December 12th remained and that no one was working to complete the cleanup. (Tr. 40). He asked Tiara Marcus, a member of the mine’s safety department, why the area was not being cleaned. (Tr. 40). Marcus responded that there was minimal manpower on the weekend. (Tr. 40). No other explanation was offered. (Tr. 41-42). Sichmeller determined that nothing was being done that would allow him to further extend the abatement time. (Tr. 41). He saw no one in the area, nor any barricades or warnings to keep people out. (Tr. 42). Moreover, the daily reports from the mine’s safety department to management explained that the work needed to be done. (Tr. 42). The inspector believed that the area continued to pose a risk to miners and, as a result, he issued Order No. 8665965 for a failure to abate the violation. (Tr. 40). Sichmeller testified that he eventually terminated the order on December 18th after the mine cleaned the entire area. (Tr. 43-44). On cross-examination, Sichmeller agreed that termination times should be tailored to the conditions cited. (Tr. 71).

Bigelow, a safety representative at the mine, testified that she accompanied Sichmeller on his December 12, 2012 inspection, took notes, and issued a report summarizing the citations issued that day. (Tr. 93, 95); Hibbing Ex. E. The report was electronically mailed to all salaried employees at the mine after it was completed at the end of the inspection day. (Tr. 95-96, 102). Bigelow explained that, at the time the report was generated, the citations had been verbally issued, and that paper citations are routinely received the day following a verbal citation issuance. (Tr. 96). Bigelow testified that, at the time the citations were issued on December 12th, she was not told about any abatement times and did not include any abatement times in her report. (Tr. 96-97, 101). Bigelow testified that, normally, she is told a time for abatement and, if the mine is not able to meet the time, she discusses it with the inspector. (Tr. 97). Bigelow took photos of the area after Citation No. 8665946 was issued. (Tr. 99); Hibbing Ex. A. Since the citation was issued later in the day, no management employees were present at the pellet plant, so she called Jake Pusateri, the pellet plant operations manager, around 5:30 p.m., told him of violation in the pellet plant, and learned that he would oversee the cleanup. (Tr. 99-101).

Tiara Marcus, who has been a safety representative for Hibbing for two years, accompanied Sichmeller on his inspection beginning on December 13th. (Tr. 106, 110). After each inspection day, she, like Bigelow, put together a report that included pictures, summarized findings during the day, and listed the citations issued. (Tr. 108-109). Marcus explained that she did not believe that abatement times were adequately explained or communicated by Sichmeller.

(Tr. 109). Marcus testified that, several times, mine personnel tried to ask for more time to terminate the citations. (Tr. 109). In some instances the requests for more time were granted, but in other instances they were denied. (Tr. 110). During the inspection on December 13th, Marcus received the written citations from the previous day. (Tr. 112-113). Thereafter, Marcus accompanied the inspector to look at the cited area. Jeff Walters met the inspection group at the pellet plant. (Tr. 112). Marcus testified that, while cleaning the affected area was a big project, the mine had been working on it. (Tr. 113). According to Marcus, after arriving at the cited area, she asked for clarification regarding the extent of the area subject to the citation. (Tr. 114). Sichmeller gave further instruction about cleaning the area around the pump. (Tr. 114). It was her belief that, at that time, Sichmeller was asking the mine to clean an area larger than that included in the original citation. (Tr. 114). Marcus testified that Sichmeller did not give her a specific termination time in the closeout meeting on the 13th, but he did extend the termination time to the morning of the 14th.

Marcus testified that, on Friday, December 14th she was present when Sichmeller met with Tom Angelo. (Tr. 116). Angelo was concerned about the termination time given for this violation, as well as others. (Tr. 116). Even though the mine had been given one extension, the job was big and Angelo wanted to discuss the termination time. It was at this point that Marcus was given the written version of all of the citations issued on the 13th, including the extension of time given to abate the violation in the pellet conveyor room. (Tr. 116-117). The inspector and mine representatives had further discussions about abatement efforts, and the mine asked for more time because it was a big project to clean the pellet room. (Tr. 117). The mine also asked for an extension of time for several other violations. Marcus testified that the pellet conveyor room looked good on the 14th and, in her opinion, the cleanup was complete. (Tr. 120). However, the inspector disagreed and issued another extension. (Tr. 120). There is no evidence that Marcus told the inspector that the condition had been abated but had recurred.

The mine was issued additional citations on December 14th. The inspection on the 14th concluded after 3:30 p.m., the time when many crews leave. According to Marcus, after 3:30, there is a skeleton crew of about six to eight miners. (Tr. 128-129). Prior to leaving for the day on the 14th, Sichmeller discussed the citations with Marcus and others. Marcus spoke to several managers about coordinating and getting the citations abated. (Tr. 129-130). She testified that the mine “knew [it] had a lot of work to do,” but she had no idea what was going to happen or when it was due as there was “no specific discussion” of abatement times. (Tr. 129-130). Marcus admitted that she failed to ask questions about how soon the citations must be terminated, but wrote her report for the day, Hibbing Ex. G, which did not include abatement times, emailed it to Hibbing’s salaried employees, and went home. (Tr. 129-130).

Marcus testified that Inspector Sichmeller returned to the mine on Saturday, December 15th and waited for Marcus to arrive. (Tr. 131-132). She explained that, prior to beginning that day’s inspection, he provided paper copies of the citations from the previous days’ inspections, as well as written extensions for a number of the earlier violations. (Tr. 133). Marcus testified that, after reviewing the conditions in the pellet plant, the inspector issued the 104(b) failure to abate order. Marcus was of the opinion that the cleanup was complete, and the citation was going to be terminated at that the time, but the inspector disagreed. (Tr. 136, 137). Moreover, she did not understand what the 104(b) order was, as she has never received one. Marcus then

questioned Sichmeller about the order and he explained the purpose of the order. (Tr. 136-138). Marcus testified that, on the 15th, while there were a few hoses on the ground, the floor was clean and dry, and, in her opinion, there was no hazard at that time. (Tr. 137).

Tim Angelo, the pellet plant operations manager, testified that he met with Sichmeller on December 14th to discuss his concerns over termination times, resources available, and the areas he had to cover. (Tr. 175). The discussion centered around the fact that the mine needed more time to abate the violations. (Tr. 175). He explained to Sichmeller that they had men assigned and he was doing what he could with the resources he had available. (Tr. 175). He understood that the inspector didn't believe the mine was using its time wisely, but the inspector told him that if the mine shows effort or some improvement then he would be willing to give extensions of time. (Tr. 176). Sichmeller told Angelo that he sets the abatement time for the following morning so that the mine will work diligently to correct the violation. (Tr. 176). However, Angelo testified that Sichmeller told him that if the mine presents some valid reason for not completing the task, he may extend the time. (Tr. 177). After the meeting, Sichmeller continued his inspection. (Tr. 177).

Angelo testified that, on Saturday, December 15th, he received a call from Marcus about the orders the mine received for not abating certain violations. (Tr. 177-178). Angelo went to the mine and learned that it had received four orders and some extensions of time on others. (Tr. 178). In response, Angelo looked at the resources available and came up with a plan, called out whoever he could call out, and used the operational crew to work some hours of overtime on the 15th. (Tr. 179-180). Angelo opined that the subject area is not a normal walkway and it is the mine's policy for miners to clean their way in if they have to reach certain areas. (Tr. 188-189). Moreover, because the area was on the bottom level that receives all of the debris and pellets from the above levels, the mine has a policy and signs warning miners to watch their footing and clean their way in. (Tr. 188-189). Angelo testified that he prioritizes his abatement efforts based upon the danger posed to the miners by the violative condition. In this instance he allocated some resources to clean the area when the citation was originally issued on December 12th. (Tr. 189-190).

In *Energy West Mining Co.*, 18 FMSHRC 565 (Apr. 1996), *aff'd*, 111 F.3d 900 (D.C. Cir. 1997), the Commission set forth the analytical framework for contesting a 104(b) order. The Commission stated as follows:

[T]he operator may challenge the reasonableness of the time set for abatement or . . . the Secretary's failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989), *citing Old Ben Coal Co.*, 6 IBMA 294, 306-07 (1976); *U.S. Steel Corp.*, 7 IBMA 109, 116 (1976); *Youghiogheny & Ohio Coal Co.*, 8 FMSHRC 330, 338-39 (March 1986) (ALJ). Section 104(b) of the Mine Act provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . .

has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring . . . all persons . . . to be withdrawn from . . . such area

30 U.S.C. § 814(b). The Act does not address the extent of an inspector's inquiry in making the determination of whether abatement time should be extended. Nor is the extent of inquiry addressed in legislative history. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), *reprinted in* 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 618 (1978); H.R. Rep. No. 563, 91st Cong., 1st Sess. 8, 31 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Coal Mine Health Safety Act of 1969*, at 1038, 1061 (1975) ("*Coal Act Legis. Hist.*"); S. Rep. No. 411, 91st Cong., 1st Sess. 37, 89, *reprinted in Coal Act Legis. Hist.* at 163, 215.

The Commission has recognized that the "Secretary . . . possesses enforcement discretion to extend the time for abatement if [he] believes it reasonable" *Clinchfield*, 11 FMSHRC at 2132. Therefore, in reviewing an operator's challenge to the Secretary's failure to extend abatement time, the Commission considers whether the inspector abused his discretion in issuing the order. The Commission has noted that "abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985).

18 FMSHRC 565, 568-569 (Apr. 1996).

I conclude that substantial evidence supports the inspector's determination that the time for abatement should not have been extended any longer and that the 104(b) order was properly issued. The inspector did not abuse his discretion prior to determining that the period of time for the abatement should not be further extended. Sichmeller considered the fact that, during the abatement period, little was done to abate the condition. Extensions were given when effort was shown, but, on the 15th, when Sichmeller went back to check on the progress of the abatement, no one was working in the area and the condition continued to exist. Sichmeller credibly testified that, while he gave the mine ample notice of the various abatement times, his primary

concern when deciding to not grant another extension was the safety of the miners, and, here, the hazard, and risk of injury, continued to exist. (Tr. 43, 86). Although, Marcus said she didn't have a specific abatement time, she also failed to ask for one, even after the time for completion had twice been extended. It is important that the mine personnel seek clarification if they do not understand the time set for abatement, yet Marcus, who was a relatively new employee, failed to do so. Certainly by the time the inspector spoke with Angelo on December 14th the time was clear. Nevertheless, the mine still had not abated the condition by the 15th. Sichmeller explained that, with regard to this particular condition, he was given no reason or explanation to justify extending the termination beyond the 15th. In his opinion, the number of persons working on the weekend is not a mitigating factor that justifies extending the time for abatement, as it is the mine's responsibility to see that sufficient workers are available to terminate the violations. I credit the inspector's testimony as to the condition of the pellet room on each of his visits. Moreover, I credit his testimony that he discussed abatement times at the end of each inspection day with a representative of the mine operator. The testimony of Hibbing's witnesses leads me to believe that the mine wants to abate on its schedule, and does not like the inspector requiring abatement outside of that schedule. Finally, I find that Sichmeller had a clear understanding of the law. He gave the company an original termination date, and when he learned that they could not complete the abatement in that amount of time, he twice extended the time for doing so. Sichmeller gave due consideration to the safety of the miners in setting a time, in extending the time, and in finally issuing an order for a failure to abate. Based upon the five penalty criteria, and the mine's failure to abate the violation in good faith, I assess a penalty of \$4,000.00.

b. Citation No. 8665957

On December 14, 2012 Inspector Sichmeller issued Citation No. 8665957 to Hibbing for an alleged violation of section 56.20003(b) of the Secretary's regulations. The cited standard requires that "[a]t all mining operations . . . [t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable[.]" 30 C.F.R. § 56.20003(b). The citation described the alleged violative condition, in pertinent part, as follows:

The walkways of the scrubber pump area were not being maintained in a clean condition. The area was found with a build up of wet slippery slurry, and cured taconite pellets[.] The north walkway was found with a build up of slurry ranging of up to ½ inch in depth for a length of about 40 feet down the width of the walkway. The walkway on the east side was found with a build up of cured taconite pellets covering the access to the east pump the pump was not in operation at the time of the inspection. Upon the north walkway there were two portable electrical disconnect units, one operating a portable heating setting inside the slurry build up. Reportedly the condition of the slurry appeared to have been created from washing the above levels. There were not [sic] person currently working in the immediate area at the time of the inspection.

Sichmeller determined that an injury or illness was unlikely to occur, but if one did occur it could reasonably be expected to result in lost workdays or restricted duty, that the violation was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$897.00 has been proposed for this violation.

The time for abatement was originally scheduled for 8:00 a.m., December 15, 2012. On December 15, 2012, Section 104(b) Withdrawal Order No. 8665970, was issued at 2:43 p.m. The order states as follows:

No efforts were being made for cleanup to the walkways of the scrubber pump area. The area was still found in the same condition as the originally cited condition. There were no persons observed in this area conducting cleanup measures, and not additional warnings or barricades in the affected area.

The order was terminated on December 17, 2012, after the “affected areas were cleaned at the scrubber pump area[.]”

The mine agrees that the original 104(a) citation accurately reflects a violation of the mandatory standard and that the negligence and gravity were properly assessed. The mine takes issue with the 104(b) failure to abate order, i.e., Order No. 8665970. Therefore, I affirm the violation as issued and address the 104(b) order issued in conjunction with this citation.

Citation No. 8665957 was issued on December 14, 2012. The cited condition was similar to the condition addressed in Citation No. 8665946, discussed *supra*, which was issued on December 12, 2012 at the conveyor area. The area addressed by the instant citation includes the walkways near the scrubber pump. Sichmeller testified that he observed taconite pellets in depths of two to three inches, and wet slurry buildup on the floor, about ½ inch in depth, for approximately 40 feet. (Tr. 44, 45). The subject area did not include the entire walkway, but the cited conditions still presented a slip, trip and fall hazard on the concrete floor. (Tr. 45). Sichmeller explained that Sec’y Exs. P3-6 through P3-9 are photos that depict the inspector’s observation of the slurry on the floor and the taconite pellets near the electrical disconnect site. (Tr. 45-46). Sichmeller testified that, while no one was working in the area at that time, a number of people work and travel in the area to conduct maintenance, daily workplace examinations, and to reach the electrical disconnect switches. (Tr. 45, 49). In addition, the area also contains pumps. Based on his observations, Sichmeller issued Citation No. 8665957 and set the termination time for 8:00 a.m. on December 15, 2012. (Tr. 49). Sichmeller testified that, during the closeout conference at the end of the day on the 14th, he advised the mine personnel of the time for termination. (Tr. 49-50).

When Sichmeller returned on the 15th, nothing had been done to abate the violation. (Tr. 51). As a result, he issued Order No. 8665970 for a failure to abate the violation. (Tr. 50-51). According to Sichmeller, the condition had not changed, no one was in the area working on it, and there was no warning or barricade in place. (Tr. 51, 52). According to Sichmeller, the mine’s inspection report again indicated that work needed to be done, and Marcus was upset that

nothing had been accomplished and was unable to explain why that was the case. (Tr. 51). Prior to issuing the order, Sichmeller had a discussion with the mine's safety department, who gave him no reason why the work had not been completed, nor any mitigating circumstance that would warrant an extension of time. Sichmeller determined that an extension was not warranted, given that a hazard continued to exist and no abatement effort was evident. (Tr. 52). The debris in the area, including the pellets, was extensive and cleanup continued until December 17th, however, in Sichmeller's view, the condition could have been easily abated in one day. On cross-examination, Sichmeller acknowledged that cleaning of areas above the cited area could affect the cited area. (Tr. 76-77). Sichmeller testified that he eventually terminated the order on the 17th after the mine cleaned the subject area. (Tr. 52-53).

Marcus, who was accompanying Sichmeller at the time this citation was issued on the 14th, testified that she was not given a "specific abatement time" when the citation was issued. However, she did not ask for a time or clarify what was expected of the mine even though Sichmeller offered her the opportunity to do so. Marcus testified that it was her understanding that abatement efforts began immediately after the citation was issued. (Tr. 122-123). Sichmeller had told Angelo earlier on the 14th, the day the citation was issued, that the termination time for all citations issued that day was 8:00 a.m. the following morning. Marcus also took photos of the area and, when she returned to the area the following day with the inspector, she believed it had been cleaned adequately. (Tr. 148-149). According to Marcus, Hibbing Ex. B shows a slightly different angle and the walkway is clear. However, the photo does not show the entire area cited. The area had not been entirely cleaned, but Marcus testified that there was a reduction in pellets and the floor was wet, which was an indication that the mine had been working on it. (Tr. 150). Marcus believed that the worker had been pulled off to work on another area but the abatement was partially done. Marcus recalled that she had spoken to the inspector the previous day about abatement times and the lack of progress on some areas. (Tr. 143). Angelo had explained on the previous day that the problem was with finding the resources to do the work on the weekend. Marcus testified that she believed the inspector was too vague when he explained on Friday that he wanted the termination time to be short so they would keep working on it. (Tr. 162).

Thomas Paul Marturano, the maintenance section manager at the pellet plant at the time of the inspection, accompanied the inspector after lunch on December 14th. (Tr. 191-193). When observing the cited area, Marturano testified that he believed that the walkway was clear, although there was material on the floor. (Tr. 194-195). He opined that a miner may access the cited area only once each shift in order to attend to the furnace, maintain the scrubber pump or do an inspection. (Tr. 195). He characterized this area as a "lower priority" because not many people work or travel through the area. (Tr. 196).

Derek Gouldin, the operations supervisor on call that weekend, testified that he participated in a pre-inspection conference on the 15th with Sichmeller, however, he does not recall any discussion of abatement time. (Tr. 207). He testified that the subject area was the same area that was addressed in another citation, and that the same mitigating factors existed, including that the area was wet because the area above or adjacent had been recently hosed down. (Tr. 202, 215). Gouldin explained that, on December 15, 2012, Sichmeller extended the abatement times for a number of violations and believed that Sichmeller should have extended

the abatement times for even more citations because there were several cited conditions that were similar, and the reasons for not completing the abatement in a timely matter were the same. Gouldin noted that, with regard to the housekeeping citations, debris falls from above as they clean those areas. (Tr. 212-213). He testified that, on the weekend, cleaning of the upper levels doesn't affect travel in the lower levels because no one is there. Finally, he explained that, in the closeout conference that day, it was safe to assume that the abatement times for all citations from there on out would be 8:00 a.m. the following day. (Tr. 216).

I conclude that substantial evidence supports the inspector's determination that the time for abatement should not have been extended and that the 104(b) order was properly issued. The inspector did not abuse his discretion prior to determining that the period of time for the abatement should not be extended. Sichmeller considered the fact that, during the abatement period, little was done to abate the condition. The mine was aware that the time for abatement on Saturday was 8:00 a.m., however, the area was not re-inspected until well after that time when Sichmeller observed that little, if anything had changed. While Marcus disagreed and testified that there was much to clean up, and that some work had been done, I credit Sichmeller's testimony that he observed little evidence of progress in the cleanup. Sichmeller credibly testified that he had given the mine ample notice of the various abatement times, and that, in refusing to grant an extension, his primary concern was for the safety of miners. (Tr. 52-53, 88). Although Marcus testified that she was not specifically told of an abatement time, she agreed that she failed to ask for further explanation. Certainly, given Sichmeller's conversation with Angelo on the morning of the 14th, the time was clear, and still was not met by the 15th. Sichmeller explained that he was given no reason or explanation to extend the termination in this instance and that the number of persons working on the weekend is not a mitigating circumstance. (Tr. 88). It is the mine's responsibility to see that sufficient workers are available to terminate the violations. I credit the inspector's testimony as to the condition of the area as well as his testimony that he discussed abatement times at the end of each inspection day with a representative of the mine operator. Finally, I find that Sichmeller had a clear understanding of the law. He gave the company a termination date and time, and gave due consideration to the safety of the miners in setting that time and in finally issuing an order for a failure to abate. Based upon the five penalty criteria, and the mine's failure to abate the violation in good faith, I assess a penalty of \$1,000.00.

c. Citation No. 8665959

On December 14, 2012 Inspector Sichmeller issued Citation No. 8665959 to Hibbing for an alleged violation of section 56.20003(a) of the Secretary's regulations. The cited standard requires that "[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]" 30 C.F.R. § 56.20003(a). The citation described the alleged violative condition, in pertinent part, as follows:

The walkway leading to the electrical disconnect was not being maintained in a clean condition to the operating indurating vent unit G. The access was completely covered with round, cured taconite pellets to a maximum depth of about four inches. This condition creates slip/fall hazards to persons accessing this area.

This condition was easily seen from the main travel route and was the second violation today for this type of condition.

Sichmeller determined that an injury or illness was unlikely to occur, but, if one occurred it could reasonably be expected to result in lost workdays or restricted duty, that the violation was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$764.00 has been proposed for this violation.

The time for abatement was originally scheduled for 8:00 a.m., December 15, 2012. On December 15, 2012, Section 104(b) Withdrawal Order No. 8665968 was issued at 2:25 p.m. The order states as follows:

No efforts were being made to clean the walkway leading up to the electrical disconnect of the operating indurating vent unit G. The conditions of round, cured taconite pellets to a depth of up to 4 inches was still in this area. There were no additional warnings or barricades in the area.

The order was terminated on December 16, 2012, after, “[t]he walkway was cleared, pellets were removed in front of the electrical disconnect for indurating vent unit G[.]”

The mine agrees that the original 104(a) citation accurately reflects a violation of the mandatory standard and that the negligence and gravity were properly assessed. The mine takes issue with the 104(b) failure to abate order, i.e., Order No. 8665968. Therefore, I affirm the violation as issued and address the 104(b) order issued in conjunction with this citation.

After speaking with Marcus and Angelo on the morning of December 14th about abatement issues, Sichmeller issued Citation No. 8665959 for a violative condition identical to those discussed above; an accumulation of taconite pellets on a walkway. (Tr. 54). Sichmeller found that the area was accessed only a couple of times per day, but that, when it was accessed, those miners were exposed to slip and fall hazards. (Tr. 54). The subject area, which was smaller than the two areas discussed *supra*, was approximately eight by eight feet with accumulations of pellets reaching depths of three to four inches. (Tr. 54). Sichmeller explained that mine personnel doing routine checks, electrical personnel that need to access the disconnect, and maintenance personnel working on the unit all must travel the area during any shift. (Tr. 55). Sichmeller testified that he communicated the termination date just as he always does, during the daily conference meetings with the mine in which he goes over every citation. (Tr. 58). Sichmeller testified that Sec’y Exs. P5-3 and P5-4 depict the area and show an accumulation of pellets near the electrical disconnect in the center of the first photo. (Tr. 55). He explained that there was no apparent change in the condition of the areas in the second photo, which was taken the following day, the 15th. (Tr. 56). Moreover, on the second day, there were no warnings or barricades. (Tr. 56). As a result, Sichmeller issued Order No. 8665968 for a failure to abate the violation. (Tr. 57-58). He based the issuance on his observation that, on the 15th, no one was working in area, it was not barricaded, and that this was a quick job that should have been easily completed and taken no longer than five minutes to do so. (Tr. 57-60). He explained that, again, the mine’s inspection report showed that work needed to be done, yet the

mine offered no mitigating factors or reasons why the cleanup had not been completed. (Tr. 57-59). The citation was eventually terminated on the 16th after the cleanup had been completed. (Tr. 59).

Marcus testified that abatement efforts began immediately after the citation was issued, but stated that she did not know of an abatement time until the day following the issuance when the paper was issued. (Tr. 125) Even though she was aware of Sichmeller's conversation with Anglo on the 14th and was told that the abatement time for all citations issued on the 14th would be the following morning.

Marturano, who was with the inspector when the citation was issued, observed pellets in front of disconnect, but believed the area could be reached without stepping on the material. (Tr. 196-197). He testified that the walkway is cleaned by miners who may be in the area to do maintenance on a piece of equipment, and pellets build up on the sides of the walkway. (Tr. 197). However, since the area is not accessed often, it is not a priority to clean. (Tr. 197). Marturano, like the other witnesses for the mine, said he was not told an abatement time.

Hibbing again argues that it was not specifically told of the abatement time. I conclude that substantial evidence supports the inspector's determination that the time for abatement should not have been extended and that the 104(b) order was properly issued. The inspector did not abuse his discretion prior to determining that the period of time for the abatement should not be extended. Sichmeller considered the fact that, during the abatement period, little was done to abate the condition. While Marcus disagreed and testified that there was much to clean up, and that some work had been done, I credit Sichmeller's testimony that he observed little evidence of progress in the cleanup. Sichmeller credibly testified that he had given the mine ample notice of the various abatement times, and that, in refusing to grant an extension, his primary concern was for the safety of miners. Although Marcus testified that she was not specifically told of an abatement time, she agreed that she failed to ask for further explanation. Certainly, given Sichmeller's conversation with Angelo on the morning of the 14th, discussed *supra*, the time was clear, and still was not met by the 15th. Sichmeller explained that he was given no reason or explanation to extend the termination in this instance and that the number of persons working on the weekend is not a mitigating circumstance. It is the mine's responsibility to see that sufficient workers are available to terminate the violations. I credit the inspector's testimony as to the condition of the area and that he discussed abatement times at the end of each inspection day with a representative of the mine operator. Finally, I find that Sichmeller had a clear understanding of the law. He gave the company a termination date and time, and gave due consideration to the safety of the miners in setting that time and in finally issuing an order for a failure to abate. Based upon the five penalty criteria, and the mine's failure to abate the violation in good faith, I assess a penalty of \$1,200.00.

d. Citation No. 8665960

On December 14, 2012 Inspector Sichmeller issued Citation No. 8665960 to Hibbing for an alleged violation of section 56.14100(b) of the Secretary's regulations. The cited standard requires that [d]efects on any equipment, machinery, and tools that affect safety shall be

corrected in a timely manner to prevent the creation of a hazard to persons. 30 C.F.R. § 56.14100(b). The citation described the alleged violative condition, in pertinent part, as follows:

The outer protective sheeting on the line number 2 windbox exhaust fan was not being maintained to prevent the creation of a hazard to persons. The sheeting was found deteriorated and loose. This condition creates a hazard to persons accessing this area. There were no persons currently working in the area and reportedly this area is accessed as needed for maintenance. Other fans in the area were found with this type of sheeting removed with spray-on insulation covering them. The complete deterioration of the material indicates that this condition has been present for some time.

Sichmeller determined that an injury or illness was unlikely to occur, but, if one occurred it could reasonably be expected to result in lost workdays or restricted duty, that the violation was not significant and substantial, that one person was affected, and that the negligence was moderate. A civil penalty in the amount of \$971.00 has been proposed for this violation.

The time for abatement was originally scheduled for 8:00 a.m., December 15, 2012. On December 15, 2012, Section 104(b) Withdrawal Order No. 8665969 was issued at 2:33 p.m. The order states as follows:

No efforts were being made to correct the outer protective sheeting on the line #2 [wind]box exhaust fan. The loose, deteriorated sheeting was still hanging in the same condition as the originally cited condition. There were no persons working in the area and there were no additional warnings or barricades for the conditions created.

The order was terminated on December 17, 2012, after, “the deteriorated sheeting was removed from the Line 2 windbox fan area[.]”

The mine agrees that the original 104(a) citation accurately reflects a violation of the mandatory standard and that the negligence and gravity were properly assessed. The mine takes issue with the 104(b) failure to abate order, i.e., Order No. 8665969. Therefore, I affirm the violation as issued and address the 104(b) order issued in conjunction with this citation.

While conducting his inspection on December 14th, Sichmeller observed that the Line No. 2 windbox exhaust fan was not being maintained. (Tr. 61). Specifically, the fan had deteriorated to the point that the protective sheeting was flapping in the wind and sharp edges existed (Tr. 61, 64). Sichmeller believed that parts could fall off and strike anyone in the area. (Tr. 61, 64). There was a walkway leading to the bearings and shaft for the windbox located below the fan. (Tr. 62). Sichmeller testified that, while there is limited access to the area, the condition created a hazard which should have been easily repaired. (Tr. 64). As a result, Sichmeller issued Citation No. 8665960 and gave the mine until 8:00 a.m. on the 15th to correct

the condition. (Tr. 64). Sichmeller discussed the time for abatement with mine personnel at the end of the day on the 14th, and again discussed it the following morning. (Tr. 64). When Sichmeller returned the on the 15th, there was no one working to abate the violative condition, and the fan was in the same condition that he observed on the prior day. (Tr. 65). Sichmeller asked Marcus why the fan had not been repaired or the area barricaded, and, according to Sichmeller, Marcus did not know why it had not been corrected. (Tr. 65). As a result, he issued Order No. 8665969 for a failure to abate the condition. Sichmeller explained that, in determining termination times, and whether to issue a 104(b) order or extension, he looks first to the health and safety of the miners, and not the staffing of company. While he will not change termination times, he will grant extensions if warranted. His concern with this mine was getting it started abating the conditions. Sichmeller believed that he was fair with the mine, and granted extensions to abate many of the roughly 100 citations he issued during the inspection. (Tr. 89-90).

Marcus testified that she was present during the issuance of this citation and took photographs of the area. (Tr. 126); Hibbing Ex. D. She recalled that, immediately after the citation was issued, she removed two pieces of the sheeting that were flapping and believed that she had abated the violation at that point. (Tr. 128, 146). However, Sichmeller stated that the sharp edges had not been addressed. (Tr. 146). Marcus again testified that she was not made aware of the intended abatement time until the following day, December 15th. (Tr. 128). The citation was eventually terminated by Sichmeller on the 17th after the mine removed the loose sheeting from the windbox and took steps to correct the sharp edges that were exposed. (Tr. 66). Sichmeller testified that Sec'y Exs. P8-8 and P8-9 depict the termination on December 17th with the sheeting removed, and the sharp edges grounded down.

Marturano testified that the fan is not accessed very often, and, generally, when an inspection is done, the attendant just walks by the area, roughly 25 to 30 feet away, without actually accessing the pedestal where the flapping metal was hanging. (Tr. 198). However, he acknowledged that a miner doing maintenance would have to access the area. (Tr. 199). Marturano testified that abatement of the condition began immediately when someone went up on the pedestal and took down the flapping sheet metal. (Tr. 199). However, he received no information on abatement time at that point. (Tr. 199). He explained that the inspection on the 14th ended after 3:00, and most day shift miners were gone, while just an operating crew remained. (Tr. 199-200). Marturano testified that, during the meeting at the end of the day, there was a brief discussion regarding the citation issued that day, but there was no mention of abatement times. (Tr. 200). After MSHA left, he had a short discussion with Marcus about it being odd that no termination time was given. (Tr. 101). Finally, he went to talk to the operations supervisor to tell them about the citations and what areas had to be cleaned. (Tr. 202). Marturano testified that there were MSHA items written in the book, however, he didn't know what exactly was going on to abate this particular citation. (Tr. 202).

Again the company argues that they were not told of the time for abatement, but I find this argument disingenuous as everyone agreed that Anglo was told on the morning of the 14th that the conditions, including this one, must be abated by the following morning. The mine further argues that the fan was not accessed often and therefore not a hazard to miners, and so the termination time could safely be extended. I conclude that substantial evidence supports the

inspector's determination that the time for abatement should not have been extended and that the 104(b) order was properly issued. The inspector did not abuse his discretion prior to determining that the period of time for the abatement should not be extended. Sichmeller considered the fact that, during the abatement period, little was done to abate the condition. While Marcus disagreed and testified that she had removed the sheeting and work had been done, I credit Sichmeller's testimony that he observed little evidence of progress. Sichmeller credibly testified that he had given the mine ample notice of the various abatement times, and that, in refusing to grant an extension, his primary concern was for the safety of miners. Given Sichmeller's conversation with Angelo on the morning of the 14th, discussed *supra*, the time for abatement was clear, and still was not met by the 15th. Sichmeller explained that he was given no reason or explanation to extend the termination in this instance and that the number of persons working on the weekend is not a mitigating circumstance. It is the mine's responsibility to see that sufficient workers are available to terminate the violations. I credit the inspector's testimony as to the condition of the fan and that he discussed abatement times at the end of each inspection day with a representative of the mine operator. Finally, I find that Sichmeller had a clear understanding of the law. He gave the company a termination date and time, and gave due consideration to the safety of the miners in setting that time and in finally issuing an order for a failure to abate. Based upon the five penalty criteria, and the mine's failure to abate the violation in good faith, I assess a penalty of \$1,200.00.

e. Settled Citations

At hearing, the parties filed a partial settlement agreement for the eight remaining violations. Hibbing has agreed to accept Citation Nos. 8665947 and 8665950 as issued and pay the originally proposed penalties for such.

Hibbing represents that, with regard to Citation No. 8665948, it would have argued that the spills were localized and the travelways were large with the spills being easily bypassed. It further represents that it would have argued that the cause of the spill was noted and they had plans for repairs. The Secretary has agreed to modify Citation No. 8665948 from "moderate" to "low" and accept a reduced penalty of \$1,530.00.

Hibbing represents that, with regard to Citation No. 8665949, it would have argued that the area was posted with a sign stating "Clean area prior to entry"; also the area has limited access and is only accessed for maintenance when the equipment is shut down. The Secretary has agreed to modify Citation No. 8665949 from "high" to "moderate" negligence and accept a reduced penalty of \$334.00.

Hibbing represents that, with regard to Citation No. 8665953, it would have argued that the main walk way was clear in the main travel way and fire extinguisher could be easily reached and there was also a fire hose nearby. The Secretary has agreed to modify Citation No. 8665953 from "moderate" to "low" and accept a reduced penalty of \$150.00.

Hibbing represents that, with regard to Citation No. 8665956, it would have argued that the cleanup of the spill had been started recently in this area and spillage was minimal on the

main travel way outside of the pillars. The Secretary has agreed to modify Citation No. 8665956 from “moderate” to “low” and accept a reduced penalty of \$1,530.00.

Hibbing represents that, with regard to Citation No. 8665963, it would have argued that the cited spillage was minimal and was located under the tail pulley with the main travel way being clear. The Secretary has agreed to modify Citation No. 8665963 from “reasonably likely” to “unlikely,” delete the significant and substantial designation, and accept a reduced penalty of \$745.00.

Hibbing represents that, with regard to Citation No. 8665971, the cited condition is more accurately described as a violation of 30 C.F.R. § 56.14110. The Respondent asserts the taconite pellet conveyance was spilling pellets causing the pellets to fall to the work area below. The Secretary has agreed to modify Citation No. 8665971 to reflect a violation of 30 C.F.R. § 56.14110, and accept a reduce penalty of \$1,657.00.

I accept the representations and the modifications of the parties as set forth in the motion for partial settlement. I have considered the representations and documentation submitted, find that the modifications are reasonable and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**.

II. PENALTY

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

- (1) The operator’s history of previous violations,
- (2) the appropriateness of such penalty to the size of the business of the operator charged,
- (3) whether the operator was negligent,
- (4) the effect on the operator’s ability to continue in business,
- (5) the gravity of the violation, and
- (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a large operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. Moreover, Hibbing has agreed to accept the gravity and negligence as assessed. Hibbing, as discussed in detail *supra*, failed to demonstrate good faith in abating the four subject 104(a) citations. The penalty amounts for the citations addressed at hearing and in the motion for partial settlement are as follows:

<u>Citation/Order No.</u>	<u>Originally Proposed Penalty</u>	<u>Final Penalty</u>
8665946	\$3,784.00	\$4,000.00
8665947	\$334.00	\$334.00
8665948	\$3,405.00	\$1,530.00
8665949	\$1,111.00	\$334.00
8665950	\$873.00	\$873.00
8665953	\$334.00	\$150.00
8665956	\$3,405.00	\$1,530.00
8665957	\$897.00	\$1,000.00
8665959	\$764.00	\$1,200.00
8665960	\$971.00	\$1,200.00
8665963	\$3,689.00	\$745.00
8665971	<u>\$4,329.00</u>	<u>\$1,657.00</u>
Total	\$ 23,896.00	\$ 14,553.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$14,553.00. Hibbing Taconite Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$14,553.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 15, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (“MSHA”),	:	Docket No. KENT 2010-160
	:	
Petitioner,	:	A.C. No. 15-08079-198829-02
	:	
v.	:	
	:	Mine ID: 15-08079
EXCEL MINING, LLC,	:	Mine: No. 3
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky for
Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

On November 24, 2009, the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), filed a Petition for the Assessment of Civil Penalty (“Petition”) against Excel Mining, LLC (“Respondent” or “Excel”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended, 30 U.S.C. §§ 815, 820 (2006). Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty (“Answer”) on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (“Commission”), dated December 1, 2010, the case was assigned to the undersigned for adjudication.

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The Petition alleges six violations described in Citation Numbers 8231582, 8231583, 8231586, 8236506, 8236514 and 8236515, each of which were issued pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), and for which the Secretary seeks penalties totaling \$13,572. In particular, Citation Number 8231582 alleges a violation of 30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan. Citation Number 8231583 alleges a violation of 30 C.F.R. § 75.362(a)(2) for failure to conduct an adequate onshift examination. Citation Number 8231586 alleges a violation of 30 C.F.R. § 75.503 for failure to maintain a roof bolter machine in permissible condition. Citation Number 8236506 alleges a violation of 30 C.F.R. § 75.400 for allowing accumulations of combustible materials to exist in an active working section. Citation Number 8236514 alleges a violation of 30 C.F.R. § 75.503 for failure to maintain a continuous miner machine in permissible condition. Finally, Citation Number 8236515 alleges a violation 30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan.

A hearing was held on the charged violations in Pikeville, Kentucky on October 18 and 19, 2011. At the hearing, the Secretary introduced the testimony of one witness, Billy Ray Meddings, and proffered nine exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1-9. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 192. Respondent, in turn, introduced the testimony of three witnesses, Jimmy Lindell Rowe, Keith Stevens, and Ronnie Johnson. The Secretary and Respondent subsequently filed post-hearing briefs on January 9, 2012, and February 6, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS

Before the hearing, the parties entered into the following stipulations ("Stip"):

1. Respondent is subject to the Mine Act.
2. Respondent has an effect upon interstate commerce within the meaning of the Mine Act.
3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Respondent operates the No. 3 Mine, I.D. No. 15-08079.
5. The No. 3 Mine produced 1,789,927 tons of coal in 2008, and had 655,991 hours worked in 2008.
6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be “significant and substantial” or to involve “unwarrantable failure,” enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from,

and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, “Section 104(d)(1) distinguishes as more serious any violation that ‘could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,’ and establishes more severe sanctions for any violation that is caused by ‘an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.’” *Wolf Run Mining Co.*, 2013 WL 1249150, *2 n.4 (Mar. 20, 2013) (alteration in original). This mechanism for enhanced enforcement serves as a “forceful incentive for the operator to exercise special vigilance in health and safety matters.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)). The legal standards applicable to each of these concepts are described below.

A. GRAVITY

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider “the gravity of the violation,” among other criteria. 30 U.S.C. § 820(i). Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if the event has occurred or was to occur; and (3) the number of persons potentially affected if the event has occurred or were to occur.

B. SIGNIFICANT AND SUBSTANTIAL

As discussed in greater detail below, the Secretary alleges that five of the alleged violations at issue in this proceeding were of a significant and substantial (“S&S”) nature. As defined by Section 104(d)(1) of the Mine Act, 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)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (April 1981), holding that a violation is properly designated as 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.” *Nat’l Gypsum*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984) (“*Mathies*”):

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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies, 6 FMSHRC at 3–4 (footnote omitted).

The S&S nature of a violation is distinct from the violation’s gravity. As noted by the Commission, “[t]he 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 at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from “a reasonable likelihood that the [cited] condition . . . could contribute, significantly and substantially, to the cause and effect of a safety hazard.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, “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 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider “whether the operator was negligent.” 30 U.S.C. § 820(i). Thus, “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence as follows:

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

30 C.F.R. § 100.3(d). When analyzing an operator’s negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

IV. SUMMARY OF THE EVIDENCE

In support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Billy Ray Meddings and copies of the six citations at issue, the field notes of Inspector Meddings, a document entitled “Assessed Violative

History Report,” and the revised basic ventilation plan for Respondent’s Number 3 Mine. Respondent, in turn, offered the testimony of Jimmy Lindell Rowe, Terry K. (“Keith”) Stevens, and Ronnie Johnson.

Admitted into evidence as Secretary’s Exhibits 1 through 6 respectively, Citation Numbers 8231582, 8231583, 8231586, 8236506, 8236514, and 8236515 were issued by Inspector Meddings between August 5, 2009 and August 28, 2009, as he performed an E01 inspection² of Respondent’s Number 3 Mine. S’s Ex. 1–6; Tr. 193. At that time, Number 3 Mine was comprised of four working sections. Tr. 333. Each section was divided further into two production operations, designated as “super sections” or “MMUs,” meaning that two continuous miner machines were operated in each section and the sections were ventilated using a “fishtail ventilation” system. Tr. 333–34. In turn, each super section consisted of nine entries. Tr. 347.

A. AUGUST 5, 2009

Inspector Billy Ray Meddings had been a member of the coal mining industry for over 30 years, including four and a half years as an inspector for MSHA. Inspector Meddings inspected the Number 4 section of Number 3 Mine on August 5, 2009, accompanied by Keith Stevens, an electrician who had been employed by Respondent for 11 years. Tr. 190–91, 232–33, 305–06; S’s Ex. 7. Upon arriving at the Number 4 section with Mr. Stevens, Inspector Meddings briefly spoke to the day shift foreman and then proceeded to perform an “imminent danger run,” which, according to Inspector Meddings, typically takes him 10 to 20 minutes to complete. Tr. 234–36. At the hearing, Inspector Meddings could not recall whether Mr. Stevens was present when he performed the imminent danger run. Tr. 235, 237. Thereafter, Inspector Meddings inspected a

² Inspector Meddings explained that an E01 inspection is performed four times a year at a given mine and requires an inspection of “everything in the mine, all the airways, all the equipment, all their records, everything at that mine.” Tr. 273–75. He further explained that the duration of an E01 inspection depends upon the size of the mine, but that larger mines like those operated by Respondent can take up to three months. Tr. 273–75.

“scrubber”³ on the continuous miner machine in the active 039-0 MMU and determined that it was generating only 3739 cubic feet per minute (“CFM”) of air, in contravention of Respondent’s revised basic ventilation plan. Tr. 193, 196–97, 232; S’s Ex. 1, 7. This plan, proffered by the Secretary and admitted into evidence as Secretary’s Exhibit 9, requires a scrubber output of 4800 CFM. S’s Ex. 9.

At the hearing, Inspector Meddings described the manner in which he typically measures the output of scrubbers, testifying that he uses a “Magna Healy gauge”⁴ to take three readings in each of a scrubber’s port holes and then performs the necessary calculations to convert those readings to the output figure. Tr. 197–99. He maintained that he measured the output of the subject scrubber in this manner. Tr. 238–39. Additionally, his field notes reflect that he took two sets of such readings and found the output of the scrubber to be 3739 CFM based upon the first set of readings. S’s Ex. 7. He testified that he took the second set of readings after Respondent’s agents attempted to fix the scrubber by “clean[ing] the screen out more” and “fix[ing] the leaks on it.” Tr. 199–200. However, because he calculated a lower output figure based upon the second set of readings, he disregarded those measurements and issued Citation Number 8231582 at 3:40 p.m. based upon the output figure of 3739 CFM that he initially calculated. Tr. 200; S’s Ex. 1, 7. He subsequently terminated the Citation on August 6, 2009, noting that “[t]he scrubber motor has been replaced . . . and scrubber output is above the minimum 4800 CFM as required by the approved ventilation plan.” S’s Ex. 1; *see also* Tr. 205.

When questioned by Respondent’s counsel, Inspector Meddings affirmed that the continuous miner machine “[p]robably more than likely” was backed away from the face of the

³ Inspector Meddings described a scrubber as a device affixed to a continuous miner machine that uses water to filter the respirable dust generated by the miner out of the air:

A scrubber more or less is a air generating suction device that’s on top of a miner. It will inhale all the dust, everything toward the face. It’ll pull it through a filter system, the filter’s got a water spray system on it. That’s the first line. And then it starts taking the particles out of it, then it goes through a demister, and demister takes the other particles of respirable dust out of it, and then it ejects just the air. So it actually filters, you know, the respirable dust out.

Tr. 196; *see also* Tr. 200. He explained that scrubbers operate in conjunction with another system of water sprays at “the ripper head of the miner,” which “try to get as much of [the dust] as it can soaked.” Tr. 200–01. He further explained that an operator is not required to use a scrubber when the depth of penetration of an entry is no greater than 20 feet but that because Respondent’s Number 3 Mine “normally all the time runs deep cuts, . . . they’ll normally run the scrubber all the time, . . . even starting off at zero cuts.” Tr. 195; *see also* Tr. 201–02.

⁴ This reference to a “Magna Healy gauge” appears to be a transcription error, as the Secretary identified this device in her Post-Hearing Brief as a “magnahelic gauge.” Secretary’s Post-Hearing Brief (“S’s Br.”) at 4. In addition, Inspector Meddings recorded in his field notes, which were admitted into evidence as Secretary’s Exhibit 7, that the day shift foreman informed him that the output of the subject scrubber had been measured prior to Inspector Meddings’ inspection also using a “magnahelic gauge.” S’s Ex. 7.

mine at the time he inspected it and that it, therefore, was not producing any coal. Tr. 236–37. However, he denied having any knowledge as to whether Respondent’s agents were awaiting delivery of a new motor for the subject scrubber at the time he arrived at the Number 4 section to inspect it. Tr. 237, 269–70.

With respect to the gravity of the charged violation, Inspector Meddings explained that a scrubber that fails to emit the required volume of air may lead to an accumulation of excessive dust, the inhalation of which can cause permanently disabling illnesses to miners, such as black lung disease and silicosis. Tr. 194, 202; S’s Ex. 1. He also testified that dust may act as an ignition source. Tr. 241–42. He determined that the alleged violation was reasonably likely to cause an injury or illness, testifying that the subject scrubber “had been used all day shift” and “was still in operation” at the time of his inspection. Tr. 202–03; S’s Ex. 1. He also noted that Respondent was currently “cutting approximately 12 inches of sandstone / shale roof which produces excessive dust.” S’s Ex. 1. Inspector Meddings admitted that he did not observe any dust, however. Tr. 242. He also determined that four miners would be affected by the violative condition, but he was unable to explain this assessment:

A: Normally I put -- and I could go back through my notes again, normally I put, if there’s two buggy operators and a miner operator, I normally put three.

Q: If you’d like to take a look --

A: Yeah, there may have been three shuttle cars hauling underneath him. I’m not for sure. I didn’t put in my notes where the extra man came from, so you know, I’m not exactly one hundred percent sure where he came from.

Tr. 203–04; S’s Ex. 1. Because he determined that a reasonable likelihood existed that a miner would be afflicted with a serious illness, Inspector Meddings characterized the alleged violation as significant and substantial in nature. Tr. 203; S’s Ex. 1. Finally, Inspector Meddings explained that he found Respondent to have been moderately negligent in committing the violation based upon his belief that the day shift foreman had examined the subject scrubber but had failed to measure the output of the scrubber accurately. Tr. 204–05.

In conjunction with Citation Number 8231582, Inspector Meddings issued Citation Number 8231583 at 3:45 p.m. on August 5, 2009. Tr. 207; S’s Ex. 2, 7. According to his testimony and field notes, he was informed by the day shift foreman upon arriving at the Number 4 section that the dust parameters and output of the subject scrubber had been measured during an onshift examination performed within 45 minutes of his arrival and that those readings complied with the mine’s revised basic ventilation plan. Tr. 204–07; S’s Ex. 7. Inspector Meddings concluded that the examination was inadequate, explaining, “this citation was issued because the scrubber, which I cited previously, wasn’t working properly, and the foreman told me it was I checked it twice and never could get it up to speed. So it never was working properly.” Tr. 207.

Finally, Inspector Meddings issued Citation Number 8231586 at 6:45 p.m. on August 5, 2009, alleging that Respondent failed to maintain a roof bolter machine being used on the active

039-0 MMU in permissible condition based upon his observations that: 1) the main control panel lacked two flat washers; 2) the cable reel was not fully insulated in three locations; 3) the half inch conduit was not properly repaired in two locations; and 4) an opening existed in the half inch conduit on the offside area work light, exposing an inner cable. S's Ex. 3, 7; Tr. 209–10, 243–46. Inspector Meddings terminated the Citation less than 30 minutes after issuing it, noting that the underlying conditions had been repaired. S's Ex. 3; Tr. 213.

With respect to the gravity of the violation, Inspector Meddings determined that an injury was reasonably likely to result based upon the frequency with which Respondent used this roof bolter machine, the number of cited defects, and the high volume of methane liberated by the mine. S's Ex. 3, 7; Tr. 211, 247. He explained that the violation exposed the two miners operating the machine to the hazard of fire or explosion and that because this hazard could result in a range of injuries or even a fatality, he designated the injury that could reasonably be expected as permanently disabling. S's Ex. 3, 7; Tr. 210–12. He also characterized the violation as significant and substantial in nature based upon the reasonable likelihood that the miners would sustain serious injuries. S's Ex. 3; Tr. 212. Finally, he determined that Respondent was moderately negligent in committing the violation based upon the number of cited defects. S's Ex. 3, 7; Tr. 212–13.

When questioned by counsel for Respondent, Inspector Meddings acknowledged that the cable stored on the cited cable reel was fully insulated and intact. Tr. 244. He also acknowledged that he had cited defective conduits but not the underlying cables, indicating that those cables were fully insulated and undamaged. Tr. 244–46. Further, he admitted that he was not aware of any instances of a fully insulated cable causing an ignition of methane or energizing the frame of equipment and thereby creating a risk of shock or electrocution. Tr. 246.

On behalf of Respondent, Keith Stevens offered an account of the August 5, 2009 inspection that diverged significantly from that of Inspector Meddings. In particular, Mr. Stevens testified that he and Inspector Meddings arrived at the Number 4 section of the mine on August 5, 2009, and immediately separated, with Inspector Meddings “tak[ing] off” and “check[ing], you know, just everything,” and Mr. Stevens proceeding to the continuous miner machine at issue. Tr. 308–09. Mr. Stevens testified that he went to the continuous miner machine within four or five minutes of their arrival at the section. Tr. 309. At the time, Mr. Stevens explained, the continuous miner machine was not mining coal or even located at the face; rather, it had been relocated “back the second block” and Respondent’s agents were in the process of removing the scrubber motor. Tr. 309–10.

According to Mr. Stevens, he observed Inspector Meddings inspecting the “pinner”⁵ approximately 20 minutes later, and he moved to join him. Tr. 310–11. Mr. Stevens confirmed that Inspector Meddings found four deficiencies on the machine. Tr. 311–20, 325–27. However, he testified, in essence, that these deficiencies were merely technical violations that did not present any hazards or risks of injury to the miners because none of the cables underlying the cited conduits had sustained any damage. Tr. 311–19.

⁵ Prompted by counsel for Respondent, Mr. Stevens affirmed that the term “pinner” is another way to describe a roof bolter machine. Tr. 311.

Mr. Stevens explained that he subsequently returned to the continuous miner machine, where he was informed that it was “ready.” Tr. 320. He presumed that Inspector Meddings, meanwhile, “was going on across the section.” Tr. 320. Upon seeing Inspector Meddings, Mr. Stevens approached and invited him to inspect the machine. Tr. 321. Claiming that Inspector Meddings appeared upset or frustrated at the time, Mr. Stevens testified that Inspector Meddings proceeded to inspect the scrubber affixed to the continuous miner machine in the following manner:

A: He just grabbed the PO tube and just -- he usually sticks it down there so far, then they'll raise it up and read it, raise it up and another reading. I mean, he just (indicates) laid it down. Never even looked at the gauge. Said it won't pass. Just walked off. So we went out.

* * *

Q: How quick did he do it?

A: I mean, whatever time it took to put the PO tube in there and out. I mean, there was no -- there was no (indicating) I didn't see him look at the gauge, and that's what shocked me. I mean, it was just -- I was awed. I couldn't believe it.

Q: Did you see him write down any numbers?

A: No, sir. At that point, I never. Not at that time. I never.

Q: Did he ask you to write down any numbers?

A: No.

* * *

Q: Did you see him even look at the gauge?

A: No.

Q: And what did he say to you after he had (indicating) –

A: “It won't pass,” and just turned and walked away.

Tr. 321–23.

B. AUGUST 20, 2009

On August 20, 2009, Inspector Meddings continued his E01 inspection of Respondent's Number 3 Mine at the Number 2 section of the mine. Tr. 215; S's Ex. 4, 7. During the inspection, he observed accumulations of loose coal and coal fines in numerous locations along

the ribs and roadways in the nine entries and connecting cross cuts comprising the Number 2 section. Tr. 214–16; S’s Ex. 4, 7. Inspector Meddings depicted the specific locations of these accumulations in a diagram of the Number 2 section that he sketched in his field notes. Tr. 215; S’s Ex. 7. The accumulations ranged in depth from four to 15 inches along the ribs and two to four inches in the roadways. Tr. 215–16; S’s Ex. 4, 7. Between the Number 8 and 9 entries, Respondent’s agents had also “punched that break through” and failed to “clean the gob up in there,” resulting in an accumulation of material the depth of which was three feet. Tr. 216; S’s Ex. 7. Based upon these observations, Inspector Meddings issued Citation Number 8236506 at 8:15 a.m., citing the accumulation of combustible materials in violation of 30 C.F.R. § 75.400. S’s Ex. 4. He subsequently terminated the Citation when he returned to the Number 2 section on August 24, 2009, and recorded that the accumulations had been removed from the cited areas. Tr. 220, 254–55; S’s Ex. 4.

At the hearing, Inspector Meddings testified that “probably some of [the accumulations were] wet” but that “the bulk of it . . . is normally dry material” because it dries as time elapses and it is run over by mining equipment. Tr. 216. He further testified that accumulations of combustible materials create a hazard of fire or explosion. Tr. 214–15. As an ignition source, he identified a noncompliant electrical cable that he also cited during his inspection of the Number 2 section on August 20, 2009. Tr. 217–18; S’s Ex. 4, 7. He further noted the amount of methane liberated at Number 3 Mine as 1,200,000 cubic feet every 24 hours. Tr. 216–17; S’s Ex. 4.

Inspector Meddings characterized the violation of 30 C.F.R. § 75.400 as significant and substantial in nature based upon the extent of the accumulations; the presence of an ignition source, which created a reasonable likelihood that an accident would occur; and the number of miners exposed to the hazard. S’s Ex. 4, 7; Tr. 218–19. According to Inspector Meddings, because the hazard created by the violation could result in a range of injuries or even a fatality, he designated the injury or illness that could reasonably be expected as permanently disabling in the Citation.⁶ S’s Ex. 4; Tr. 218–19. Finally, he determined that the violation resulted from a moderate level of negligence, even though “[he] probably could have justified high easily.” Tr. 219.

When questioned by counsel for Respondent, Inspector Meddings affirmed that the noncompliant electrical cable that he pointed to as an ignition source had sustained damage to the “outer jacket” but that “[t]he cable was still covered with shielding” and “the inner conductors were still insulated.” Tr. 251–52. Inspector Meddings admitted that he was not aware of any such cables igniting coal. Tr. 252.

Ronnie Johnson, the chief electrician on the day shift at the time of the alleged violations, accompanied Inspector Meddings during his inspection on August 20, 2009, and was served Citation Number 8236506. S’s Ex. 4; Tr. 330–32. Mr. Johnson acknowledged that he did not accompany Inspector Meddings through each entry of the Number 2 section, that some accumulations of coal were present in those areas that he did travel with Inspector Meddings, and that he did not have any reason to disagree with the diagram of the section contained in Inspector

⁶ In his field notes, however, Inspector Meddings designated the injury or illness that could reasonably be expected as lost workdays or restricted duty. S’s Ex. 7. The Secretary failed to offer any explanation for this discrepancy.

Meddings' field notes. Tr. 345, 349. He disputed the extent of these accumulations, however. In particular, he testified that Inspector Meddings "started complaining about how dirty the roadways looked" upon their arrival at the Number 2 section but that he thought they appeared "kind of normal" and "[n]ot excessively dirty." Tr. 334, 337. He opined, "[i]t had been dusted, but I recollect it had been real black. Probably been rock dusted over some coal, what had been done." Tr. 334–35. Mr. Johnson explained that he and Inspector Meddings proceeded on foot up the Number 4 entry to the face of the section, where the conditions also appeared to be "normal" and not "excessively dirty." Tr. 335, 346–47. While he admitted that he did not observe Inspector Meddings take any measurements, he further disputed the depth of the accumulations along the rib of the entry, testifying that they appeared to be only two to four inches deep, rather than the four to 15 inches cited by Inspector Meddings. Tr. 336–37, 346; *see also* Tr. 347. Mr. Johnson speculated that these accumulations had resulted from Respondent's agents cleaning the entry of loose coal with a "scoop" and that excess coal had "rolled over the scoop bucket when they went through." Tr. 336; *see also* Tr. 347. He testified that he did not observe any miners operating the scoop but that he heard it, leading him to believe that miners were cleaning elsewhere in the section at the time of Inspector Meddings' inspection. Tr. 335–37.

Finally, Mr. Johnson denied that the noncompliant electrical cable cited by Inspector Meddings posed a risk of igniting the alleged accumulations based upon a number of considerations, including that "it was too far away" and that the shielding would prevent arcing. Tr. 339–40; *see also* Tr. 351. He explained that he sought the opinion of an electrical engineer on the issue and that the electrical engineer agreed with his assessment. Tr. 340. He further testified that the quantity of methane liberated by Number 3 Mine was irrelevant to the Citation because none was present at the time and the mine is ventilated by 600 million cubic feet of air per day. Tr. 341–42.

C. AUGUST 27, 2009

Inspector Meddings continued his E01 inspection of Respondent's Number 3 Mine on August 27, 2009. S's Ex. 5, 7. As part of that day's inspection, he inspected the equipment in the Number 4 section of the mine and found a gap in the right side tram panel of a continuous miner machine that measured 0.025 inches, which exceeded the limit of 0.004 considered to be permissible. Tr. 221–22; S's Ex. 5, 7. Accordingly, Inspector Meddings issued Citation Number 8236514 at 2:07 a.m., citing Respondent for a failure to maintain the machine in permissible condition, in violation of 30 C.F.R. § 75.503. S's Ex. 5. He subsequently terminated the Citation on August 28, 2009, and recorded that the gap had been closed. Tr. 224; S's Ex. 5.

Inspector Meddings testified that a failure to maintain a piece of equipment such as a continuous miner machine in permissible condition exposes miners to the hazard of fire. Tr. 221. He also noted the amount of methane liberated at Number 3 Mine as 1,200,000 cubic feet every 24 hours. Tr. 221; S's Ex. 5, 7. He admitted, however, that he did not detect any methane at the continuous miner machine at the time he issued the Citation. Tr. 256–57. He also admitted that he does not possess any knowledge of the particular components of the machine enclosed by the subject panel or whether they are capable of arcing or sparking. Tr. 258.

Inspector Meddings characterized the violation as reasonably likely to cause injury or illness based upon the frequency with which the subject equipment is used by Respondent, the related exposure of miners to the condition, and the amount of methane liberated at the mine. Tr. 222; S's Ex. 5, 7. He cited these considerations in characterizing the violation as significant and substantial in nature as well, testifying that any accident would be of a "serious nature to the miners around it or on the section." Tr. 223; S's Ex. 5. According to Inspector Meddings, because the hazard created by the violation could result in a range of injuries or even a fatality, he designated the injury or illness that could reasonably be expected as permanently disabling. Tr. 222-23; S's Ex. 5, 7. Finally, Inspector Meddings determined that the violation resulted from a low degree of negligence because he typically finds multiple violative conditions when inspecting the permissibility of equipment but the impermissible gap in the electrical panel was the only issue that he detected on the continuous miner machine. Tr. 223-24; S's Ex. 5, 7.

Jimmy Rowe, the chief electrician on the third shift at Respondent's Number 3 Mine, accompanied Inspector Meddings during his inspection on August 27, 2009, and was served Citation Number 8236514. S's Ex. 5; Tr. 293, 297. While he did not dispute the existence of a gap in the right side tram panel, he challenged the likelihood that the condition would injure a miner, testifying that the electrical components enclosed by that particular panel were "confined to their own . . . sealed containers" and incapable of arcing or sparking. Tr. 297-300. Mr. Rowe contrasted the components enclosed by the right side tram panel with those enclosed by the left side tram panel, which protects "your pump contactor, your cutter contractor, your conveyor contactors and your scrubber contactors." Tr. 298. He testified that he would have agreed with Inspector Meddings' assessment of the gravity of the violation had it occurred on this latter panel. Tr. 298-99. He explained that he does not possess any knowledge of the type of component found behind the subject panel generating an arc or spark and igniting methane in a mine. Tr. 302-03. Finally, he explained that he does not possess any knowledge of a miner coming into contact with an electrical component through a gap of the size found by Inspector Meddings on the subject panel. Tr. 303.

Based upon his familiarity with the equipment at Respondent's Number 3 Mine and with the continuous miner machine at issue in Citation Number 8236514, Mr. Johnson also opined that the components enclosed by the right side tram panel were incapable of arcing or sparking due to an absence of moving components. Tr. 342-43, 348. Accordingly, Mr. Johnson disagreed with Inspector Meddings' assessment of the gravity of the violation:

Q: And Mr. Meddings issued it as reasonably likely to result in permanently disabling injury to 13 miners. Do you agree with that?

A: No.

Q: And why not?

A: There's no emission source in that panel, plus it was not stated that there was any methane there, anyway.

Q: So what is the risk of a methane explosion, in your mind?

A: Very low.

Q: What was the risk of a methane ignition, in your mind?

A: Me, myself, I've been there at this mine ten years and I've never found in the working face explosive mixtures myself. I carry a spotter continuous with me.

Q: So what was the risk, in your mind, of a methane ignition?

A: None.

Tr. 344.

D. AUGUST 28, 2009

Inspector Meddings continued his E01 inspection of the Number 4 section of Respondent's Number 3 Mine on August 28, 2009. S's Ex. 6, 7. As part of that day's inspection, he measured the level of methane present in the Number 2 entry of the section and found it to be 0.2 percent. S's Ex. 6, 7. He subsequently attempted to measure the air velocity behind the "line curtain" in the Number 2 entry using first a calibrated anemometer and then chemical smoke, but he was unable to detect any movement. Tr. 226; S's Ex. 6, 7. He thereafter issued Citation Number 8236515 at 5:15 a.m., citing Respondent for a failure to comply with its approved ventilation plan. Tr. 224–25; S's Ex. 6, 7. This plan requires Respondent to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of line curtain[s] in idle places." S's Ex. 9; *see also* Tr. 225. Inspector Meddings terminated the Citation 45 minutes later, noting that "[t]he wing curtain was extended into the intersection and 4050 CFM was measured using a calibrated anemometer." S's Ex. 6; Tr. 230–31.

Inspector Meddings noted that the foreman, Rick Wright, had recorded the date and time and his initials in the Number 2 entry approximately 22 minutes prior to issuance of the Citation. Tr. 227–28; S's Ex. 6, 7. He also noted that the line curtain did not extend into the "intersection," thereby hindering its ability "to catch the air and shove it up in the entry." Tr. 228; S's Ex. 7.

Inspector Meddings testified that a deficient level of air flow in a mine may lead to the accumulation of methane to explosive concentrations. Tr. 225–26. He explained that he characterized the cited condition as unlikely to result in an injury, and not significant and substantial in nature, because he did not detect any such accumulation at the time of his inspection. Tr. 228–30; S's Ex. 6, 7. According to Inspector Meddings, should an accumulation of methane develop and cause an injury, it would be permanently disabling because the hazard created by the violation could result in a range of injuries or even a fatality. Tr. 229; S's Ex. 6, 7. Finally, Inspector Meddings determined that the violation resulted from a high degree of negligence because the foreman had checked the conditions of the entry only 22 minutes prior to the inspection, as reflected by the date, time, and initials recorded in the entry. Tr. 230; S's Ex. 6, 7.

Upon questioning by counsel for Respondent, Inspector Meddings affirmed that Respondent's agents were performing a "belt move" and "power move" and that no equipment or miners were present in the Number 2 entry at the time of his inspection. Tr. 260; *see also* S's Ex. 7. While Inspector Meddings testified that equipment was "tramping around the section," he also affirmed that equipment is not permitted to enter inby the last open crosscut before a "gas test" is performed. Tr. 261. In addition, Inspector Meddings testified that he could not recall whether a rock had dislodged the line curtain out in the intersection and that such an occurrence "absolutely" could reduce the amount of air reaching the mine face. Tr. 262. He admitted that he had "no idea" when the line curtain had fallen and that he did not ask the section foreman as to whether it had been properly hung at the time he checked the entry, even though such information could have been pertinent. Tr. 262.

Inspector Meddings also admitted that he did not inform Jim Rowe, who was accompanying him during his inspection, of the Citation at the time he issued it. Tr. 259–60. During his testimony, Mr. Rowe confirmed that Inspector Meddings neglected to notify him of the Citation at that time. Tr. 296. Mr. Rowe further testified that he lacked any knowledge of the circumstances surrounding the Citation, explaining that he did not accompany Inspector Meddings to the face of the entry and that he generally waits at the mouth of the entry during inspections. Tr. 295–97.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CITATION NUMBER 8231582: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 3:40 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 8231582 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the "Condition or Practice" section as follows:

The approved ventilation plan is not being followed on the active 039-0 MMU. The Joy Continuous Mining Machine CO# 0134 scrubber output is only 3,739 CFM (78% what's required). The approved plan requires the minimum 4,800 CFM. This section is cutting approximately 12 inches of sandstone / shale roof which produces excessive dust. An improper working scrubber allows excessive amounts of rock/coal dust to be suspended into the mine atmosphere. This section produces coal two shift per day and average of five days per week. This condition exposes these miners to the hazards associated with black lung disease that would result in permanently disabling illness. The operator immediately began repairs on the mining machine.

S's Ex 1. The Citation further alleges that Respondent's failure to comply with the approved ventilation plan constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow

a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine, subject to the approval of the district manager. *Id.*

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.370(a)(1) was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that four people would be affected. S's Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was moderate. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1,530.

2. LIABILITY

As set forth above, Citation Number 8231582 alleges that Respondent failed to comply with the basic revised ventilation plan governing its Number 3 Mine on August 5, 2009, based upon Inspector Meddings' determination that the scrubber affixed to the continuous miner machine in the active 039-0 MMU failed to generate a volume of air that met the minimum threshold required by the plan. S's Ex. 1. In her Post-Hearing Brief, the Secretary cites the testimony and field notes of Inspector Meddings and the observations he recorded in the body of the Citation to support the alleged violation. Secretary's Post-Hearing Brief ("S's Br.") at 3-4 (citing Tr. 193, 196-98, 200-01; S's Ex. 1, 7). Respondent, on the other hand, claims that Inspector Meddings "act[ed] outside the bounds of his authority to issue a citation[] without a factual basis, let alone underlying legal merit." Respondent's Post-Hearing Brief ("R's Br.") at 3-4. More specifically, Respondent argues that the testimony of Mr. Stevens establishes that Inspector Meddings performed a "non-existent, invalid test" of the subject scrubber and that the Citation, consequently, was "issued improvidently" and should be vacated. R's Br. 2-4.

Upon consideration of the evidence presented by the parties concerning Inspector Meddings' inspection of the subject scrubber, the undersigned finds in favor of the Secretary. At the hearing, Inspector Meddings credibly described in significant detail the technique that he typically uses to measure the output of scrubbers, and he maintained that he measured the output of the subject scrubber in the same manner. Tr. 197-99, 238-39. He also recorded in his field notes a series of measurements that he collected from the subject scrubber and the calculations that he performed based upon those measurements, which corroborate his testimony and are also deemed credible given their specificity and contemporaneous nature. S's Ex. 7. Finally, the considerable experience of Inspector Meddings in the coal mining industry lends further credibility to his account of the inspection. Altogether, this evidence compels a finding that Inspector Meddings properly measured the output of the scrubber and found it to be 3739 CFM, in violation of Respondent's basic revised ventilation plan.

Respondent failed to elicit any conflicting testimony from Inspector Meddings or offer any alternative explanation for the measurements and calculations set forth in his field notes. The account of the inspection offered by Mr. Stevens also fails to sufficiently rebut this evidence. Above all, the undersigned finds that the evidence presented by Inspector Meddings is simply more reliable than that offered by Mr. Stevens. Unlike Inspector Meddings, Mr. Stevens

did not record any contemporaneous notes regarding the citations at issue, and he testified at the hearing based solely on his memory of the events underlying those citations, events which occurred over two years before. Tr. 328. This consideration does not necessarily discredit his testimony, and indeed, he maintained at the hearing that he did not have any reason to question his memory, particularly of the suspect manner in which Inspector Meddings measured the output of the subject scrubber. Tr. 329. Mr. Stevens expressed hesitation about certain events, however, due to the amount of activity occurring in Number 3 Mine on the day of the inspection and the passage of time since that day. For example, when asked whether he accompanied Inspector Meddings as he exited the mine, Mr. Stevens testified, “I believe I was the one that rode out with him, now. I mean, like I say, we had so much going on that night” Tr. 325. Additionally, when questioned about the time at which Inspector Meddings began to inspect the scrubber, Mr. Stevens responded, “I’m not sure when he checked it, because it’s been so long. I’m not sure if he checked it or not, you know, I don’t know. I just know how it was checked when I told him it was ready to go.” Tr. 309.

This testimony casts some doubt on the reliability of Mr. Stevens’ account of the inspection and suggests that he was not entirely certain about the sequence of events that occurred on August 5, 2009. In addition, while Mr. Stevens recalled that Inspector Meddings inspected the roof bolter machine prior to his inspection of the scrubber, such a sequence of events conflicts with the contemporaneous field notes of Inspector Meddings, which reflect that Inspector Meddings cited the noncompliant scrubber at 3:40 p.m. and the noncompliant roof bolter machine more than three hours later at 6:45 p.m. This point similarly suggests that Mr. Stevens’ memory of the inspection was faulty. Thus, while Mr. Stevens appeared to be sincere in his insistence that Inspector Meddings measured the output of the scrubber in a suspect manner, the weight of the evidence supports a finding that Inspector Meddings properly inspected the subject scrubber and subsequently issued Citation Number 8231582 based upon that inspection.⁷

⁷ Even if Mr. Stevens’ recollection of the technique used by Inspector Meddings to measure the output of the scrubber was accurate, that testimony does not necessarily preclude a finding that Inspector Meddings properly inspected the subject scrubber at the outset of the inspection without the knowledge of Mr. Stevens. While such a scenario is inconsistent with the testimony of Mr. Stevens that he proceeded to the continuous miner machine within only four or five minutes of their arrival at the Number 4 section, given the questionable reliability of Mr. Stevens’ account, the undersigned finds it plausible that Inspector Meddings properly measured the output of the subject scrubber as 3739 CFM while outside the presence of Mr. Stevens, that Respondent’s agents determined a faulty motor caused the deficiency found by Inspector Meddings, and that Mr. Stevens arrived at the continuous miner machine thereafter, at which time Respondent’s agents were awaiting a replacement motor. Under this scenario, the perfunctory inspection allegedly performed by Inspector Meddings would not have formed the basis of the Citation but, rather, would have constituted an attempt by Inspector Meddings to determine whether the violative condition had been abated. This sequence of events is consistent with the documentary evidence concerning the times at which Inspector Meddings cited the noncompliant scrubber and noncompliant roof bolter machine.

Based upon the foregoing discussion, the undersigned finds that the Secretary has met her burden of demonstrating by a preponderance of the evidence that Inspector Meddings properly measured the output of the subject scrubber on August 5, 2009, and found it to be less than that required by its basic revised ventilation plan, and that Respondent failed to sufficiently refute the evidence in the record supporting the violation. Accordingly, Respondent is liable for failing to comply with its basic revised ventilation plan, in violation of 30 C.F.R. § 75.370(a)(1), at its Number 3 Mine on August 5, 2009.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings for his designations of the gravity and significant and substantial nature of the violation. S's Br. at 4–5, 13–14 (citing Tr. 202–03). While Respondent hotly contested its liability for the violation, it opted not to challenge Inspector Meddings' characterization of these aspects of the violation.

Upon consideration, the undersigned disagrees with Inspector Meddings' determinations. As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. Having concluded that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged, the first element of *Mathies* is satisfied.

Turning to the second element of *Mathies*, the record contains insufficient evidence to support a finding that the violation contributed to a discrete safety hazard. According to Inspector Meddings, a malfunctioning scrubber allows excessive coal and rock dust to accumulate in a mine, which contributes to the risk of respiratory illnesses such as black lung disease. S's Ex. 1; Tr. 194, 202. Respiratory illnesses resulting from exposure to respirable coal mine dust, including coal workers' pneumoconiosis, emphysema, silicosis, and chronic bronchitis (collectively referred to as "black lung"), undoubtedly remain a serious risk to coal miners' health. Lowering Miners' Exposure to Respirable Coal Mine Dust, 75 Fed. Reg. 64,412, 64,413 (Oct. 19, 2010). Indeed, data from the National Institute for Occupational Safety and Health indicate that black lung is becoming more prevalent among the nation's coal miners, with even younger miners showing evidence of advanced and seriously debilitating lung disease. *Id.* The Commission has also recognized the insidious nature of dust-induced respiratory illnesses. In affirming an administrative law judge's decision holding that respirable coal dust in excess of the permissible level set forth at 29 C.F.R. § 70.100(a) is serious and substantial, the Commission asserted that "[t]here is no dispute . . . that overexposure to respirable dust *can* result in chronic bronchitis and pneumoconiosis." *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986) (emphasis added), *rev. denied*, 824 F.2d 1071 (D.C. Cir. 1987). Respondent did not dispute the impact that exposure to respirable coal mine dust can have on coal miners' health.

The parties also do not dispute that the function of a scrubber is similar to that of a vacuum cleaner in that it suctions air from the mine into its filtration system, which removes any dust generated during mining operations from the air, and then the scrubber emits fresh air back to the mine atmosphere. Tr. 196, 200, 324. Given this design, Inspector Meddings reasonably inferred from the deficient output of the subject scrubber that it was not properly suctioning air into its system.

The Secretary failed to present sufficient evidence, however, that the malfunctioning scrubber resulted in the accumulation of excessive dust in the section on the day in question. First, the record is not clear that use of the subject scrubber was even required at the time it was malfunctioning. While Inspector Meddings recorded in the body of the Citation that “[t]his section is cutting approximately 12 inches of sandstone / shale roof which produces excessive dust,” he also testified that operators are not required to use a scrubber when the depth of penetration into an entry is no greater than 20 feet. S’s Ex. 1; Tr. 195, 201–02. In addition, Respondent’s basic revised ventilation plan prescribes, “If the scrubber becomes inoperative the depth of penetration will be limited to 20 feet.” S’s Ex. 9 (emphasis in original omitted). The record lacks any evidence that the continuous miner machine was making a cut greater than 20 feet, and that use of the subject scrubber was therefore required, at the time it was malfunctioning. Indeed, the only evidence of the precise location of the continuous miner machine on the day in question is the testimony of Inspector Meddings and Mr. Stevens that it had been backed away from the face of the mine. Tr. 236–37; Tr. 309–10. According to Inspector Meddings, the day shift foreman had also informed him that the dust parameters and output of the subject scrubber had been measured during an onshift examination performed within 45 minutes of his arrival on the section and that those readings complied with the mine’s revised basic ventilation plan. Tr. 204–07; S’s Ex. 7. As discussed more fully below, the evidentiary record does not support a finding that these measurements were improperly taken and that the output of the subject scrubber was, in fact, deficient at the time of the onshift examination. Thus, even if the continuous miner machine was operating in an area where use of the subject scrubber was required, the record does not establish that it was malfunctioning for a significant period of time. In addition, the subject scrubber was not fully inoperative. Rather, it was merely operating at a reduced capacity, generating 78% of the volume of air required by Respondent’s revised basic ventilation plan. Finally, Inspector Meddings testified that he did not observe any airborne dust during his inspection of the Number 4 section. Tr. 242. He also appears not to have taken any air quality readings, which would have established whether dust levels exceeded regulatory limits.

Given the absence of evidence in the record that use of the subject scrubber was required at the time it was malfunctioning, that it was malfunctioning for a significant period of time, and that excessive dust levels were indeed present in the Number 4 section at the time of Inspector Meddings’ inspection, the undersigned finds that the contribution of the malfunctioning scrubber to excessive levels of respirable coal dust in the section on August 5, 2009, was not significant and substantial. Therefore, the second element of the *Mathies* test has not been satisfied, and the violation charged in Citation Number 8231582 is found not to be significant and substantial in nature.

The undersigned now turns to the gravity of the violation. While the severity of respirable illnesses caused by exposure to respirable coal dust is undeniably grave, the undersigned is compelled to find based upon the foregoing discussion that the likelihood that the malfunctioning scrubber would result in such illnesses is low at most. Additionally, the Secretary failed to present sufficient evidence of the number of miners impacted by the malfunctioning scrubber. Inspector Meddings recorded in his field notes that “[a]ll men on Sec. (13) x2” would be exposed to hazards caused by the violative condition. S’s Ex. 7. The meaning of this notation is unclear. He also recorded in the body of the Citation that four miners would be affected, but as previously recounted, he was unable to explain this determination at the hearing:

A: Normally I put -- and I could go back through my notes again, normally I put, if there’s two buggy operators and a miner operator, I normally put three.

Q: If you’d like to take a look --

A: Yeah, there may have been three shuttle cars hauling underneath him. I’m not for sure. I didn’t put in my notes where the extra man came from, so you know, I’m not exactly one hundred percent sure where he came from.

Tr. 203–04; S’s Ex. 1. Based upon these considerations, the undersigned finds the gravity of the violation to be moderate.

b. Negligence

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings concerning his determination that Respondent was moderately negligent in committing the charged violation. S’s Br. at 5 (citing 204–06). Respondent again opted not to challenge Inspector Meddings’ characterization of this aspect of the violation.

Upon consideration, the undersigned finds that the record supports a finding that Respondent exhibited a low degree of negligence with respect to the malfunctioning scrubber. Inspector Meddings testified that he accepted the representations of the day shift foreman that an onshift examination of the subject scrubber had been performed. Tr. 204–05. As discussed more fully below, the evidentiary record does not support a finding that these measurements were improperly taken and that the output of the subject scrubber was, in fact, deficient at the time of this examination. The fact that the scrubber appears to have been functioning properly as of the onshift examination is a considerable mitigating factor. In addition, Inspector Meddings recorded in his field notes that he inspected the scrubber within 45 minutes of the onshift examination. S’s Ex. 7. Thus, the record supports a finding that the scrubber was malfunctioning for a relatively brief amount of time. Finally, the location of the continuous miner machine suggests that Respondent had exercised some diligence and identified an issue. As noted above, Inspector Meddings affirmed at the hearing that the continuous miner machine “[p]robably more than likely” was backed away from the face of the mine at the time of his inspection and that it, therefore, was not producing any coal. Tr. 236–37. In its Post-Hearing Brief, Respondent attributes the location of the continuous miner machine to “the company

[having] recognized an issue between first and second shift” and contends that it “was in the process of correcting the problem” at the time of Inspector Meddings’ inspection. R’s Br. at 3–4 (citing Tr. 309–10). The Secretary did not offer any alternative explanation for the continuous miner machine having been moved away from the face of the mine during a production shift, and the undersigned finds the explanation of Respondent to be plausible. Based upon these considerations, the undersigned finds that Respondent’s negligence in committing the violation to be low.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent’s history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 348 violations that became final orders in the preceding 15-month period over the course of 743 days of inspection. Of those 348 violations, 15 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled “Assessed Violation History Report,” which was admitted into evidence as Secretary’s Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent’s ability to remain in business. Stip. 6. The parties also stipulated that Respondent’s Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a “10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.” 30 C.F.R. § 100.3(f). The Secretary found that Respondent’s agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the levels of gravity and negligence, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8231582 to be \$250. Further, this Citation shall be modified to low negligence, injury unlikely, and non-S&S.

B. CITATION NUMBER 8231583: ALLEGED VIOLATION OF 30 C.F.R. § 75.362(a)(2)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 3:45 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 8231583 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

An inadequate on shift exam has been conducted on the active 039-0 MMU. When the scrubber output was checked on the Joy Continuous Miner CO# 0134 only 3,739 CFM could be measured. The approved ventilation plan requires a minimum of 4,800 CFM. This dust parameter exam was conducted within 45 minutes of this inspection. This inadequate exam of the improper working scrubber is allowing excessive dust into the mine atmosphere exposes miners working on this active section to the hazards associated with black lung disease that would result in permanently disabling illness.

S's Ex. 2. The Citation further alleges that Respondent's failure to conduct an adequate onshift examination constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.362(a)(2), which requires "[a] person designated by the operator [to] conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan" as part of the requisite onshift examination. The provision further provides:

In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan.

30 C.F.R. § 75.362(a)(2).

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.362(a)(2) was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that four people would be affected. S's Ex. 2. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was moderate. *Id.*

Finally, the Secretary proposed the assessment of a civil penalty in the amount of \$1,304.00 for the alleged violation.

2. LIABILITY

Citation Number 8231583 alleges that Respondent performed an inadequate onshift examination on the active 039-0 MMU on August 5, 2009, in violation of 30 C.F.R. § 75.362(a)(2). S's Ex. 2. As the condition underlying this alleged violation, the Citation refers to the insufficient output of the scrubber detected by Inspector Meddings and notes that the examination of the scrubber had been performed within 45 minutes of his inspection. *Id.* The Secretary cites the testimony of Inspector Meddings and the observations he recorded in the

Citation to support the alleged violation. S's Br. at 6 (citing Tr. 206–08; S's Ex. 2). As Respondent claimed with reference to Citation Number 8231582, Respondent argues here that Inspector Meddings “act[ed] outside the bounds of his authority to issue a citation[] without a factual basis, let alone underlying legal merit.” R's Br. at 3–4. Respondent contends that the testimony of Mr. Stevens demonstrates that Respondent “had recognized an issue [with the subject scrubber] between first and second shift and was in the process of correcting the problem” by removing the scrubber motor and that Inspector Meddings subsequently performed a “non-existent, invalid test” of the output of the scrubber. R's Br. 2–4 (citing Tr. 309–10, 321–23). Respondent contends that Citation Number 8231583 was “issued improvidently” on this basis and urges the undersigned to vacate it. R's Br. 2–4.

As noted above, the cited standard requires “[a] person designated by the operator [to] conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan.” 30 C.F.R. § 75.362(a)(2). This standard imposes an obligation on an operator to conduct an examination sufficient to detect existing conditions that do not comply with the respirable dust control parameters contained in the mine's ventilation plan. *See Twentymile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). In order to establish that an operator failed to perform such an examination, the Secretary is required to show that conditions existed in the area subject to the examination that did not comply with the respirable dust control parameters specified in the mine's ventilation plan and that the operator failed to detect them, as evidenced by a failure to record or otherwise report the conditions. *See id.*; *Shelby Mining Co., LLC*, 31 FMSHRC 1501, 1510 (Dec. 31, 2009) (ALJ).

Upon consideration, the undersigned finds that the Secretary has failed to demonstrate by a preponderance of the evidence that Respondent performed an inadequate onshift examination on August 5, 2009, in violation of 30 C.F.R. § 75.370(a)(1), as charged in Citation Number 8231583. First, the Secretary claims in her Post-Hearing Brief that Inspector Meddings “inspected the mine's shift book to determine if the hazardous condition had been recorded” and, “[u]pon examination of the shift book, . . . found that no record was made of the ventilation hazard.” S's Br. at 6 (citing Tr. 206–08; S's Ex. 2). The testimonial and documentary evidence cited by the Secretary do not indicate that Inspector Meddings reviewed Respondent's records and found them to be lacking in any way. In fact, the undersigned is unable to locate any portion of the record that supports the Secretary's claim. Rather, the record supports a finding that, upon his arrival at the Number 4 section, Inspector Meddings was verbally informed by the day shift foreman that the output of the subject scrubber had been measured and found to be compliant with the mine's ventilation plan during the onshift examination performed within 45 minutes of Inspector Meddings' inspection. Tr. 204, 206–07; S's Ex. 7. As discussed above, the record also demonstrates that Inspector Meddings properly measured the output of the scrubber and found it to be less than the minimum threshold set by the ventilation plan.

Inspector Meddings relied upon these considerations alone to conclude that the scrubber “never was working properly” and that Respondent's agents failed to detect it during the onshift examination. Tr. 207, 242–43. Such a leap is untenable. “The mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the on-shift examination.” *Cemex, Inc.*, 32 FMSHRC 1897, 1901 (Dec. 27, 2010) (ALJ). The Secretary failed to offer any evidence other than the unsupported belief of Inspector

Meddings that the violative condition of the scrubber existed at the time of the onshift examination. The lack of persuasive evidence upon which to find that the violative condition of the scrubber existed at the time of the onshift examination entirely undercuts the Secretary's position. In addition, as discussed above, the location of the continuous miner machine suggests, as argued by Respondent in its Post-Hearing Brief, that Respondent's agents had identified an issue with the scrubber during the onshift examination and were preparing to remedy it. Under those circumstances, the alleged violation does not stand.

Based upon the foregoing discussion, the undersigned finds that the record lacks sufficient evidence to support the violation of 30 C.F.R. § 75.370(a)(1) charged in Citation Number 8231583. Accordingly, this Citation is vacated.

C. CITATION NUMBER 8231586: ALLEGED VIOLATION OF 30 C.F.R. § 75.503

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 6:45 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 823586 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the "Condition or Practice" section as follows:

The Fletcher Bolter Company No. 006 being used on the active 039-0 MMU is not being kept in permissible condition, the following conditions were found during this inspection.

1. The Main Control Aluminum panel has two flat washers missing
2. The cable reel is not fully insulated in three areas measuring 9", 9" and 4" long.
3. ½ inch Conduit not properly repaired in two different locations on the rear area light.
4. Opening exist in the ½" conduit on the offside area work light exposing inner 120 cable.

This mine operates three shifts per day and average five days per week and is currently on a 5 day methane spot and liberates over 1,000,000 CFM of methane per 24 hour period. These conditions exposes these miners to the hazards associated with methane / dust explosions that would result in permanently disabling injuries.

S's Ex. 3. The Citation further alleges that these conditions constitute a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.503, which provides, "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine." *Id.*

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.503 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that two people would be affected. S's Ex. 3. He also determined that the violation was significant and substantial in nature and that it resulted from a moderate degree of negligence on the part of Respondent.

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1,111.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.503 as charged in the Citation. According to the field notes and testimony of Inspector Meddings, he observed the above-described conditions on a roof bolter machine being used on the active 039-0 MMU during his inspection on August 5, 2009. S's Ex. 3, 7; Tr. 209–10, 243–46. Mr. Stevens acknowledged these violative conditions at the hearing, Tr. 311–20, 325–27, and Respondent does not contest the alleged violation of 30 C.F.R. § 75.503 in its Post-Hearing Brief, R's Br. at 2, 5. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.503 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.503 for failing to maintain the roof bolter machine being used on the active 039-0 MMU in permissible condition, as charged in the Citation.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings and the Citation itself to argue in favor of the designated gravity and the significant and substantial nature of the violation. S's Br. at 7, 14 (citing Tr. 211–12; S's Ex. 3). In particular, the Secretary contends that Respondent's failure to maintain the roof bolter machine in permissible condition was reasonably likely to result in a methane ignition or explosion given the volume of methane liberated by Number 3 Mine, that such an occurrence was reasonably likely to result in permanently disabling injuries, and that the two miners normally assigned to operate the machine would be affected. S's Br. at 7 (citing Tr. 211–12). Relying upon the same considerations to argue that the violation was significant and substantial in nature, the Secretary maintains that the violation contributed to a discrete safety hazard "because the condition of the equipment was not permissible" and that the operation of the equipment in this condition "would reasonably likely lead to a serious injury to the bolter operators being exposed to a methane explosion resulting from a spark created by the equipment that was not permissible." S's Br. at 14 (citing Tr. 212; S's Ex. 3).

Respondent contends that the cited defects were neither reasonably likely to result in injury nor significant and substantial in nature. R's Br. at 5–7. Because the alleged hazard was an ignition or explosion of methane, Respondent argues, the Secretary is required to demonstrate that "a confluence of factors" existed to create a reasonable likelihood of such an occurrence. R's Br. at 5–6 (citing *Sidney Coal Co.*, 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ) (citation omitted)). Claiming that the Secretary "falls woefully short of meeting [this] legal burden of

proof,” Respondent notes that the Secretary did not present any evidence of methane being present at the time of the Citation’s issuance or of a violation of the approved ventilation plan governing the mine. R’s Br. at 6. Rather, Respondent argues, the Secretary relies solely upon the volume of methane liberated by the mine on a daily basis. R’s Br. at 6 (citing Tr. 216). Respondent contends that this reliance is misplaced, because the mine operator was required to comply with the approved ventilation plan, which was designed to dilute and render harmless any methane or respirable dust encountered during normal mining operations. R’s Br. at 6–7. Pursuant to this plan, “the amount of methane in the continued normal mining atmosphere of the No. 3 Mine is approximately 0.1% -- fifty (50) times less than the amount of methane needed in an atmosphere to create an explosive range of methane.” R’s Br. at 6–7. To reflect the improbability of an injury, Respondent urges the undersigned to modify the gravity and significant and substantial designations in the Citation and reduce the penalty accordingly. R’s Br. at 7.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. The Commission has emphasized that designations of permissibility violations as significant and substantial especially “must be based on the particular facts surrounding the violation, including the nature of the mine involved.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (“*Texasgulf*”). The Commission thereby recognized that “the individual nature of a mine with regard to its methane liberations and its history of previous emissions and explosions has a bearing on the validity of an S&S finding.” *Knox Creek Coal Corp.*, 2010 WL 5619977, *45 (Dec. 27, 2010) (ALJ) (“*Knox Creek*”).

Applying the foregoing principles to the record in this case, the undersigned finds that the first element of *Mathies* is satisfied, as the fact of the violation has been established. Regarding the second element, Inspector Meddings determined that the violative conditions that he observed on the roof bolter machine exposed miners to the hazards associated with an equipment fire or a methane- or dust-fueled explosion. S’s Ex. 3, 7; Tr. 210–11. With respect to the improperly repaired conduit in particular, he explained that “it has to be repaired as approved, spliced to maintain any flames that would be inside of it.” Tr. 209–10. Respondent does not challenge this alleged hazard. The undersigned agrees and finds that the violation contributed to the discrete safety hazard of exposing a potential ignition source to the mine atmosphere, where it could trigger an ignition or explosion. Further, little question exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the second and fourth elements of *Mathies* are also met.

The undersigned now turns to the third element of *Mathies*, which poses the question of whether the defects present on the roof bolter machine were reasonably likely to trigger an injury-causing event, such as an ignition or explosion, had normal mining operations continued

without the intervention of Inspector Meddings. In considering the reasonable likelihood of such an occurrence, the Commission has provided the following framework:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997) (“*Enlow*”).

Based upon the record in this case, the critical questions in applying the framework set forth in *Enlow* are: 1) whether an ignitable or explosive concentration of methane was reasonably likely to exist in the atmosphere surrounding the defects, and 2) whether the defects constituted viable sources of ignition. With respect to the likelihood of an ignitable or explosive concentration of methane occurring in the atmosphere surrounding the defects, the undersigned finds instructive the Commission’s decision in *U.S. Steel Mining Company*, 6 FMSHRC 1866 (Aug. 1984). Among the objections raised on appeal to the Commission in that case, the mine operator argued that an explosive concentration of methane would not have occurred in the area of the cited permissibility violation, thus rendering the likelihood of an explosion so remote that the violation could not be significant and substantial in nature. *U.S. Steel Mining Co.*, 6 FMSHRC at 1868. In rejecting this argument and affirming the designation of the violation as significant and substantial in nature, the Commission relied upon the gassy nature of the subject mine, its history of methane ignitions, and the fact that the mine operator had “offered no evidence to rebut the testimony of the inspector that it was reasonably likely that the violation would contribute to a methane explosion.” *Id.* at 1869. The Commission also rejected the notion that the sufficiency of the mine’s ventilation system at the time of the violation was relevant to the issue, holding that “the fact that the mine’s ventilation was adequate at the time the citation was issued did not diminish the possibility that the violation would result in a serious mine hazard.” *Id.*

In the present proceeding, Inspector Meddings explained that Respondent's Number 3 Mine liberates 1.2 million cubic feet of methane each day and is subject to five-day spot inspections pursuant to Section 103(i) of the Mine Act, 30 U.S.C. § 813(i).⁸ Tr. 210–11; S's Ex. 3, 7. The Secretary failed to offer any evidence, however, regarding the frequency that concentrations of methane have reached an ignitable or explosive range at the mine or regarding the number of actual ignitions and explosions of methane that have occurred there. Conversely, Mr. Johnson testified on behalf of Respondent that he has never encountered an explosive range of methane at a working face during his ten years of experience at the mine.⁹ Nevertheless, upon consideration of all the evidence, the undersigned finds that the Secretary has sufficiently demonstrated that an accumulation of methane to ignitable or explosive proportions could reasonably be expected. In so finding, the undersigned attributes great weight to the gassy nature of Respondent's Number 3 Mine and the unquestionable capacity of methane to accumulate rapidly in such mines during the course of operations. On the other hand, Mr. Johnson's claim that he has never encountered an explosive range of methane at a working face of Respondent's Number 3 Mine is not particularly persuasive that such an occurrence is unlikely. Moreover, this testimony was self-serving, and Respondent failed to offer any evidence to corroborate it. Standing alone, it is insufficient to rebut the evidence presented by the Secretary that an ignitable or explosive concentration of methane was reasonably likely to occur.

⁸ Section 103(i) of the Mine Act provides, in pertinent part:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period.

30 U.S.C. § 813(i).

⁹ As discussed above, Respondent also disputes the likelihood of an ignitable or explosive concentration of methane occurring in the entry on the grounds that the record lacks any evidence that the mine's ventilation system was malfunctioning at the time of the inspection and it was required to comply with the ventilation plan governing the mine as operations continued, which would have ensured that ignitable or explosive concentrations of methane did not accumulate. Indeed, according to the regulations governing the ventilation of underground coal mines, an operator is required to develop and follow a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1). Thus, the ventilation system presumably was equipped to control the high volume of methane liberated by the mine as operations continued. While Respondent's argument is appealing, the precedent set by the Commission in *U.S. Steel Mining Company* seems to preclude consideration of this factor, and therefore, the undersigned accords little weight to it.

Turning to the question of whether the cited defects on the roof bolter machine constituted viable sources of ignition, the Secretary offered scant evidence on the issue. Inspector Meddings testified to the general importance of maintaining equipment in permissible condition, explaining, “you get the danger of -- if it’s not being maintained in permissible condition, of a mine fire or equipment fire. You know, a panel or a light opening sparking that’s not being maintained, catching the equipment itself on fire.” Tr. 210. He did not offer any testimony, however, as to the likelihood that the cited defects would generate a spark as mining operations continued or to the factors that would contribute to such an occurrence. To the contrary, Inspector Meddings admitted that the cable stored on the cited cable reel and the cables underlying the defective conduits were fully insulated and intact, and that, in his experience as an inspector, he is not aware of any instances of a fully insulated cable causing an ignition of methane. Tr. 244–26. Respondent also presented contrary evidence on the issue from Mr. Stevens, an electrician who had been employed by Respondent for 11 years at the time of the hearing. Mr. Stevens testified that the outer jacket of the cable stored on the cited cable reel was intact, that the cable was shielded, and that the circuit breaker system on the machine would instantaneously terminate the flow of electricity in the event that the cable sustained damage to the outer jacket, shielding, and inner jacket of the phase lead. Tr. 314, 316–18. He also testified that the cables underlying the defective conduits were not shielded but they were fully insulated and undamaged. Tr. 315–16, 318–19. When questioned by counsel for the Secretary, Mr. Stevens affirmed that each layer of insulation is important to contain voltage running through a wire. Tr. 326. Nevertheless, he opined that the cited defects did not pose any danger to miners. Tr. 313–16.

Upon consideration, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that the cited defects on the roof bolter machine were reasonably likely to spark, thereby generating a source of ignition. While the testimony presented by Inspector Meddings suggests that such an event could happen, it does not establish that it was reasonably likely to actually happen. The Secretary neglected to present any additional evidentiary support, such as evidence of incidents at Respondent’s Number 3 Mine or at any other mines where defects similar to those cited in this proceeding have led to an ignition or explosion or evidence showing that the defects were reasonably likely to degrade further and become more hazardous as mining operations continued. The Secretary also failed to identify any legal authorities to support her position. Meanwhile, the evidence proffered by Respondent weighs against a finding that the cited defects were reasonably likely to spark and ignite methane in the surrounding atmosphere. Thus, the undersigned simply is unable to gauge the likelihood that such an event might occur. Accordingly, based upon the record in this case, the undersigned finds that the third element of *Mathies* has not been satisfied and that Respondent’s violation of 30 C.F.R. § 75.503 was not significant and substantial in nature.

Turning now to the gravity of the violation, the undersigned finds it to be serious. Inspector Meddings determined that the violation exposed the two miners tasked with operating the roof bolter machine to the danger of injury or illness. This finding is supported by the record. Further, should the cited defects generate a spark and trigger an ignition or explosion of methane, little doubt exists that the resulting injuries could be severe or even fatal. Indeed, Inspector Meddings found that any injuries were reasonably likely to be permanently disabling, and

Respondent did not dispute this common sense conclusion. Accordingly, the undersigned finds that the violation subjected at least two miners to the risk of severe injury or fatality and that the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that the violation resulted from a moderate degree of negligence on the part of Respondent, explaining his rationale as follows:

[W]hen I cite anything, you know, I've already reviewed or know pretty much how many times they've been cited as far as permissibility violations. Because the operator normally, like I said, has been cited 20 or 30 or 40 times and it's according to what it is or how many items, you know, this many items, which was wrong with this machine, I felt that moderate was justifiable rather than high negligence.

Tr. 212–13. Thus, Inspector Meddings appears to have weighed the number of defects that he found on the roof bolter machine against the low frequency with which Respondent has been cited for violations of 30 C.F.R. § 75.503 and concluded that these considerations warranted a finding of moderate negligence. This conclusion is supported by the record, and Respondent does not dispute it. Accordingly, the undersigned finds that Respondent was moderately negligent in violating 30 C.F.R. § 75.503 in this instance.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 348 violations that became final orders in the preceding 15-month period over the course of 743 days of inspection. Of those 348 violations, 14 consisted of violations of 30 C.F.R. § 75.503. In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 823586 to be \$400. Further, this Citation shall be modified to injury unlikely and non-S&S.

D. CITATION NUMBER 8236506: ALLEGED VIOLATION OF 30 C.F.R. § 75.400

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 8:15 a.m. on August 20, 2009, Inspector Meddings issued Citation Number 8236506 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

Accumulations of combustible material in the form of loose coal and coal fines is being allowed to exist on the active 038-0/040-0 MMU (#2 Section). These accumulations exist along the ribs lines and roadways in several areas starting 80 Feet inby survey spad #26385 located in #4 entry and extending approximately two X-cuts to the working face. Taking in all nine entries and connecting cross cuts. These accumulations measured along the rib 4 to 15 inches in various locations and 2 to 4 inches in the roadways in various locations across the working section. This mine has a history of methane and last total liberations shown 1,200,000 Cubic feet per 24 hours. The operator has also been put on notice in July, 2009 for excessive 75.403 Violations. A total of (38) 75.403's and (60) 75.400 violations has been issued to this operator in the past 24 months.

A electrical cable violation #8236507 was also issued during this inspection in the cited area. A combination of all these conditions and factors exposes mines to the hazards associated with mine explosions / Fires that would be reasonably likely to result in a permanently disabling injuries.

S's Ex. 4. The Citation further alleges that these conditions constitute a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.400, which provides, “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” *Id.*

As recorded in the Citation, Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.400 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that 13 people would be affected. S's Ex. 4. He also determined that the violation was significant and substantial in nature and that it resulted from a moderate degree of negligence on the part of Respondent. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$4,689.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.400 as charged in the Citation. According to the field notes and testimony of Inspector Meddings, on August 20, 2009, he observed accumulations of combustible materials in the form of loose coal and coal fines in numerous locations along the ribs and roadways in the nine entries and connecting cross cuts comprising the Number 2 section of Respondent's Number 3 Mine. S's Ex. 7; Tr. 214–16. He measured the accumulations and found that they ranged in depth from four to 15 inches along the ribs and two to four inches in the roadways. Tr. 215–16; S's Ex. 4, 7. He also found between the Number 8 and 9 entries that Respondent's agents had "punched that break through" and failed to "clean the gob up in there," resulting in an accumulation of material the depth of which was three feet. Tr. 216; S's Ex. 7. Inspector Meddings depicted the specific locations of the accumulations in a diagram that he sketched in his field notes. Tr. 215; S's Ex. 7.

At the hearing, Mr. Johnson acknowledged that accumulations of coal were present in those areas of the Number 2 section where he accompanied Inspector Meddings and that he did not have any reason to disagree with Inspector Meddings' diagram of the accumulations. Tr. 345. While Mr. Johnson disputed the extent of the accumulations, Tr. 334–37, 346–47, in its Post-Hearing Brief, Respondent does not contest the alleged violation 30 C.F.R. § 75.400. R's Br. at 2. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.400 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.400 on August 20, 2009, by allowing accumulations of combustible materials to exist along the ribs and roadways of the entries and connecting cross cuts of the Number 2 section.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Citing the testimony of Inspector Meddings as support, the Secretary argues that a cable in the area that was not being properly maintained could reasonably be expected to ignite the accumulations of coal present in the Number 2 section, that a fire "could cause injuries ranging from minor smoke inhalation to fatalities," that permanently disabling injuries "were reasonably likely to occur because of the extent of the combustible material and the exposure to an ignition source," and that 13 miners would be affected. S's Br. at 9 (citing Tr. 218–19). The Secretary relies upon the same considerations to argue that the violation was significant and substantial in nature as well. S's Br. at 15 (citing Tr. 218–19; S's Ex. 4).

Respondent argues that "the Secretary's posited ignition source is not a plausible one" and that, without it, the Secretary has not met the "confluence of factors" standard that applies in this proceeding. R's Br. at 7–9. As support for its position, Respondent first notes that the Secretary relies solely upon the opinion of Inspector Meddings with respect to this issue, despite

his lack of electrical certifications. R's Br. at 7 (citing S's Br. at 8; Tr. 258). Respondent then points to the testimony of its witness, Mr. Johnson, the Maintenance Manager at Respondent's Number 3 Mine who previously served as the Chief Electrician on the day shift at the mine and who is certified by the federal and state government as an underground and surface mining electrician for low, medium, and high voltages. R's Br. at 8 (citing Tr. 330–32). Respondent contends that Mr. Joyhnsong's testimony establishes that the particular type of cable cited by the Secretary as an ignition source does not pose a risk of sparking should it sustain any damage, because the circuit breaker system would terminate the flow of electricity within a quarter of a second. R's Br. at 8 (citing Tr. 340). Respondent also notes Mr. Johnson's testimony that the cable was between 100 and 120 feet from the cited accumulations. R's Br. at 8 (citing Tr. 339). Based upon these considerations, Respondent argues that the Secretary has failed to prove a confluence of factors necessary to justify the characterization of the violation as reasonably likely to result in an injury and significant and substantial in nature. R's Br. at 8–9.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). Having already found that Respondent violated 30 C.F.R. § 75.400 as charged, the first element of *Mathies* is satisfied. As for the second element, Inspector Meddings determined that the accumulations of coal that he observed, coupled with the violative condition of an electrical cable that he also cited on August 20, 2009, and the amount of methane liberated by the mine, exposed miners to the hazards associated with a fire or explosion. S's Ex. 4; Tr. 214–15. With respect to the danger of an explosion, Mr. Meddings testified:

[I]f the operator continues to keep loose material like this and the constant machinery running over it and grinds it up, and then they grind it into the floor of the mine and then they keep advancing, and then here you've got a lot of combustible material outby them, which would feed an explosion if one was to occur strong enough to pick it up.

Tr. 214. Respondent did not dispute the alleged hazards. Abundant case law supports the conclusion that accumulations of coal contribute to the discrete safety hazard that these combustible materials would encounter a source of ignition and spark a fire or explosion, or that the combustible materials would propagate an ignition or explosion originating elsewhere in the mine, such as an ignition of methane at the mine face, and increase the force of that event. *See, e.g., Old Ben Coal Co.*, 1 FMSHRC 1954, 1956–57 (Dec. 1979); *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985); *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990); *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). Further, little doubt exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the second and fourth elements of *Mathies* have also been met.

The undersigned now turns to the third element of *Mathies*, which poses the question of whether the accumulations of coal present in the Number 2 entry were reasonably likely to trigger an injury-causing event, such as an ignition or explosion, had normal mining operations continued without Inspector Meddings' intervention. In considering the reasonable likelihood of such an occurrence, the Commission has provided the following framework:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow, 19 FMSHRC 5, 9 (Jan. 1997).

Applying the framework set forth in *Enlow* to the record in this case, the undersigned finds that a number of factors increased the likelihood of an ignition or explosion. First, the record reflects that the accumulations were extensive. The evidence presented by both Inspector Bell and Mr. Johnson establish that accumulations of combustible materials in the form of loose coal and coal fines were present in numerous locations along the ribs and roadways of the nine entries and connecting cross cuts comprising the Number 2 section. S's Ex. 7; Tr. 214–16, 345. The undersigned credits the testimony and contemporaneous field notes of Inspector Meddings as to the precise locations and depths of these accumulations. While Mr. Johnson disputed this point, he acknowledged that he did not accompany Inspector Meddings through each entry of the Number 2 section where Inspector Meddings identified an unlawful accumulation and that he did not observe Inspector Meddings measure the depths of the accumulations. Tr. Tr. 334–37, 345–47. Thus, he very well could have overlooked some of the accumulations observed by Inspector Meddings, and his estimates as to their depths are undoubtedly less reliable than the measurements taken by Inspector Meddings. Accordingly, the undersigned finds the accumulations to be as extensive as described by Inspector Meddings at the hearing and in his field notes.

While the accumulations of coal alone constituted a significant fuel source for an ignition or explosion, the undersigned also adopts the findings above that an ignitable or explosive concentration of methane was reasonably likely to occur as mining operations continued given the gassy nature of the mine and the capacity of methane to accumulate rapidly in such mines during the course of operations. This factor undoubtedly heightened the risk of an ignition or explosion in the Number 2 section.

The critical question that remains to be considered is whether the defective electrical cable identified as an ignition source by Inspector Meddings was reasonably likely to arc or spark, thereby producing a source of ignition for either the unlawful accumulations of coal or the excessive concentration of methane that was reasonably likely to occur. Once again, the Secretary offered scant evidence on this issue. In particular, the Secretary neglected to introduce into evidence a copy of the citation addressing the defective cable, and Inspector Meddings

explained at the hearing only that the electrical cable had “a gap in it or something was wrong with the cable.” Tr. 217. His contemporaneous field notes are more elaborative, stating, “A splice 27” in length 13.5’ from the arm of the Joy Continuous Miner [illegible]. An opening exist [sic] at the end of the splice 1/2” long around the entire cable exposing the inner phase leads, ground lead, and monitor.” S’s Ex. 7. When questioned by Respondent’s counsel, Inspector Meddings affirmed that the outer jacket of the cable had sustained damage but that “[t]he cable was still covered with shielding” and “[t]he inner conductors were still insulated.” Tr. 252. He also admitted that he is not aware of any instances of cables in that condition igniting coal. Tr. 252.

In support of its position that the defective electrical cable did not constitute a feasible ignition source, Respondent presented the testimony of Mr. Johnson. An employee of Respondent for 23 years as of the date of the hearing, Mr. Johnson explained that he currently serves as the Maintenance Manager at Respondent’s Number 3 Mine and is responsible for overseeing the maintenance and repair of equipment at the mine, but that he was the chief electrician on the day shift at the time Inspector Meddings issued the subject Citation. Tr. 330–31. As for his credentials on the subject of electrical systems, Mr. Johnson testified that he holds state and federal certifications for both underground and surface mines and for low, medium, and high voltages. Tr. 331–32. When questioned about the defective electrical cable identified by Inspector Meddings as an ignition source, Mr. Johnson first described the structure of the cable, testifying, “Well, you got your conductors and then you got your insulated conductors, and then you got semiconductive tape around the leads, then shielding on the lead which is connected to the miner [machine]. The shielding is grounded to the power center, to the machine itself.” Tr. 339. Mr. Johnson further testified that the field notes of Inspector Meddings reflect that the cable was approximately 100 to 120 feet from the cited accumulations of coal. Tr. 339. Finally, Mr. Johnson opined that the cable did not pose a risk of igniting the accumulations:

For one thing, it was too far away to even pose anything. Plus the shielded cable, it’s shielded to protect any kind of arcing. If it does, it goes to ground. Takes 15 amps or less to knock the breaker, and 45 or less volts, so that ain’t going to create no spark. And it knocks within probably three to five cycles, which is probably less than quarter of a second.

Tr. 340.¹⁰

Upon consideration, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that the defective electrical cable was reasonably likely to arc or spark, thereby generating a source of ignition. While the field notes of Inspector Meddings describe the defective condition of the cable, the Secretary failed to

¹⁰ Mr. Johnson attempted to bolster his testimony by explaining that he sought the opinion of an electrical engineer, who allegedly agreed with his assessment. Tr. 340. While hearsay may be admitted under the procedural rules governing this proceeding set forth at 29 C.F.R. § 2700.63(a), it is not required to be. The hearsay evidence regarding Mr. Johnson’s conversation with the unnamed electrical engineer is not inherently reliable, and the Secretary lacks any means of confronting this individual and challenging his conclusions. Therefore, the undersigned will not consider this evidence.

offer any evidence that this condition rendered the cable capable of arcing or sparking, let alone that such an event was reasonably likely to occur. To the contrary, Inspector Meddings admitted that he is not aware of any instances of a cable in the same condition acting as an ignition source for coal. The Secretary also neglected to present any evidence that the cable was reasonably likely to degrade further and become more hazardous as mining operations continued, or to identify any legal authorities to support her position. Further, Respondent countered the sparse evidence presented by the Secretary with the testimony of Mr. Johnson, the opinion of whom is deemed to be credible given his demonstrated expertise on electrical matters. Thus, based upon the record in this case, the undersigned finds that the Secretary has failed to establish that the defective electrical cable constituted a viable source of ignition. As the Secretary identified only the cable as a potential ignition source, the undersigned finds that the Secretary has failed to establish that the accumulations of coal present in the Number 2 entry were reasonably likely to result in an injury-causing event. Accordingly, the third element of *Mathies* has not been met, and Respondent's violation of 30 C.F.R. § 75.400 is deemed not to have been significant and substantial in nature.

Nevertheless, the violation was serious. As noted above, the Commission has advised that "[t]he 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 undisputed testimony of Inspector Meddings establishes that 13 miners were present on the section at the time he issued the Citation, Tr. 218, and the presence of the accumulations undoubtedly exposed these individuals to a risk of injury in the event of an ignition or explosion. With regard to the severity of this potential injury, the undersigned accepts as credible Inspector Meddings' conclusion that permanently disabling injuries were reasonably likely to result should an ignition or explosion occur. Inspector Meddings reasoned that in the event of a fire, "the least you'll get by with is somebody just gets smoke inhalation and misses a few days from trying to fight a fire. The worst part it would be a fatal mine fire and people get trapped and can't get out and get killed, so I took the middle of the road." Tr. 218–19. Respondent did not offer any evidence to rebut this common sense conclusion. Accordingly, the undersigned finds that the violation subjected 13 miners to the risk of severe injury or fatality. Given this finding, the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that Respondent was moderately negligent in violating 30 C.F.R. § 75.400, reasoning, "I couldn't mark it low, as the amount of citations and the amount and extent of conditions here. Moderate is what I marked it. I probably could have justified high easily, but I just marked it moderate." Tr. 219. Respondent did not dispute Inspector Meddings' characterization.

Based upon the record in this case, the undersigned finds that Respondent was, in fact, highly negligent in allowing the cited accumulations to exist. First, as found above, the accumulations were extensive. In addition, as Inspector Meddings recorded in the body of the Citation, "The operator has . . . been put on notice in July, 2009 for excessive 75.403

Violations.¹¹ A total of (38) 75.403's and (60) 75.400 violations has been issued to this operator in the past 24 months." S's Ex. 4. Respondent did not dispute this evidence. Thus, Respondent had received repeated warnings of unlawful accumulations of combustible materials at Number 3 Mine in the two years preceding the issuance of the subject Citation. Despite being on notice to prevent such violations from occurring, Respondent failed to take any steps to address the accumulations at issue here. In fact, the testimony of Mr. Johnson suggests that Respondent's agents had already cleaned the cited areas and simply left behind the accumulations observed by Inspector Meddings. *See* Tr. 335–37, 347. The record does not contain any suggestion that Respondent's agents intended to return to the cited areas and remove the accumulations.¹² Therefore, the accumulations of loose coal and coal fines would have persisted uncorrected had Inspector Meddings not intervened.

The considerations discussed above undoubtedly support a finding of high negligence, and the undersigned is hard-pressed to find in the record any evidence of mitigating circumstances. When asked by counsel for the Secretary whether he had considered any mitigating factors in characterizing the degree of negligence shown by Respondent, Inspector Meddings responded, "I couldn't see, you know, that I tried to look -- I tried to ask around, you know, why that condition started, and I tried to see what I could do to help the operator do this. This right here was just operator just failed to clean it up." Tr. 219. This largely non-responsive answer fails to elucidate whether any mitigating circumstances existed. Accordingly, the undersigned finds the violation resulted from a high degree of negligence on the part of Respondent.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month

¹¹ At the time Inspector Meddings issued Citation Number 8236506, the regulations at 30 C.F.R. § 75.403 provided, in pertinent part:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

30 C.F.R. § 75.403.

¹² Indeed, according to Mr. Johnson, Respondent's agents had already applied rock dust in the area. Tr. 335. He testified, however, that "it had been real black," Tr. 335, which calls into question whether the materials met the requirements of 30 C.F.R. § 75.403. Inspector Meddings testified that he did not sample the rock dust anywhere in the section, however. Tr. 253.

period over the course of 720 days of inspection. Of those 334 violations, 19 consisted of violations of 30 C.F.R. § 75.400. In support of these figures, the Secretary proffered a document entitled “Assessed Violation History Report,” which was admitted into evidence as Secretary’s Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent’s ability to remain in business. Stip. 6. The parties also stipulated that Respondent’s Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a “10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.” 30 C.F.R. § 100.3(f). The Secretary found that Respondent’s agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236506 is \$3,750. Further, this Citation shall be modified to injury unlikely, non-S&S, and high negligence.

E. CITATION NUMBER 8236514: ALLEGED VIOLATION OF 30 C.F.R. § 75.503

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 2:07 a.m. on August 27, 2009, Inspector Meddings issued Citation Number 8236514 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

The DBT Continuous Mining Machine CO #0176 being used on #4 Section is not being maintained in permissible condition. An opening exist of .025 inch in the right side tram panel top left handed side. The maximum allowable opening is .004 inch to be considered permissible. This mine produces over 1.2 million Cubic Feet of Methane in a 24 hour period and produces coal an average two shifts per day five days per week. This condition exposes miners to the hazards associated with methane explosions that would result in permanently disabling injuries.

S’s Ex. 5. The Citation further alleges that the cited condition constitutes a violation of 30 C.F.R. § 75.503. *Id.* As noted above, this provision provides, “The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.” 30 C.F.R. § 75.503.

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.503 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that 13 people would be affected. S's Ex. 5. He also determined that the violation was significant and substantial in nature and that it resulted from a low degree of negligence on the part of Respondent. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1795.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.503 as charged in the Citation. According to the field notes and testimony of Inspector Meddings, he inspected a continuous miner machine located in the Number 4 section on August 27, 2009, and detected a gap in the right side tram panel that measured 0.025 inches, which exceeded the limit of 0.004 considered to be permissible. Tr. 221–22; S's Ex.7. Mr. Rowe acknowledged the presence of the impermissible gap at the hearing, Tr. 298, and Respondent does not contest the alleged violation of 30 C.F.R. § 75.503 in its Post-Hearing Brief. R's Br. at 2, 9. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.503 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.503 on August 27, 2009, by failing to maintain the continuous miner machine in the Number 4 section in permissible condition, as charged in the Citation.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Citing the testimony of Inspector Meddings as support, the Secretary argues that “[a] spark could cause a methane explosion or mine fire with fatalities or serious burns,” that permanently disabling injuries “were reasonably likely to occur because the miner was actually in use and cutting coal,” and that the 13 miners working on the Number 4 section would be affected by the violative condition. S's Br. at 10 (citing Tr. 222–23). Turning to the designation of the violation as significant and substantial in nature, the Secretary argues that the violation contributed to a discrete safety hazard, “because the condition of the equipment was not permissible” and the operation of the continuous miner machine “would reasonably likely lead to a serious injury to the miners being exposed to a methane explosion resulting from a spark created by a continuous miner.” S's Br. at 15 (citing Tr. 212, 223; S's Ex. 5).

Respondent challenges the characterization of the violation as reasonably likely to result in an illness or injury and as significant and substantial in nature. R's Br. at 9–11. Arguing that the Secretary has not met the “confluence of factors” standard that applies to this determination,

Respondent contends that the testimony of Mr. Johnson and Mr. Rowe establish that the components behind the cited panel “are not capable of arcing, sparking, or otherwise presenting an ignition source for methane,” because “no moving components are a part of the panel and . . . the components are individually sealed off from one another.” R’s Br. at 9–11 (citing Tr. 298–99, 343–44). Thus, Respondent contends, the cited condition did not constitute a source of ignition. R’s Br. at 10. Seeking to discredit Inspector Meddings, Respondent notes that he admitted that he lacked any electrical certifications or real knowledge of the components behind the cited panel. R’s Br. at 9 (citing Tr. 258). Finally, Respondent argues that “the likelihood of a potential fuel source in the form of methane was also very low,” given that Inspector Meddings did not detect any appreciable levels of methane at the time of his inspection, Mr. Johnson has never found an explosive range of methane at or around the working face of Respondent’s Number 3 Mine in his ten years of experience working there, and the mine’s ventilation system was working properly that day. R’s Br. at 10–11 (citing Tr. 256, 344, 348, 351). Respondent also disputes the Secretary’s reliance upon the average volume of methane liberated by the mine to demonstrate the likelihood that an explosive range of methane was reasonably likely to form. R’s Br. at 11.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). The Commission has emphasized that designations of permissibility violations as significant and substantial “must be based on the particular facts surrounding the violation, including the nature of the mine involved.” *Texasgulf*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission thereby recognized that “the individual nature of a mine with regard to its methane liberations and its history of previous emissions and explosions has a bearing on the validity of an S&S finding.” *Knox Creek*, 2010 WL 561997, *45 (Dec. 27, 2010) (ALJ).

Applying the foregoing principles to the record in this case, the undersigned finds that the first element of *Mathies* is satisfied, because the fact of the violation has been established. The second element is also met. Inspector Meddings determined that the impermissible gap present on the continuous miner machine’s right side tram panel exposed the 13 miners working in the section to the hazard of a methane-fueled fire or explosion. Tr. 221; S’s Ex. 5. He explained that the purpose of the panel is to ensure that any ignition that may occur inside the compartment it encloses will not escape into the mine atmosphere and trigger a larger ignition or explosion:

[T]he panel was not designed to keep methane out. The panel will allow methane in. The panel is designed to keep -- if methane gets into the panel, to keep the flame path from coming out of the panel. That’s where you get the four-thousandths gap, you’re allowed up to four-thousandths. Anything bigger than that, when the miner is operating, cutting down coal, the coal is liberated a lot more, especially when they’re cutting coal. So there’s going to more methane

liberating in and around them panels. So like I said, the panel is not designed to keep methane out; it's designed to keep the flame path in.

Tr. 271. Respondent did not dispute the alleged hazard. The undersigned agrees and finds that the violation contributed to the discrete safety hazard of methane entering the compartment enclosed by the right side tram panel, the electrical components behind the panel arcing or sparking and thereby igniting the methane, and the resulting flame traveling out of the compartment through the impermissibly wide gap and triggering a larger ignition or explosion if the concentration of methane in the mine atmosphere fell within the ignitable or explosive range. Further, little question exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the fourth element of *Mathies* is also met.

The critical question is whether this hazard was reasonably likely to result in an injury-causing event had normal mining operations continued, thereby satisfying the third element of *Mathies*. As argued by Respondent, the Commission has examined whether the “confluence of factors” necessary to cause an ignition or explosion was present in evaluating the reasonable likelihood of such occurrence, “including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources.” *Texasgulf*, 10 FMSHRC at 501.

With respect to the quantity of methane present in the atmosphere, Inspector Meddings did not measure the level of methane at the continuous miner machine on the date of the inspection because, as he explained, he performed the inspection during the mine's maintenance shift when the mine does not produce any coal, thereby allowing Respondent's agents to back the continuous miner machine away from the face and “pull all the shields off of it” in preparation for his inspection, without hindering production. Tr. 256–57. In the normal course of events, however, the continuous miner machine reasonably could have been expected to move back to the mine face and resume operation during the next production shift. The record does not contain any suggestion that Respondent would have observed and corrected the impermissible gap prior to that time. Thus, the question for the undersigned to consider is whether the continuous miner machine was reasonably likely to encounter an ignitable or explosive concentration of methane after it resumed operation at the mine face. With respect to this issue, the undersigned again adopts the findings above that an ignitable or explosive concentration of methane was reasonably likely to occur, given the gassy nature of the mine and the capacity of methane to accumulate rapidly in such mines during the course of operations.

The undersigned now considers the likelihood that the electrical components contained by the right side tram panel on the continuous miner machine would arc or spark, thereby producing a source of ignition. Upon consideration of the evidence presented by the parties, the undersigned finds that the Secretary has failed to carry her burden in this regard. The Secretary rested solely on the finding of Inspector Meddings that the impermissible gap exposed miners to the hazard of fire or explosion, but Inspector Meddings did not offer any basis for his belief that the electrical components enclosed by the panel would generate a source of ignition. To the contrary, he admitted that he lacks any knowledge as to the nature of these components or whether they were capable of arcing or sparking. Tr. 221, 258. He also admitted that he lacks expertise on electrical matters. Tr. 258. These considerations significantly undermine his conclusion that an ignition source existed. In addition, the testimony offered by Respondent's

witnesses compels a finding that the components behind the right side tram panel were not capable of arcing or sparking and, therefore, that the impermissible gap did not constitute a feasible source of ignition. Mr. Rowe explained that these particular components were incapable of arcing or sparking and that each component was sealed in its own container within the compartment. Tr. 298–99. Mr. Johnson confirmed this testimony, testifying that the absence of moving parts precluded the components from arcing or sparking. Tr. 343, 348. Given their past and current responsibilities at the mine, both Mr. Rowe and Mr. Johnson are found to possess considerable expertise on electrical matters and the cited continuous miner machine, which lends credibility to their determinations. Therefore, the undersigned finds that the Secretary has failed to demonstrate by a preponderance of the evidence that the electrical components were reasonably likely to arc or spark and thereby result in an ignition of methane. Accordingly, the third element of *Mathies* has not been met, and the violative condition of the continuous miner machine was not significant and substantial.

Nevertheless, the undersigned finds the violation to have been serious. As noted above, the Commission has advised that “[t]he 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). While Inspector Meddings testified that 13 miners were present on the section at the time of his inspection, he failed to identify the number of miners present on the section during production shifts, when operation of the cited continuous miner machine would resume. At a minimum, however, the violation subjected the operator of this equipment to the risk of injury in the event of an ignition or explosion. With regard to the severity of this potential injury, the undersigned accepts as credible Inspector Meddings’ conclusion that permanently disabling injuries were reasonably likely to result should the violation result in an ignition or explosion. Inspector Meddings reached this conclusion by weighing the “best case scenario,” which would be that an ignition results and causes burn injuries to one person, and the “worst case scenario,” which would be an explosion. Tr. 223. Respondent did not offer any evidence to rebut this common sense conclusion. Accordingly, the undersigned finds that the violation subjected at least one miner to the risk of severe injury or fatality. Given this finding, the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that the violation resulted from a low degree of negligence because he typically finds multiple violative conditions when inspecting the permissibility of equipment and the impermissible gap that he found in the right side tram panel was the only issue that he detected on the continuous miner machine. Tr. 223–24; S’s Ex. 5, 7. At the hearing, he explained, “[A]s many things that can go wrong with this miner, this is the only one I found. So I made a low negligence [designation].” Tr. 224. Respondent did not dispute this finding. Upon consideration, the undersigned agrees and finds that the inconspicuous nature of the impermissible gap and the absence of any other violative conditions on the continuous miner machine warrant a finding of low negligence.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 721 days of inspection. Of those 334 violations, 12 consisted of violations of 30 C.F.R. § 75.503. In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236514 to be \$200. Further, this Citation shall be modified to injury unlikely and non-S&S.

F. CITATION NUMBER 8236515: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 5:15 a.m. on August 28, 2009, Inspector Meddings issued Citation Number 8236515 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the "Condition or Practice" section as follows:

The approved ventilation plan is not being followed on the active 035-0/039-0 MMU. No measurement could be obtained behind the line curtain in No. 2 entry using a calibrated anemometer. Also no positive air movement could be detected using chemical smoke. The approved ventilation plan requires 1,000 CFM be maintained in all idle/bolted faces. This entry is approximately 27 feet deep and 7.5 Ft. in height, 0.2% methane was detected in this face during this inspection. This mine has a history of methane and liberates over 1.2 Million Cubic feet of methane in a 24 hours period by the last total liberation bottle sample taken. The foreman's Date, Time and initials are in the area within 22 minutes of this citation

was issued. This mine has been issued 49 Violations of failing to follow the approved ventilation plan within the past 24 months.

S's Ex. 6. The Citation further alleges that Respondent's failure to comply with the approved ventilation plan constitutes a violation of 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine, subject to the approval of the district manager. *Id.*

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.370(a)(1) was unlikely to cause injury or illness but that any such injury or illness could reasonably be expected to be permanently disabling. S's Ex. 6. He further determined that 11 people would be affected by the alleged violation. *Id.* Finally, he determined that the violation was not significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

As a civil penalty for this alleged violation, the Secretary proposes the assessment of \$3,143.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged in the Citation. As noted above, the revised basic ventilation plan governing Respondent's Number 3 Mine reflects that Respondent is required to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of line curtain[s] in idle places." S's Ex. 9; *see also* Tr. 225. Inspector Meddings presented ample evidence that he was unable to detect any air velocity behind the line curtain in the Number 2 entry on August 28, 2009, in contravention of the plan. S's Ex. 7; Tr. 226. Respondent did not offer any contradictory evidence at the hearing. Rather, Mr. Rowe testified that he lacked any knowledge of the circumstances surrounding the Citation, explaining that he did not accompany Inspector Meddings to the face of the entry and that he generally waits at the mouth of the entry during inspections. Tr. 295-97. Further, Respondent does not contest the alleged violation of 30 C.F.R. § 75.370(a)(1) in its Post-Hearing Brief. R's Br. at 2. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.370(a)(1) is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.370(a)(1) on August 28, 2009, by failing to maintain 1000 CFM of air flow in the Number 2 entry of the Number 4 section, as required by its approved ventilation plan.

3. PENALTY

a. Gravity of the Violation

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings and the Citation in support of the gravity of the violation. S's Br. at 12 (citing Tr. 228–30; S's Ex. 6). Respondent does not dispute Inspector Meddings' characterization of this aspect of the violation.

Upon consideration, the undersigned finds the violation to be serious. While Inspector Meddings measured the concentration of methane present in the Number 2 entry of the section to be only 0.2 percent, well below the concentration necessary to ignite or explode, he testified that a deficient level of air flow in a mine, such as the one that he detected, can lead to the accumulation of methane to explosive concentrations. Tr. 225–30; S's Ex. 6, 7. Respondent did not challenge this assertion. Given the gassy nature of Respondent's Mine and the deficient flow of air to the entry, methane reasonably could have been expected to accumulate rapidly without detection, even though coal was not being cut at the time.

The record, however, does not disclose the presence of an ignition source for the methane which would have warranted a finding that an injury-causing event was reasonably likely to occur. No equipment was present in the Number 2 entry during the inspection, and while Inspector Meddings testified that equipment was "tramping around the section," he acknowledged that equipment was not permitted to enter in by the last open crosscut unless methane levels had first been measured. Tr. 260–61. Even if this precautionary measure was not considered, the Secretary failed to introduce any evidence as to how the particular equipment that was "tramping around the section" would generate a source of ignition once in the Number 2 entry. In the absence of an ignition source, an injury-causing event was unlikely to occur as a result of the violation. Nevertheless, should an ignitable or explosive concentration of methane have formed and ignited, the resultant injuries undoubtedly could have been severe. As Inspector Meddings testified, "I evaluated permanently disabling. I looked at it, if this was to continue and then explosive mixture would be allowed to accumulate in it, and then it would have ignited and, again, too, I normally -- I'll take the middle of the road. Worst case scenario is something like Upper Big Branch. Best case scenario is just somebody gets burned. I marked it middle of the road" Tr. 229. He also testified that the 11 miners present on the section at the time of his inspection would be impacted by such an occurrence. Tr. 230. The undersigned accepts these conclusions as credible and, based upon the foregoing considerations, finds the proper characterization of the violation to be of high gravity.

b. Negligence

The Secretary cites the testimony of Inspector Meddings as support for the designation of Respondent's negligence as high, noting that Inspector Meddings observed that the foreman had verified that an adequate examination had been performed in the cited area but that "[t]he examination was not completed correctly, because there was no positive air flow in the area." S's Br. at 12 (citing Tr. 230). Respondent counters that Inspector Meddings' investigation on this point "is simply not sufficient to justify a finding that the company engaged in high

negligence simply because the air volume was reportedly different twenty-two minutes after an examiner had been through the area.” R’s Br. at 12. As support for this position, Respondent relies upon the testimony of Inspector Meddings that he could not recall whether a rock had dislodged the line curtain in the entry, that he had “[n]o idea” when the line curtain had become dislodged, and that he neglected to ask the section foreman whether the line curtain was hung properly at the time of the examination, even though it would have been “some good information.” R’s Br. at 11–12 (citing Tr. 262). On these grounds, Respondent requests that the undersigned assess its negligence as moderate, rather than high. R’s Br. at 12.

The undersigned finds Respondent’s position persuasive. To demonstrate that the violation resulted from a high degree of negligence on the part of Respondent, the Secretary rested primarily on the belief of Inspector Meddings that the examination had not been performed properly, and the record reflects that the basis for this belief was simply that he detected a violative condition during his inspection. As noted above, “[t]he mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the [preshift] examination.” *Cemex, Inc.*, 32 FMSHRC 1897, 1901 (Dec. 27, 2010) (ALJ). While only 22 minutes had elapsed between the examination and inspection, conditions in a coal mine can change quickly and unexpectedly, a point conceded by Inspector Meddings at the hearing. Tr. 262. Inspector Meddings did not deny that a rock could have dislodged the line curtain directing air to the entry after the examination, thereby disrupting the velocity of air at the face. Absent any other evidence demonstrating that the examination of the Number 2 entry was deficient or that the lack of air flow could not have developed between the examination and inspection, the record supports a finding that the examination was adequate, which warrants a finding of low negligence. On the other hand, Respondent had received repeated warnings of its failure to comply with the ventilation plan governing Number 3 Mine in the two years preceding the issuance of the subject Citation. In particular, Inspector Meddings noted that Respondent had been cited for 49 violations of the ventilation plan during that period. S’s Ex. 6; Tr. 226–27. While he admitted on cross-examination that he did not confirm that each of those citations had become final orders, he explained that representatives of MSHA confer with Respondent as a consequence of the citations having been issued on ways to improve compliance. Tr. 226–27, 263–67. Thus, Respondent clearly was on notice that greater efforts were necessary to comply with the ventilation plan. Weighing these considerations, the undersigned finds that Respondent exhibited a moderate degree of negligence in committing the violation charged in this Citation.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent’s history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 718 days of inspection. Of those 334 violations, 20 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled “Assessed Violation History Report,” which was admitted into evidence as Secretary’s Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236515 to be \$2,150. Further, this Citation shall be modified to moderate negligence.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Citation Number 8231582 is to be modified to low negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of \$250.
2. Citation number 8231583 is vacated in all respects.
3. Citation number 8231586 is to be modified to injury unlikely and non-S&S. Respondent shall pay a penalty of \$400.
4. Citation number 8236506 is to be modified to high negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of \$3,750.
5. Citation number 8236514 is to be modified to injury unlikely and non-S&S. Respondent shall pay a penalty of \$200.
6. Citation number 8236515 is to be modified to moderate negligence. Respondent shall pay a penalty of \$2,150.
7. Respondent shall pay the aforementioned penalty amounts totaling \$6,750 within 30 days of the date of this Order.¹³ Upon receipt of payment, the Citations are **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

¹³ 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 63179-0390. Please include the Docket and A.C. Numbers.

Distribution:

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Gary McCollum, Esq., 771 Corporate Drive, Suite 500, Lexington, KY 40503

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE N.W., SUITE 520N
WASHINGTON, D.C. 20004-1710
(202) 434-9900

August 15, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (“MSHA”),	:	Docket No. KENT 2010-161
Petitioner,	:	A.C. No. 15-18839-198843-01
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: Van Lear Mine
	:	
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky for Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

On November 24, 2009, the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), filed a Petition for the Assessment of Civil Penalty (“Petition”) against Excel Mining, LLC (“Respondent” or “Excel”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended, 30 U.S.C. §§ 815, 820. Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty (“Answer”) on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (“Commission”), dated December 13, 2010, the case was assigned to the undersigned for adjudication.

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The Petition alleges two violations described in Order Numbers 8230534 and 8230536, for which the Secretary seeks a civil penalty in the aggregate amount of \$8,000. Order Number 8230534 alleges a violation of 30 C.F.R. § 75.202(a) for failure to provide roof support or other controls adequate to protect workers from hazards related to roof falls. Order Number 8230536 alleges a violation of 30 C.F.R. § 75.362(b) for failure to conduct an adequate onshift belt examination along each belt conveyor haulageway. Both orders were issued pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2).

A hearing was held on the charged violations in Pikeville, Kentucky, on October 18, 2011. At the hearing, the Secretary introduced testimony from one witness, Kip Bell, and proffered five exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1-5. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 18. Respondent also introduced testimony from one witness, Mike Moore. The Secretary and Respondent filed Post-Hearing Briefs on January 6, 2012, and February 3, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS²

Before the hearing, the parties entered into the following stipulations ("Stip."):

1. Respondent is subject to the Mine Act.
2. Respondent has an effect on interstate commerce within the meaning of the Mine Act.
3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Respondent operates the Van Lear Mine, with Mine Identification Number 15-18839.
5. The Van Lear Mine produced 874,670 tons of coal in 2008, and had 398,784 hours worked in 2008.
6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable

² The parties filed Joint Stipulations on August 6, 2011. As noted by Respondent in its Post-Hearing Brief, the Secretary represents in her Post-Hearing Brief that the parties agreed upon facts differing from those set forth in the Joint Stipulations. The only stipulations identified herein are those contained in the Joint Stipulations.

than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be “significant and substantial” or to involve “unwarrantable failure,” enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under [this Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, “Section 104(d)(1) distinguishes as more serious any violation that ‘could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,’ and establishes more

severe sanctions for any violation that is caused by ‘an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.’” *Wolf Run Mining Co.*, 2013 WL 1249150, *2 n.4 (Mar. 20, 2013). This mechanism for enhanced enforcement serves as a “forceful incentive for the operator to exercise special vigilance in health and safety matters.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)). The legal standards applicable to each of these concepts are described below.

A. GRAVITY

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider “the gravity of the violation,” among other criteria. 30 U.S.C. § 820(i). Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if that event occurs; and (3) the number of persons potentially affected.

B. SIGNIFICANT AND SUBSTANTIAL

As discussed in greater detail below, the Secretary alleges that one of the charged violations was of a significant and substantial (“S&S”) nature. As defined by Section 104(d)(1) of the Mine Act, 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)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (Apr. 1981), holding that a violation is properly designated as 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.” *Nat’l Gypsum*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984) (“*Mathies*”):

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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies, 6 FMSHRC at 3–4.

The S&S nature of a violation is distinct from the violation’s gravity. As noted by the Commission, “[t]he 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 at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from “a reasonable likelihood that the [cited] condition . . . could contribute, significantly and substantially, to the cause and effect of a safety hazard.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, “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 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider “whether the operator was negligent.” 30 U.S.C. § 820(i). Thus, “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence as follows:

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

30 C.F.R. § 100.3(d). When analyzing an operator’s negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

D. UNWARRANTABLE FAILURE

As discussed in greater detail below, the Secretary alleges that both of the charged violations resulted from Respondent’s unwarrantable failure to comply with the cited standards. The Commission has described an unwarrantable failure 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,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002–04; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure analysis). The

Commission has explained the role of Administrative Law Judges in determining whether conduct is “aggravated” in the context of an unwarrantable failure analysis:

[W]hether 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. . . . While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.

IO Coal Co., 31 FMSHRC 1346, 1350–51 (Dec. 2009). Repeated similar violations are relevant to the unwarrantable failure analysis to the extent that they serve to notify the operator that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261–62 (Aug. 1992).

IV. SUMMARY OF THE EVIDENCE

At the hearing, in support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Kip Bell and copies of Order Numbers 8230534 and 8230536, the field notes of Inspector Bell, a document entitled “Assessed Violation History Report,” and the revised roof control plan for Respondent’s Van Lear Mine. Respondent, in turn, offered the testimony of Mike Moore.

A member of the coal mining industry for the last 25 years, including four years as a mine safety and health inspector for the State of West Virginia and seven years as an inspector for MSHA, Inspector Bell testified that he issued Order Numbers 8230534 and 8230536 while conducting an “E01 inspection”³ of Respondent’s Van Lear Mine on August 19, 2009. Tr. 10–15, 22, 34. Admitted into evidence as Secretary’s Exhibits 1 and 3, respectively, Order Number 8230534 and the field notes of Inspector Bell reflect that he traveled the “off side” of the Number 5 belt conveyor⁴ in the Number 4 entry of the Mine, beginning at the tailpiece of the belt conveyor, as part of his inspection. S’s Ex. 1, 3. In accordance with applicable regulations, an

³ Inspector Bell explained that an E01 inspection is an inspection conducted underground on a quarterly basis. Tr. 22.

⁴ When asked to distinguish the off side of a belt conveyor, Inspector Bell explained that “[n]ormally the other side [of the belt conveyer] is what was walked or traveled” but that “the off side is supposed to be maintained 24 inches for a walkway.” Tr. 49. Inspector Bell further explained that this walkway is utilized for “examinations” and that “stoppings [exist] on the offside as well, with manddoors, to go through return and airways, intakes.” Tr. 61.

examination of the Number 5 belt conveyor had last been performed by Respondent during the second production shift on August 18, 2009,⁵ or between eight and 12 hours prior to Inspector Bell's inspection, which he began at 6:50 a.m. Tr. 39–41, 50–51, 64, 73–74; S's Ex. 3. Inspector Bell explained that he reviewed Respondent's records at the outset of his inspection, and in the records kept for the Number 5 belt conveyor, the examiner who performed the last examination on August 18 wrote that no hazards were observed along the belt conveyor at that time. Tr. 30–31, 34–35; S's Ex. 2, 3.

According to Inspector Bell's testimony and field notes, he was accompanied by Mr. Moore, a belt coordinator at the Van Lear Mine, as he traveled the off side of the Number 5 belt conveyor on August 19th, and Mr. Moore informed him of the presence of "draw rock"⁶ along the entire length of the off side of the belt conveyor before they set off from the tailpiece. Tr. 23–24, 29, 35–36, 49; S's Ex. 3. Upon traveling this area, Inspector Bell observed three segments along the walkway totaling a distance of approximately 2730 feet where loose and broken draw rock was indeed present,⁷ including one piece of draw rock that measured approximately 4.5 feet by 3 feet and that was 4 inches thick, which "had fallen and knocked the tubular belt structure out and off of the belt stand located on the off side." S's Ex. 1, 3; Tr. 19–20, 41–42, 45–47. Inspector Bell recorded in the body of the Order that the draw rock had resulted from "sloughing and scaling . . . around the permanently installed (6 feet resin grouted) roof bolts in the affected area" and that three such bolts were hanging from the roof.⁸ S's Ex. 1; *see also* Tr. 19–20, 43. Describing the hanging bolts that he observed as "inoperative," Inspector Bell explained that they were not "doing their job as far as the draw rock had deteriorated away from the bearing plates." Tr. 20.

⁵As established by the testimony of Inspector Bell and Mr. Moore, employees at the Van Lear Mine work in three shifts: the first two shifts, which together run from approximately 6:30 a.m. to midnight, are production shifts, and the third shift, which runs from approximately 10:30 p.m. to 8 a.m., is a maintenance shift. Tr. 39, 63, 74.

⁶Inspector Bell described draw rock as "laminated sandstone or slate . . . that has shifted due to air or deterioration away from the roof bolt or ribs." Tr. 20. He further explained that this loose rock "[breaks] away from the immediate mine roof and . . . kind of gap[s] down," similar to peeling paint, until it ultimately falls to the floor of the mine. Tr. 57–59. When draw rock forms, Inspector Bell testified, operators are obligated to eliminate it and install additional roof support. Tr. 20–21. He further testified that while some operators install netting on the roofs of their mines to prevent any draw rock that forms from falling to the floor, Respondent did not employ any such measures at the Van Lear Mine. Tr. 57–58.

⁷For reference, Mr. Moore testified that the length of the belt conveyor at the time of Inspector Bell's inspection was approximately 4000 feet. Tr. 73.

⁸Inspector Bell affirmed at the hearing that Respondent utilizes two types of bolts in the belt entry, resin grouted bolts and cable bolts, in order to maintain the stability of the roof, and that between 4000 and 5000 resin grouted bolts had been installed there. Tr. 43–45; *see also* S's Ex. 3. Mr. Moore also confirmed the use of these resin grouted bolts during his testimony. Tr. 82–83.

According to Inspector Bell's testimony and field notes, as he and Mr. Moore traveled the off side of the Number 5 belt conveyor, Inspector Bell observed two miners report to Mr. Moore and Mr. Moore instruct them to shovel coal along the walkway.⁹ Tr. 24–25, 52–53, 60–61; S's Ex. 3. Inspector Bell testified that he questioned Mr. Moore about the instructions he had issued and Mr. Moore responded that "he told those two to shovel on the off side because we were traveling off side. And he assumed that's where the -- they had accumulations of coal." Tr. 24–25. While Inspector Bell could not recall at the hearing whether he saw the two miners shoveling along the Number 5 belt conveyor as ordered by Mr. Moore, Tr. 53, he recorded in his field notes that he "[o]bserved a Green Hat miner shoveling on the off side of 5 Belt and a Black Hat miner shoveling on the walkway side," S's Ex. 3. Later in his field notes, he identified the miners by name. *Id.*

Thereafter, at 11:30 a.m., Inspector Bell issued Order Number 8230534 to Respondent for failure to support or otherwise control the roof for hazards related to roof falls where persons work or travel. S's Ex. 1, 3. At the hearing, Inspector Bell testified that Mr. Moore "put two guys in harm's way with shoveling" in an area known to him to have loose and broken draw rock. Tr. 24. He explained his belief that the draw rock posed a risk of falling onto miners passing beneath it and causing injuries, such as broken bones and injured backs, or even fatalities. Tr. 20, 29. Inspector Bell believed that such an accident was reasonably likely to occur and that permanently disabling injuries would result. Tr. 22–23. He testified that Respondent was aware that greater compliance efforts were necessary because of a citation issued to it on August 4, 2009, related to record-keeping requirements. Tr. 27–28, 47–48. Finally, he described how Respondent remedied the cited conditions, testifying, "[t]he roof had been scaled and the roof bolt had been repaired with half -- cap wedges. The whole entry had been rescaled to knock the draw rock down." Tr. 29–30. He also recorded in the Order, "[t]he entire No. 4 entry mine roof has been properly scaled from the No. 5 belt tail piece down to the discharge head. Also, management has installed half headers over all hanging roof bolts, and the damaged belt structure has been repaired as required." S's Ex. 1. Inspector Bell terminated the Order at 4 p.m. that day. *Id.*

Upon returning to the surface of the mine, Inspector Bell also issued Order Number 8230536 to Respondent at 12:45 p.m. S's Ex. 2, 3. Explaining that operators are required to document any hazardous conditions observed during belt examinations in order to inform miners working in the affected areas, Inspector Bell testified that the records he reviewed prior to entering the Van Lear Mine failed to identify the conditions that he cited in Order Number 8230534 and three other citations that he issued during his inspection of the Number 5 belt conveyor. Tr. 30–31, 34–35; *see also* S's Ex. 3. Admitted into evidence as Secretary's Exhibit 2, Order Number 8230536 reflects that the alleged violation was abated by the mine foreman

⁹ Inspector Bell's testimony and field notes reflect that he also observed two miners shoveling at the tailpiece of the Number 5 belt conveyor. Tr. 36–37; S's Ex. 3. Mr. Moore confirmed that he assigned two miners the task of shoveling at the tailpiece that morning. Tr. 74–75. The record is confusing as to whether those particular miners were the same individuals who allegedly reported to Mr. Moore as he accompanied Inspector Bell on his inspection of the off side of the belt conveyor. *See* S's Ex. 3; Tr. 24–25, 26–37, 52–53, 60–61.

documenting the hazards cited in the aforementioned citations. S's Ex. 2. Inspector Bell terminated the Order 10 minutes after he issued it. *Id.*

During questioning by Respondent's counsel, Inspector Bell agreed that a mine "can look different from different directions" and that he did not know the direction traveled by the examiner who last performed an examination of the area. Tr. 39-40. Inspector Bell also conceded that the condition of a mine roof can change over the course of a shift and that draw rock forms more readily in the Van Lear Mine during the "sweat season" it experiences in the summer months.¹⁰ Tr. 40, 54. In addition, when questioned by counsel for the Secretary and later by the undersigned, Inspector Bell affirmed that the amount of draw rock that he observed could have formed since the last examination performed by Respondent. Tr. 56, 59. Inspector Bell also recorded in his field notes, "Evidence not available to ascertain an equitable time for existence" of the conditions. S's Ex. 3. Nevertheless, Inspector Bell estimated at the hearing that the conditions he observed had been present for "more than one day, more than three shifts." Tr. 27, 53-54.

On behalf of Respondent, Mr. Moore testified that he was not aware of the condition of the Number 5 belt conveyor at the time it was last examined on August 18 because he "hadn't traveled it for a while and they never let you know -- they never left nothing -- say anything was wrong with it." Tr. 73. Following Inspector Bell's inspection, however, Moore conferred with the miners who performed examinations of the Number 5 belt conveyor on August 18, and they informed him that they did not observe any hazardous conditions at the time of those examinations. Tr. 89-91.

Mr. Moore also denied informing Inspector Bell at the tailpiece of the Number 5 belt conveyor on August 19 that any draw rock was present along the belt conveyor:

Q: Now, at the tailpiece did you tell Mr. Bell that loose and broken draw rock is present on the offside of the entire No. 5 belt?

A: No.

Q: You're certain of that?

A: I'm certain.

Q: Did you ever make that statement to Mr. Bell?

A: No.

Q: What did you say to him at the tailpiece?

¹⁰ When questioned about the "sweat season," Inspector Bell affirmed that warm air entering the cooler interior of the mine can cause draw rock to form. Tr. 54. As Mr. Moore explained, "[y]ou have it like in the summer and towards the fall where draw rock falls pretty regular off the course, and it really does. And we call it sweat season, top gets wet and just loose rock breaks loose." Tr. 77.

A: He would just ask me what kind of shape -- I had never made the belt myself. I didn't know. I had no idea.

Tr. 76.

While Mr. Moore conceded that he observed draw rock and loosened roof bolts as he traveled the off side of the Number 5 belt conveyor with Inspector Bell, he minimized the extent of these conditions, testifying that the draw rock was present in "three little places" and consisted of "a few pieces laying here and there." Tr. 78-80, 82. He further testified that he observed "3 by 4 rock or something" but that he didn't remember "the size of it or anything." Tr. 79. He also denied that draw rock had dislodged any of the belt structure, as alleged by Inspector Bell, explaining that he thought the structure had loosened simply because a miner had failed to "pin it together good" and that the absence of any fallen draw rock nearby supported his conclusion. Tr. 81-82, 87-88. When questioned about the abatement of the cited conditions, Mr. Moore testified:

A: Well, I went back and got the belt shovelers and we took care of it. They helped me take care of the rock, fix the bolts.

Q: And approximately how long did that take?

A: Probably an hour, hour maybe at the most.

Tr. 84. Later extending this estimate to 90 minutes, he explained that he and the belt shovelers scaled the roof to eliminate the hanging draw rock and disposed of the fallen draw rock by using hammers to break it apart and then remove it on the belt conveyor. Tr. 88, 90.

Finally, while Mr. Moore conceded that draw rock generally poses a hazard and is capable of causing injury, he denied that the particular conditions observed along the off side of the Number 5 belt conveyor endangered any miners:

Q: Do you believe that you put two belt shovelers in an unsafe work environment?

A: No, no.

Q: Why not?

A: Because I left them at the tailpiece, said, "Stay right there at the tailpiece and clean it and clean the head drive."

Tr. 84-85, 87-93. Mr. Moore emphasized that miners were not permitted to work at any other location along the belt conveyor because it had not yet been subject to an examination during the current shift. Tr. 76.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. ORDER NUMBER 8230534: ALLEGED VIOLATION OF 30 C.F.R. § 75.202(a)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 11:30 a.m. on August 19, 2009, Inspector Bell issued Order Number 8230534 to Respondent pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging in the “Condition or Practice” section as follows:

The roof where persons work or travel, is not being supported or otherwise controlled for the hazards related to roof falls, in the No. 4 entry on the off side of the Co. No. 5 belt conveyor (walk way) in three different locations. (1) From the tail roller, cross cut No. 58 down to cross cut No. 29 down to cross cut No. 1, at the discharge head. A total distance of approximately 2,730 feet. Loose and broken draw rock is present due to sloughing and scaling from around the permanently installed (6 feet resin grouted) roof bolts in the affected area. A piece of draw rock that measured approximately 4.5 feet by 3 feet and approximately 4 inches thick, had fallen and knocked the tubular belt structure out and off of the belt stand located on the off side. The belt is not rubbing in the affected area. Also, observed three previously installed 6 feet resin grouted permanent roof bolts hanging from the mine roof, ranging from 2 inches up to 10 inches. No additional roof supports have been installed in the affected area. This area is required to be shoveled at regular intervals. This violation is an unwarrantable failure to comply with a mandatory standard.

S’s Ex. 1. The Order further alleges that these conditions constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.202(a), which requires “[t]he roof, face and ribs of areas where persons work or travel [to] be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.”

As set forth in the Order, Inspector Bell determined that an injury was reasonably likely to occur as a result of this alleged violation, that such an injury could reasonably be expected to be permanently disabling, and that two people would be affected. S’s Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent’s degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$4,000.

2. LIABILITY

a. Arguments of the Parties

The Secretary cites the testimony of Inspector Bell and the observations he recorded in the Order to support the alleged violation. Secretary's Post-Hearing Brief ("S's Br.") at 4 (citing Tr. 19–20, 24; S's Ex. 1).

In turn, Respondent claims that the Secretary failed to establish a violation of 30 C.F.R. § 75.202(a) and requests that the Order be vacated. Respondent's Post-Hearing Brief ("R's Br.") at 5, 7. In support of its position, Respondent first cites a number of legal authorities to describe the applicable legal standard for adjudicating an alleged violation of 30 C.F.R. § 75.202(a). In particular, Respondent argues that the "adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." R's Br. at 4 (quoting *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Respondent further argues that "the reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation." R's Br. at 4–5 (quoting *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005)).

Turning to the evidentiary record, Respondent asserts that its agents had not examined the Number 5 belt conveyor for at least eight hours prior to Inspector Bell's inspection on August 19, that none of its agents had traveled the length of the conveyor in the time that elapsed between that examination and the inspection, and that Inspector Bell did not dispute that the draw rock he observed could have formed in that time. R's Br. at 5–6 (citing Tr. 39, 50, 56, 59, 64, 72–73, 80). Referring to Inspector Bell's observation of three previously-installed roof bolts hanging from the roof, Respondent argues that this small number of loose bolts, relative to the thousands of secure bolts supporting the mine roof, demonstrates "the reasonably prudent nature of the roof support measures in place along the length of the No. 5 Belt Line." R's Br. at 6 (citing Tr. 20, 43–45; S's Ex. 1). Finally, Respondent contends that the testimony of Mr. Moore clearly refutes Inspector Bell's characterization of the extensiveness of the draw rock along the Number 5 belt conveyor. R's Br. at 6–7. In particular, Respondent cites Mr. Moore's testimony that he did not consider the draw rock to be as extensive as claimed by Inspector Bell, that he was able to scale back the draw rock in no more than 90 minutes, and that the belt structure claimed by Inspector Bell to have been knocked loose by draw rock had simply worked itself loose on its own accord. R's Br. at 7 (citing Tr. 78–80, 82 84, 88).

b. Discussion

The requirements of 30 C.F.R. § 75.202(a), as applied to roofs, can be divided into three elements: 1) the cited area must be one where persons work or travel; 2) the area must be supported or otherwise controlled; and 3) such support or controls must be adequate to protect persons from falls of the roof. The first two elements are undisputed. Inspector Bell explained that the off side of a belt conveyor is utilized for "examinations" and that "stoppings [exist] on

the offside as well, with manddoors, to go through return and airways, intakes.” Tr. 61. Inspector Bell also recorded in the body of the Order that he understood the area to be shoveled at regular intervals. S’s Ex. 1. Respondent did not challenge this evidence or offer any contradictory evidence about the purpose for which the off side of the Number 5 belt conveyor is used. In addition, Inspector Bell affirmed at the hearing that Respondent utilizes two types of bolts in the Number 5 belt entry, resin grouted bolts and cable bolts, in order to support the roof, and that between 4000 and 5000 resin grouted bolts had been installed there. Tr. 43–45; *see also* S’s Ex. 3. Mr. Moore confirmed the use of these resin grouted bolts during his testimony. Tr. 82–83.

As the first two elements of the cited standard are established, liability turns on the third element, the adequacy of the roof support or other controls in protecting miners from hazards as they work or travel beneath it. As noted by Respondent, in considering the protective aspect of the standard, the Commission has held:

[T]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. . . . [T]he reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.

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

The undersigned finds that Respondent failed to satisfy this requirement. The testimony of both Inspector Bell and Mr. Moore establish that draw rock had loosened and broken around the resin grouted bolts installed along the off side of the Number 5 belt conveyor as of August 19, 2009. Tr. 19–20, 41–42, 45–47, 78–80, 82. Inspector Bell testified that these conditions resulted in three of the bolts hanging from the roof in such a way that they no longer supported it, a conclusion that Respondent did not dispute. Tr. 20, 43. This evidence reflects that some force was acting on the roof in the cited areas and weakening its stability enough to cause draw rock to form and fall and render some of the existing roof support inoperative. While the parties dispute the extensiveness of the draw rock, the undersigned credits the testimony and contemporaneous field notes of Inspector Bell as to the magnitude of the deteriorating condition of the roof. As a long-standing member of the coal mining industry, including 11 years of experience as an inspector for state and federal government agencies, Inspector Bell was particularly persuasive in his characterization of the conditions at the hearing. Further, his field notes provided a detailed and quantitative description of the conditions. Conversely, Mr. Moore’s attempts to downplay the magnitude of the draw rock were vague and self-serving and, without more, are entitled to less weight than the countervailing evidence presented by Inspector Bell.

The danger generally posed by draw rock is not disputed by the parties. Indeed, Mr. Moore affirmed that any amount of loose rock constitutes a hazard. Tr. 87–88. Both Inspector Bell and Mr. Moore testified that draw rock can fall at any time, an assertion supported by their observations of fallen draw rock on the floor of the entry, including one piece measuring approximately 4.5 by 3 feet and approximately 4 inches thick. S’s Ex. 1; Tr. 19–20, 41–42, 45–

47, 58, 78–80, 82. Inspector Bell and Mr. Moore also agreed that the likelihood that pieces of draw rock would form and fall was greater at the time of Inspector Bell’s inspection due to the “sweat season” experienced by the Van Lear Mine. Tr. 54, 77. Notwithstanding the increased likelihood of such an occurrence, the record reflects that Respondent did not employ any additional measures to support the roof or prevent draw rock from falling to the mine floor, such as the netting installed by some operators for that purpose. Tr. 57–58.

Given the extensiveness of the draw rock present on the off side of the Number 5 belt conveyor on August 19, 2009, the likelihood that it would fall, and the fact that at least one large piece of draw rock had already fallen, the undersigned finds that a hazard existed and that a reasonably prudent operator would have noted and eliminated it prior to permitting any miners to work or travel in that area. While Mr. Moore disputed whether any miners would be exposed to the purported hazard because, as he maintained, he did not direct any miners to work or travel in the cited area and miners were prohibited from entering the area until an examination had been performed, the testimony and field notes of Inspector Bell support a finding that two miners reported to Mr. Moore as he and Inspector Bell traveled the off side of the Number 5 belt conveyor and that Mr. Moore issued instructions to the miners to shovel coal along the walkway in advance of their approach. Tr. 24–25, 52–53, 60–61, 76, 84–85; S’s Ex. 3. Inspector Bell could not recall at the hearing whether he saw the two miners shoveling along the Number 5 belt conveyor as ordered by Mr. Moore. Tr. 53. However, he recorded in his field notes during the course of the inspection that he “[o]bserved a Green Hat miner shoveling on the off side of 5 Belt and a Black Hat miner shoveling on the walkway side.” S’s Ex. 3. Later in his field notes, he identified the miners by name. *Id.* The specificity and contemporaneous nature of this evidence compels the undersigned to find that at least one of the miners was performing work along the off side of the belt conveyor as instructed by Mr. Moore and that the miner, therefore, was at risk of injury by the draw rock present in the area, contrary to Mr. Moore’s claims.

Based upon the foregoing discussion, the undersigned finds that, on August 19, 2009, the roof along the off side of the Number 5 belt conveyor was not adequately supported or otherwise controlled to protect persons working or traveling in that area from hazards related to falls of the roof. Accordingly, Respondent violated 30 C.F.R. § 75.202(a) as charged in Order Number 8230534.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Addressing the three factors by which the gravity of a violation is measured pursuant to 30 C.F.R. § 100.3, the Secretary notes that Inspector Bell found the draw rock to be reasonably likely to cause an accident, that such an accident would result in permanently disabling injuries such as broken bones, and that the two miners sent to clean the belt conveyor by Mr. Moore would be affected by the hazard. S’s Br. at 5 (citing Tr. 23–24). As for Inspector Bell’s determination that the violation was significant and substantial, the Secretary contends that Respondent’s failure to remedy the loose draw rock contributed to a significant degree of danger

to the safety of the miners sent to clean the belt conveyor, upon whom the draw rock could fall. *Id.* at 6–7 (citing Tr. 30). The Secretary further contends that a reasonable likelihood existed that the hazard created by the loose draw rock would result in an injury reasonably serious in nature to those miners. *Id.* at 7–8 (citing Tr. 23).

Respondent counters that the Secretary has failed to point to specific facts demonstrating that the charged violation was properly designated as significant and substantial in nature. R’s Br. at 10. In particular, Respondent notes that miners were precluded from performing any work along the length of the Number 5 belt conveyor until an examination had been conducted. *Id.* at 11–12 (citing Tr. 51, 85; 30 C.F.R. § 75.361). Further, Respondent disputes that Mr. Moore instructed miners to work at any location along the Number 5 belt conveyor other than the tailpiece, which had been subject to a preshift examination and where the roof was undisputedly free of hazards. *Id.* at 11–13 (citing Tr. 38, 53, 74–77, 85). Indeed, Respondent notes, Inspector Bell was able to recall at the hearing only that he observed miners working at the tailpiece of the belt conveyor. *Id.* at 12 (citing Tr. 53). Finally, Respondent points to the conflicting accounts offered by Inspector Bell and Mr. Moore of the conditions along the belt conveyor, which, according to Respondent, raises “serious questions . . . regarding the veracity of Bell’s contentions regarding the actual roof conditions.” *Id.* at 13–14 (citing Tr. 46–47, 79–80, 82, 84, 88). In view of the foregoing considerations, Respondent contends, “the Secretary’s S&S designation cannot stand.” *Id.* at 13–14.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). Having found above that Respondent violated 30 C.F.R. § 75.202(a) by failing to adequately support or otherwise control the roof along the off side of the Number 5 belt conveyor and that this violation exposed miners to the hazard of falling rock, the first two elements have already been established.

The undersigned further finds that the hazard was reasonably likely to result in injury, thereby satisfying the third element of *Mathies*. The record supports a finding that draw rock was present along an extensive stretch of the off side of the belt conveyor and that Mr. Moore directed two miners to clean the area of coal in advance of Inspector Bell’s approach, despite the prohibition against the performance of any work on the belt conveyor until an examination had been conducted. Had the miners reviewed the records kept for the Number 5 belt conveyor before they commenced working in the area, they would have found that the examiner who last conducted an examination there reported an absence of hazards. While Mr. Moore testified that Respondent’s agents are routinely advised to be watchful for the formation of draw rock, Tr. 77–78, as agreed upon by the witnesses and as evidenced by the draw rock that had already fallen to the floor of the entry, draw rock can form and fall at any time, and the “sweat season” experienced by the Van Lear Mine increased the likelihood of such an occurrence. Based upon these considerations, the undersigned agrees with Inspector Bell’s conclusion that the miners

were reasonably likely to be struck by falling draw rock while working or traveling along the off side of the Number 5 belt conveyor.

Finally, the record contains sufficient evidence that any injury caused by falling draw rock was reasonably likely to be reasonably serious in nature. Inspector Bell testified that a mine inspector was struck by falling draw rock at the Van Lear Mine only a few months prior to his August 19, 2009 inspection, and multiple surgeries were required to repair the inspector's leg. Tr. 59–60. While this anecdotal evidence is limited, Respondent failed to elicit any contradictory testimony from Inspector Bell on this subject or present any evidence in rebuttal to discredit the possibility of such a serious injury. Tr. 66, 92–93. Additionally, as noted above, the testimony of both Inspector Bell and Mr. Moore establish that a piece of draw rock, measuring approximately 4.5 feet by 3 feet and approximately 4 inches thick, had already formed and fallen to the floor of the entry. A falling rock of that size is unquestionably capable of causing severe injury to a person beneath it.

Based upon the foregoing discussion, the undersigned affirms that the charged violation was significant and substantial in nature. Given the reasonable likelihood of a miner being struck by falling rock and sustaining a severe injury, the undersigned also finds the gravity of the violation to be serious and affirms Inspector Bell's characterizations in this regard.

b. Negligence and Unwarrantable Failure

i. Arguments of the Parties

Citing the testimony of Inspector Bell, the Secretary argues that Respondent exhibited a high degree of negligence because its agent, Mr. Moore, instructed two miners to work in an area where he knew loose draw rock to exist. S's Br. at 5 (citing Tr. 24). The Secretary relies upon *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010) ("*Coal River*"), to support her position that agents of Respondent "reasonably should have known" of the violative conditions." *Id.* (citing *Coal River*, 32 FMSHRC at 92). The Secretary argues further that the charged violation resulted from Respondent's unwarrantable failure to comply with 30 C.F.R. § 75.202(a). *Id.* at 12. In support of this claim, the Secretary cites the following aggravating factors: 1) Respondent failed to properly support the roof over an extensive area; 2) according to Inspector Bell, the violative condition existed for more than a day; 3) the hazardous condition was obvious and posed a high degree of danger based upon the extent of the draw rock; 4) Respondent was aware that greater efforts were necessary to comply with standards related to roof support based upon its history of violations of its roof control plan and the issuance of Citation Number 8227072 to Respondent on August 14, 2009,¹¹ requiring that all belt examiners receive training in recognizing and recording hazards; and 5) Respondent had knowledge of the existence of the violation. *Id.* at 10–11 (citing Tr. 23, 25, 27–28; S's Ex. 4; *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *Coal River*, 32 FMSHRC at 92).

¹¹ While the Secretary identified Citation Number 8227072 as having been issued on August 14, 2009, Inspector Bell documented in the body of Order Number 8230536 that it was issued on August 4, 2009. S's Ex. 1. As a copy of Citation Number 8227072 was not introduced into the record, the precise date of its issuance is unclear.

Respondent challenges each of the considerations identified by the Secretary as supporting a finding of unwarrantable failure to comply. R's Br. at 15–21. In particular, Respondent questions the veracity of Inspector Bell's testimony concerning the extensiveness of the hazardous conditions given the conflicting testimony of Mr. Moore and the small number of bolts found by Inspector Bell to be hanging loose from the roof relative to the total number installed. *Id.* at 16–17 (citing Tr. 43–45, 82–83). Respondent also contends that the length of time that these conditions existed is unclear from the record, as Inspector Bell first testified they existed for more than one day but later acknowledged that they could have developed between Respondent's last examination of the Number 5 belt conveyor on August 18 and Inspector Bell's inspection eight to 12 hours later on August 19. *Id.* at 15 (citing Tr. 27, 56, 59).

Next, Respondent disputes the Secretary's contention that the hazardous conditions were obvious and posed a high degree of danger, arguing again that the evidentiary record does not support a finding that the draw rock was extensive. R's Br. at 19. To the extent the draw rock did exist, Respondent argues, the testimonial evidence in the record demonstrates that "it had formed since the last examination of the area, was quickly eliminated, and no miners would have been permitted to work along the length of the No. 5 Belt Line tailpiece until the area had been subjected to a preshift examination." *Id.* Respondent further argues that "the Secretary offered absolutely nothing of substance to suggest MSHA had placed Excel on notice of a need for greater efforts with respect to the adequacy of roof control efforts along its belt conveyor entries," noting that the record reflects that Respondent was last cited for a violation of 30 C.F.R. § 75.202(a) at its Van Lear Mine almost two years prior to issuance of the Order at issue here, that the Secretary failed to offer into evidence the citation referenced by the Secretary in her Post-Hearing Brief, and that the standard under which that citation was issued is unclear. R's Br. at 17–18 (citing Tr. 28, 48–49; S's Ex. 4). Finally, citing the "unequivocal" testimony of Mr. Moore, Respondent denies that it knew of the conditions alleged by the Secretary. R's Br. at 19–21 (citing Tr. 73, 76–77).

ii. Discussion

As previously discussed, an unwarrantable failure to comply with a mandatory safety standard is aggravated conduct constituting more than ordinary negligence. In order to determine whether conduct is "aggravated" in this context, the Commission directs the undersigned to consider such factors as the extent of the violative condition, whether the violation was obvious or posed a high degree of danger, the length of time that the violation existed, the operator's knowledge of the existence of the violation, whether the operator had been placed on notice that greater efforts were necessary to comply, and the operator's efforts in abating the violative condition. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009).

Consistent with the discussions above, the undersigned is persuaded by Inspector Bell's characterization of the extent of the violative conditions and finds that these conditions posed a high degree of danger. However, in this case, the other factors articulated by the Commission as part of the unwarrantable failure analysis do not support a finding that Respondent's conduct was

aggravated.¹² In particular, the undersigned is unable to find sufficient support in the record for Inspector Bell's conclusion regarding the amount of time that the violative conditions existed. The Secretary presented conflicting evidence on this point. On one hand, Inspector Bell estimated at the hearing that the conditions he observed had been present for "more than one day, more than three shifts." Tr. 27, 53–54. On the other hand, he recorded in his contemporaneous field notes, "Evidence not available to ascertain an equitable time for existence." S's Ex. 3. He also conceded at the hearing that the condition of a mine roof is dynamic and can change over the course of a shift, particularly during the "sweat season" experienced by the Van Lear Mine. Tr. 40, 54. In addition, when questioned by counsel for the Secretary and later by the undersigned, Inspector Bell affirmed that the amount of draw rock that he observed could have formed since the last examination conducted by Respondent, during which, according to the records kept by Respondent, the examiner found no hazards to exist. Tr. 30–31, 34–35 56, 59; S's Ex. 3. This evidence casts significant doubt on Inspector Bell's estimate that the violative conditions had existed for more than a day, particularly as he failed to offer any rationale for this divergent opinion. The undersigned finds, therefore, that the conditions more likely than not developed between the last examination of the Number 5 belt conveyor performed on August 18 and the inspection of the off side of the belt conveyor performed by Inspector Bell on August 19.

The undersigned finds that the Secretary has also failed to establish that Respondent was aware that greater efforts were necessary for compliance with the cited standard. As argued by Respondent, the Secretary's reliance upon Citation Number 8227072 as support for this argument is untenable. A copy of that citation was not introduced into the record, and Inspector Bell admitted at the hearing that he was uncertain of the precise standard cited by it. Tr. 48. While Inspector Bell recorded in the body of Order Number 8230536 that "[a]ll belt examiners received training in recognizing hazards and the proper way to record these hazards as per citation No. 8227072," this broad assertion does little to prove that Respondent was made aware that greater efforts were necessary for compliance with 30 C.F.R. § 75.202(a), which pertains to the particular hazard of falls from the roof, face, and ribs of a mine and is unrelated to record-keeping requirements. S's Ex. 2. The Secretary also refers to Respondent's history of violations of its roof control plan in arguing that Respondent was aware that greater efforts were necessary for compliance. However, the document entitled "Assessed Violation History Report," which was proffered by the Secretary and admitted into evidence as Secretary's Exhibit 4, reflects that Respondent was last found to have violated 30 C.F.R. § 75.202(a) on December 17, 2007, close to two years prior to the issuance of this Order. S's Ex. 4. Additionally, Inspector Bell testified that he was not aware of the number of times Respondent had been cited for the presence of draw rock along belt entries. Tr. 49. Thus, the undersigned finds that the scant evidence offered by the Secretary on this issue fails to sufficiently demonstrate that Respondent was aware that greater efforts were necessary for compliance.

Finally, the undersigned turns to the question of whether Respondent knew of the existence of the violation. According to the testimony and field notes of Inspector Bell, Mr. Moore informed him of the presence of loose and broken draw rock along the entire length of the off side of the Number 5 belt conveyor as he began his inspection at the tailpiece of the belt

¹² The undersigned notes that neither party offered any evidence related to actions taken by Respondent to improve its compliance with 30 C.F.R. § 75.202(a). Therefore, this factor will not be considered.

conveyor. Tr. 23–24, 29, 35–36, 49; S’s Ex. 3. Respondent failed to elicit any contradictory testimony from Inspector Bell at the hearing:

Q: Now, you contend that Mr. Moore told you at the tailpiece loose and broken draw rock is present on the offside of the entire No. 5 belt?

A: Yes, sir.

Q: That’s not actually what he told you, is it?

A: If it’s in my note, that’s what he told me.

Q: He mentioned the conditions that could arise during that time of year, didn’t he?

A: I don’t recall that.

Q: He told you to be alert for draw rock along the belt entry?

A: No, sir.

Tr. 49–50. Mr. Moore denied informing Inspector Bell of the condition of the roof, however, and when questioned about the conversation he had with Inspector Bell at the tailpiece, he maintained, “He would just ask me what kind of shape -- I had never made the belt myself. I didn’t know. I had no idea.” Tr. 76. As noted above, he also testified that Respondent’s agents are generally advised to be watchful for the formation of draw rock:

Q: How often during the course of working in the mines do you sort of give fair warning of possible draw rock?

A: Oh, we talk about it all the time, you know, take care of it and watch for it

Tr. 77.

The undersigned finds the conflicting evidence on this issue to be in equipoise. While the testimony and field notes of Inspector Bell reflect that Mr. Moore informed him at the outset of the inspection that draw rock was present along the off side of the Number 5 belt conveyor, Mr. Moore denied unequivocally that he made such a statement or that he was even aware of the conditions in the area. A number of considerations appear to support Mr. Moore’s claims. First, his testimony that Respondent’s agents are generally advised to be alert for the formation of draw rock suggests, as counsel for Respondent implied during his questioning of Inspector Bell, that Mr. Moore merely cautioned Inspector Bell about the possibility of draw rock along the belt conveyor. In addition, having found above that Mr. Moore directed two miners to shovel accumulations of coal along the off side of the Number 5 belt conveyor in advance of Inspector Bell’s approach, the undersigned would expect that Mr. Moore would have also instructed the miners to address the loose and broken draw rock if he had actually known of its presence. This

inconsistency suggests that Mr. Moore was not, in fact, aware that draw rock existed in the area. Furthermore, while the record supports a finding that the violative conditions developed at some point after the last examination of the belt conveyor had been performed on August 18, it lacks sufficient evidence that Mr. Moore or any other agent of Respondent had traveled the off side of the belt conveyor since that time and thereby had the opportunity to observe the conditions of the roof in the area. When asked whether he had traveled along the belt conveyor on August 19, Mr. Moore responded, “No. No one had.” Tr. 72. He also testified that he and Inspector Bell traveled to the tailpiece of the belt conveyor to begin the inspection by way of “the next entry over from the belt.” Tr. 72. With respect to the two miners assigned the task of shoveling at the tailpiece of the belt conveyor on August 19, Mr. Moore explained that he “took them up there and dropped them off at the tailpiece [that morning].” Tr. 75. While Mr. Moore did not explain the route that he and the miners traveled to reach the tailpiece, Inspector Bell acknowledged that they could have used an adjacent entry like the one that he himself traveled. Tr. 64–65. Thus, the record is unclear as to how Mr. Moore would have detected the presence of the draw rock. Given these considerations and the testimony of Mr. Moore, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that Respondent was aware of the existence of the violative conditions along the off side of the Number 5 belt conveyor on August 19.

Upon weighing the factors articulated by the Commission as part of the unwarrantable failure analysis, the undersigned concludes that they do not warrant a finding that Respondent’s violation of 30 C.F.R. § 75.202(a) rose to the level of aggravated conduct and resulted from an unwarrantable failure to comply. In reaching this conclusion, the undersigned accords great weight to the lack of sufficient evidence in the record that the violative conditions had existed at the time of the last examination of the cited area, that Respondent was aware that greater efforts were necessary for compliance with the cited standard, or that Respondent knew of the draw rock found by Inspector Bell. Nevertheless, the undersigned finds that Respondent was moderately negligent in committing the violation. While Respondent may not have known of the specific condition of the roof along the belt conveyor, the record reflects that Mr. Moore clearly understood the likelihood that draw rock could form and fall in the area; that Respondent did not employ any additional measures to support the roof or prevent draw rock from falling to the mine floor, such as the netting installed by some operators for that purpose; that Mr. Moore was aware that an examination of the belt conveyor had not been performed since the previous day; and that he still ordered two miners to travel and work in that area. These considerations support a finding of moderate negligence.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent in committing it, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent’s history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 183 violations that became final orders in the preceding 15-month period over the course of 441 days of inspection. As noted above, however, Respondent has not been found to have violated 30 C.F.R. § 75.202(a) since December 17, 2007, close to two years prior to the issuance of this Order. S’s Ex. 4.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that the Van Lear Mine produced 874,670 tons of coal and had 398,784 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued.¹³ Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the proposed penalty assessment form attached to the Petition. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the level of negligence, the undersigned finds the appropriate penalty to assess for the violation charged in Order Number 8230534 to be \$950. Further, this Order shall be modified to a 104(a) citation and moderate negligence.

¹³ As described by the regulations promulgated by MSHA for the purpose of implementing its penalty assessment scheme, the appropriateness of the penalty to the size of the mine operator's business is calculated as follows:

The appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year.

30 C.F.R. § 100.3(b). In the proposed penalty assessment form attached to the Petition, the Secretary accounted for both the size of the Van Lear Mine and the size of Respondent's controlling entity. While the Assessed Violation History Report reflects that Respondent's controller is Alliance Resource Partners LP ("ARPL"), a review of the evidentiary record fails to disclose the coal production of this entity. S's Ex. 4. Respondent contends, however, that it is "an independent operating subsidiary of ARLP" and that "ARLP – itself – has no 'coal produced' for which 'annual tonnage' can be measured, as described by the plain language of 30 C.F.R. § 100.3(b)." R's Br. at 21–22. Thus, Respondent contends, the Secretary improperly considered this information in calculating the proposed penalty. *Id.* The Secretary did not respond to this allegation.

B. ORDER NUMBER 8230536: ALLEGED VIOLATION OF 30 C.F.R. § 75.362(b)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 12:45 p.m. on August 19, 2009, Inspector Bell issued Order Number 8230536 to Respondent pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging in the “Condition or Practice” section as follows:

An adequate onshift belt examination is not being conducted along the Co. No. 5 underground belt conveyor. Obvious hazardous conditions as stated in citation No.’s 8230532, 8230534, and 8230535 that were issued on this date prior to this issuance, were not recorded in the belt examination record book. The belt examiner recorded “none observed” for the No. 5 belt on 08/18/2009 evening shift, in the book provided for such records. All belt examiners received training in recognizing hazards and the proper way to record these hazards as per citation No. 8227072, issued on 08/04/2009. This violation is an unwarrantable failure to comply with a mandatory standard.

S’s Ex. 2. The Order further alleges that this practice constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.362(b), which, at the time the Order was issued, required the following:

During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b).

As set forth in the Order, Inspector Bell determined that an injury was unlikely to occur as a result of this alleged violation; that should an injury occur, it could reasonably be expected to result in no lost workdays; and that no people would be affected. S’s Ex. 2. He also determined that the violation was not significant and substantial in nature and that Respondent’s degree of negligence in committing the violation was high. *Id.*

Finally, the Secretary proposed the assessment of a civil penalty in the amount of \$4,000 for the alleged violation.

2. LIABILITY

a. Arguments of the Parties

To support the alleged violation, the Secretary cites the testimony of Inspector Bell that he reviewed Respondent’s shift examination records as part of his inspection on August 19, 2009, and that these records did not contain any documentation of the hazards that he cited along

the Number 5 belt conveyor that day. S's Br. at 5 (citing Tr. 30–31). Accordingly, the Secretary asserts, Inspector Bell “issued Order Number 8230536 as a records violation for failing to record [these] hazards.” *Id.*

Respondent requests that Order Number 8230536 be vacated. In support thereof, Respondent first notes that the standard cited by Inspector Bell lacks any requirement that an examiner document the conditions observed during an onshift examination and yet Inspector Bell described a deficiency in Respondent's record-keeping as the basis for his issuance of Order Number 8230536. R's Br. at 8 (citing S's Ex. 2; Tr. 30). Respondent contends, “Bell cited Excel for failing to comply with a non-existent requirement under the regulation. Bell's belief that such a requirement exists does not, and cannot, circumvent the plain language of the regulation cited. As such, the . . . Order must be vacated for this reason, alone.” *Id.*

Respondent next argues that the Secretary failed to establish the inadequacy of the examination performed during the last production shift before Inspector Bell's inspection. *Id.* at 9. Respondent notes, “Bell had no recollection of inspecting the Van Lear Mine on [the date of that production shift], never spoke to the examiner who conducted the examination on that date, [and] admitted at hearing that the alleged hazardous and ‘excessive’ drawrock observed may not have existed at the time of the last examination.” *Id.* (citing Tr. 56). Accordingly, Respondent argues, Order Number 8230536 should be vacated. *Id.*

b. Discussion

As discussed above, Order Number 8230536 cites Respondent for a violation of 30 C.F.R. § 75.362(b), which requires “a certified person [to] examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated” during each shift that produces coal at an underground coal mine. S's Ex. 2. As the condition or practice underlying the charged violation, Order Number 8230536 alleges that the examiner who performed the last onshift examination before Inspector Bell's inspection on August 19, 2009, failed to document the hazardous conditions that Inspector Bell observed during the inspection. S's Ex. 2; *see also* Tr. 30; S's Br. at 5.

As noted by Respondent, the standard cited by Order Number 8230536 (*i.e.*, 30 C.F.R. § 75.362(b)) does not expressly require an examiner to record any hazardous conditions that he or she observes during the course of an examination. Rather, the regulations at 30 C.F.R. § 75.363 set forth the applicable requirements governing the documentation and correction of hazardous conditions found by the examiner. Because the “plain language” of the cited standard lacks any record-keeping requirement, Respondent argues, in essence, that an examiner's failure to document hazardous conditions cannot form a basis for liability under that standard. R's Br. at 8. Accordingly, Respondent contends, grounds exist to vacate Order Number 8230536. *Id.*

This argument has already been considered and rejected by a number of persuasive authorities. As recently noted by Senior Administrative Judge Michael E. Zielinski:

Section 75.362(b) is part of the preshift and onshift examination requirements, and specifically applies to entries where belt conveyors are operated. While it

addresses onshift examinations, it provides that the onshift examination can be conducted at the same time as the preshift examination, if it is done during the time that the preshift examination must be done, i.e., within three hours before the oncoming shift. The Commission has held that the preshift standard requires a preshift examiner to find and record a hazardous condition in a preshift examination book. Section 75.362(b) imposes a virtually identical requirement.

TRC Mining Corp., 2013 WL 1856600, *9 (Mar. 7, 2013) (ALJ) (internal citations omitted). Also, Administrative Law Judge David F. Barbour held:

It is beyond doubt that the requirement of section 75.362(b) to conduct an on shift examination during each shift when coal is produced, carries with it the obligation that the examination be sufficient to detect existing hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.

Twentymile Coal Co., 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). Finally, Administrative Law Judge William Moran reasoned that the duty to record hazardous conditions is implicit in 30 C.F.R. § 75.362(b) because the standard requires operators to conduct *adequate* examinations and an examination is not adequate if it does not result in the reporting of hazards. *Bledsoe Coal Corp.*, 2012 WL 5178246, *30–31 (Oct. 2, 2012) (ALJ).

The undersigned agrees with the above-described reasoning and finds that the duty to record hazardous conditions observed by an examiner during an onshift examination is implicit in 30 C.F.R. § 75.362(b). Nevertheless, upon consideration of the evidentiary record, the undersigned finds that the Secretary has failed to establish by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.362(b) as alleged.

As noted above, among the ways of establishing that an operator has failed to perform an adequate onshift examination is to show that the violative condition cited by the inspector existed at the time of the onshift examination and that the examiner failed to document it in the examination records. *Twentymile Coal Co.*, 34 FMSHRC at 2171. The parties do not dispute that prior to Inspector Bell's inspection of the Number 5 belt conveyor on August 19, 2009, the last onshift examination of the belt conveyor was performed during the second production shift on August 18, as required by applicable regulations. Tr. 39–41, 50–51, 64, 73–74. According to the testimony and field notes of Inspector Bell, he reviewed Respondent's records at the outset of his inspection, and in the records kept for the Number 5 belt conveyor, the examiner who performed that last examination wrote that no hazards were observed along the belt conveyor at that time. Tr. 30–31, 34–35; S's Ex. 3. Respondent does not dispute this assertion. Thus, the critical question in determining Respondent's liability for the alleged violation of 30 C.F.R. § 75.362(b) is whether any of the hazardous conditions cited by Inspector Bell during his inspection of the belt conveyor also existed at the time of that last onshift examination. The

Secretary introduced little evidence pertaining to the three other violations cited on August 19, 2009. Only the field notes of Inspector Bell address those alleged violations, and that evidence is not sufficiently compelling to support a finding that the cited conditions existed at the time of the examination. As discussed above, the record also does not convincingly establish that the draw rock observed by Inspector Bell had developed by the time of the last onshift examination. Tr. 30–31, 34–35, 56, 59, 89–91; S’s Ex. 3. Accordingly, the undersigned finds that the Secretary has failed to satisfy her burden of demonstrating that Respondent failed to perform an adequate onshift examination on August 18, 2009, and Order Number 8230536 is hereby vacated.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Order Number 8230534 is to be modified to a 104(a) citation and moderate negligence. Respondent shall pay a penalty of **\$950**.
2. Order Number 8230536 is **VACATED** in all respects.
3. Respondent shall pay the aforementioned penalty amount within 30 days of the date of this Order.¹⁴ Upon receipt of payment, Order Number 8230534 is **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Distribution:

LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 420, Nashville, TN 37219-2456

Gary McCollum, Esq., 771 Corporate Drive, Suite 500, Lexington, KY 40503

¹⁴ Payment shall be sent to the following address: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004-1710
Telephone No.: 202-434-9933

August 15, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-485-M
Petitioner,	:	A.C. No. 26-02246-000278790 R83
	:	Mine: Meikle Mine
v.	:	
	:	Docket No. WEST 2012-486-M
J.S. REDPATH CORPORATION,	:	A.C. No. 26-02300-000278798 R83
Respondent.	:	Mine: Storm Exploration Decline

DECISION

Appearances: Timothy J. Turner, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO on behalf of the Petitioner;

Mark N. Savit, Esq. and Erik M. Dullea, Esq., Patton Boggs LLP, Denver, CO, on behalf of the Respondent.

Before: Judge Rae

This case is before me upon two petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Administration Act of 1977, 30 U.S.C. §801 et seq. (the “Act”). A hearing was held in Sparks, Nevada.¹ Post-hearing briefs were submitted by the parties.²

¹ At the conclusion of the hearing, I instructed counsel for both parties to provide the court reporter with the original exhibits admitted at trial. Both counsel provided loose leaf binders to the court reporter that contained many exhibits that were not admitted into evidence. These exhibits were then mistakenly made part of the official transcript. The Secretary’s exhibits properly admitted into evidence and considered by me in this decision are Exhibits 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, and 16 (referred to as “Ex. S.-#”). The Respondent’s exhibits properly admitted into evidence and considered by me are Exhibits 2, 7, 8, 9 and 30 (referred to as “Ex. R-#”). Exhibit R-7 was not listed in the Index of the record of trial as having been admitted, however, the record reflects that the exhibit was admitted over Respondent’s objection. Tr. 192.

² The Respondent filed a motion post-hearing to reopen for the purpose of admitting new evidence in the form of a series of emails between MSHA’s Western District Manager and the Information Systems Administrator of the Nevada Mining Association. I denied the motion and found the proposed exhibit irrelevant to the issue of whether the snow fence in this instance was properly constructed to meet the requirements of 30 C.F.R. §57.8528.

Barrick Gold Corporation (“Barrick”) owns the Storm Exploration Decline and Meikle Mine gold mines located in Eureka County, Nevada. Tr. 23. J.S. Redpath Corporation (“Redpath” or “Respondent”) performs all mining operations for Barrick as a subcontractor. Tr. 24, 82, 167. A regular inspection was conducted at both mines in early October 2011. Two citations were issued at the Meikles Mine; one for a violation of 30 C.F.R. §57.6200 and the other for a violation of 30 C.F.R. §57.6300(b) (Docket WEST 2012-485). A third violation was issued at the Storm Exploration Decline for a violation of 30 C.F.R. §57.8528 (Docket WEST 2012-486). The Secretary proposes penalties in the amount of \$12, 209.00.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Secretary and Respondent stipulated that:

1. Respondent was, at all relevant times, a contractor at the Storm Exploration Decline Mine ID: 26-02300 and the Meikles Mine, ID: 26-02246.
2. The mines listed above are mines, as defined in the Federal Mine Safety and Health Act of 1977 (“the Act”).
3. Respondent is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
4. Respondent is subject to the jurisdiction of the Act, 30 U.S.C. §§801-965.
5. The Federal Mine Safety and Health Review Commission and its Administrative Law Judge have subject matter and personal jurisdiction over the dispute in this case pursuant to Section 105 of the Act.
6. The citations at issue in this matter were issued on the date indicated in section one of the citations.
7. The inspector whose signature appears in block 22 of the citations at issue was acting in his official capacity and acting as an authorized representative of the United States Secretary of Labor.
8. The Secretary’s proposed penalties for each citation as listed on Exhibit A to each of the petitions for penalty assessment filed in this matter and those amounts are incorporated by reference herein.
9. The proposed penalties will not affect Respondent’s ability to continue in business.
10. The parties agree that electronic and/or facsimile copies may be used in the same manner as originals.

Court Exhibit A.

Docket WEST 2012-485

Inspector Joel T. Tankersley has been with MSHA for 14 years most of which has been spent as an inspector of metal/non-metal mines. He was promoted to the position of the Metal/Non-Metal Safety Specialist for the Northeast District within the past year. Tr. 77-78. He began his mining career after serving in the U.S. Army and spent a total of 15 years in the field. Tr. 79-81. He issued the following two related citations during a regular inspection of the Mickle Mine on October 6, 2011.

Citation No. 8608112

The condition or practice in this citation states:

Upon inspection of the Redpath CLEARBAYS (Sic) it was found that the powder truck was found to be in the bay with the motor off. This is an area where simple maintenance is done, a lube, fuel or quick fix, light maintenance. This truck was loaded with explosives, boosters emulsion and Non el primers and two fuse caps. This is out of the way from the explosive storage to the blast site. Explosive material (sic) shall transported without undue delay to the storage area or the blast site.

Ex. S-9.

Tankersley marked the gravity of the alleged violation as reasonably likely to result in a fatal injury, significant and substantial affecting one person. He assessed the negligence as moderate. The Secretary proposes a penalty of \$5503.00.

The regulation cited by Tankersley provides: "Explosive material shall be transported without undue delay to the storage area or blast site." 30 C.F.R. §57.6200.

Secretary's Evidence:

Tankersley testified that Redpath was doing development work on the upper and lower banshee. Tr. 82. The inspector was in the lower banshee zone where mining by means of blasting was being done in the drifts (or entries) to access the ore veins. Tr. 90. Upon his arrival on the lower zone, Tankersley observed that Redpath was either bolting or mucking out a blasted round.³ There was no evidence that preparations were being made to ready a shot in any of the headings. Tr. 90-91. As Tankersley, accompanied by shift boss Freddy Molina and Patty Melrose from the safety department, walked down the entry and turned to the right they entered

³ The mining cycle was explained by Redpath's superintendent, Theron Harper. After blasting has been done on a previous shift, the next shift mucks out the blasted material, installs ground support and then drills the face to ready another shot. The explosives are then loaded and fired and the cycle begins again. Tr. 168.

the area called the CLAIR-bay. Tr. 82-83, 91. The CLAIR-bay is a dead-end area, or crosscut, intersecting the main travelway that is used to perform light maintenance. Tr. 91. According to Tankersley, it can be used to do cutting and welding among other things. The mine uses mobile fuel trucks and could refuel in this area as well. Tr. 105. Although he recalled seeing basic tools including welding equipment in the CLAIR-bay, he did not recall seeing a welder. Tr. 95, 97.

As Tankersley describes the sequence of events, he and the two company representatives arrived at the CLAIR-bay where a Teledyne lift truck used to transport explosives was parked. Tr. 92. The lift truck is approximately 26 feet in length. Tr. 99. The CLAIR-bay is a crosscut that is 40 feet in length and 18 feet wide. Tr. 220, Ex. S-18. The cab of the truck has windows that are approximately 3 ½ feet by 3 ½ feet in dimension and are located at eye level to someone standing on the ground. Tr. 99. The area was well lit and completely quiet at the time of this inspection. Tr. 99-100. He walked all the way around the truck. As he did so, he did not see anyone in the cab nor did he hear the cab door open and close. Tr. 100-01. He also did not observe or hear any other vehicles approaching or departing the area. Tr. 92. On the driver's side of the powder truck, Tankersley stopped to inspect two powder boxes fully loaded with non-electrical ("non el") detonators and powder. The doors of the boxes were severely bent appearing as if someone had run into them. Tr. 93, 101. While he was on the driver's side of the vehicle facing the powder boxes, the driver of the truck came walking up approaching from the mouth of the crosscut. Tr. 103, 115. Tankersley introduced himself to the driver, Buck Slade, and had a conversation with him. Slade told the inspector that he picked up the explosives from someone else at the storage magazine and he was tasked with taking the explosives to the shot area and was to help load it. Tr. 104. He told Tankersley that when he picked up the truck he saw he was low on fuel so he went down to the CLAIR-bay to refuel. Tr. 105. When asked why the truck was not fueled before he headed out with it loaded, he did not respond. *Id.*

Based upon what transpired, Tankersley was of the opinion that Slade had proceeded with undue delay in transporting the loaded powder truck from the magazine to the shot area and issued this citation. As Tankersley testified, the regulations do not provide a definition of the term "undue delay." Tr. 108. In his opinion, it means to go from one area to another in as direct a manner as possible. Tr. 109. The operator must engage in a work practice when transporting explosives that mitigates hazards recognizing the inherent dangers of unintended detonation. *Id.* Examples of undue delay, in his opinion, would be not eliminating hazards such as fueling the truck before loading it with explosives, doing some other task rather than driving from pickup to delivery point and back, or not getting into the truck and leaving immediately after fueling was completed. Tr. 139, 136, 113. He would not consider undue delay to include stopping in case of an emergency, fueling en route when absolutely necessary to avoid running out or immediately unchocking the wheels and reentering the truck if fueling was absolutely necessary en route. Tr. 109, 112, 138, 152.

Respondent's Evidence:

The Respondent argues that there was no undue delay involved in Slade's route to and from the magazine and the blast site. He stopped momentarily at the CLAIR-bay, which is directly along the route from the face to the magazine because he needed fuel. As soon as he was done fueling, he got back in his truck and was prepared to leave the CLAIR-bay. There was so little delay, in fact, that the fuel truck had just departed the area and could be seen driving away.

Freddy Molina, Redpath's compliance supervisor, testified that as Tankersley was walking towards the CLAIR-bay, he was following at a distance of about 40 feet behind. As Tankersley was turning right from the travelway into the CLAIR-bay, Molina could see the fuel truck pulling away down the crosscut just opposite the CLAIR-bay. Ms. Melrose was with Tankersley when Tankersley entered the CLAIR-bay. Tr. 227.⁴ When Molina reached the CLAIR-bay, Tankersley was on the driver's side of the cab taking notes. Melrose was on the passenger side looking at the powder boxes. Tr. 228. Molina walked from the passenger side of the truck, around the back to the driver's side, then walked back to the passenger side again to look at the powder boxes and then walked back to the driver's side where Tankersley was. Tr. 216-217, 228. In Molina's estimation it took Slade three to five minutes after Molina went back to where Tankersley was standing on the driver's side of the cab to arrive on the scene. Tr. 228.

Buck Slade, the powder truck driver, testified that he had picked up the powder truck when he arrived on shift. The truck had already been loaded with explosives. He performed his walk around inspection of the truck, noticed it was low on fuel and called the mobile fuel truck operator. He was told the fuel truck was not available so he drove the explosives to his first shot area, helped load the shot and called again for fuel. He then met the fuel truck in the CLAIR-bay on his way back to the magazine or to another shot. Tr. 232, 236, 245-46. He backed the truck into the CLAIR-bay with the cab facing the travelway. The fuel truck was positioned directly in front of the powder truck in the travelway at the mouth of the CLAIR-bay to deliver fuel. Tr. 232, 250. The fuel tank is on the driver's side in front of the cab. Tr. 250.

Slade testified at first that as Tankersley walked into the CLAIR-bay, the fuel truck was just leaving. Tr. 232. He said he saw Tankersley for the first time as he (Slade) was getting back into his truck and Tankersley was at the back of the truck writing something up. Tr. 232-33. Then Slade testified that he was in the cab about to leave and he got out upon seeing Tankersley, chocked his wheels and went back to join Tankersley. Tr. 232-33, 235. Tankersley asked him some questions and mentioned something about "undue delay" and it being a "practice." Tr. 237. Slade then testified that he assisted the fuel truck driver and then walked back to his truck. After the fuel truck pulled away, Slade walked back to his truck, he did his walk around inspection of it, unchocked the wheels and got in the cab. He then turned on the ignition and was about to test the horn when he saw Tankersley at the rear. He turned off the truck, chocked his wheels and approached Tankersley. Tr. 252, 255-56. Slade confirmed that the area was well lit but he did not see Tankersley near the truck until he was seated in the cab. Tr. 250, 253. Melrose was at the back of the truck at this time; he was not with Tankersley. Tr. 258. Slade

⁴ Melrose was not called as a witness at trial.

testified that he told Tankersley when questioned as to where he had been that he was in the cab of the truck. He testified very unconvincingly as follows:

Q. Did you tell him you were in the cab?

A. Yeah.

Q. You told him you were in the cab?

A. I told him I just came from the seat.

Q. You told him you just came from the seat?

A. We didn't have an explicit conversation about where I was.

Tr. 259-60.

Analysis

I find Molina's testimony regarding seeing the fuel truck pulling away in the crosscut unworthy of belief. According to Molina's sketch of the scene (Ex. 18) Tankersley was located immediately in front of the lift truck, directly across from the crosscut where the fuel truck was allegedly seen just pulling away. Molina was 40 feet away from the CLAIR-bay and claims he saw the fuel truck in the crosscut yet Tankersley, who was in the immediate vicinity did not see or hear a fuel truck in the area. Making this scenario even more unlikely is the fact that the fuel tank is located on the driver's side of the truck in front of the cab which means Tankersley would have had to walk right past the fuel truck as he entered the CLAIR-bay and somehow did not notice it.

The operator asserts that it is possible Tankersley was not familiar with the fuel truck and did not recognize it on the scene. Resp.'s Post-Hearing Brief. Molina testified, however, upon my questioning, that the fuel truck has reels and hoses on it and the majority of people who work underground would recognize it. From the distance at which he saw the fuel truck (40 feet), the reels were visible. Tr. 229. Tankersley has 14 years as an inspector of metal/nonmetal mines and 15 years in mining. Tr. 78-81. I find it implausible he would not recognize a fuel truck from a few feet away had one been there.

Tankersley very credibly offered many scenarios in his testimony that he would not have cited as undue delay. Tr. 110, 112, 114, 152, 133, 138. He also testified that had the powder boxes not been bent exposing the explosives, he would not have viewed the situation the same way. Tr. 138. He was concerned that there was a dangerous practice in the transportation of explosives. *Id.* He took notes contemporaneously with this inspection. Tr. 83-85, 87. Ex. S-10. I find Tankersley was unbiased and did not harbor any rancor towards the Respondent. Tankersley was more credible a witness than Molina.

I find the testimony of Slade stretches the imagination. If he were to be believed, in a well-lighted, very quiet area he managed to walk around the powder truck, un-chock his wheels, open and close the cab door, start the truck, turn it off, open and close the cab door, and re-chock his wheels as Tankersley walked right by without hearing or seeing a thing. He somehow managed to sit in a truck with 3 ½ x 3 ½ foot windows at eye-level as Tankersley walked by without being seen. Unfortunately for Slade, even Molina contradicts his story. Molina testified that Tankersley entered the CLAIR-bay before he did; he was 40 feet behind. When Molina

entered the CLAIR-bay, he walked around the truck twice then joined Tankersley at the drivers' side of the truck and then three to five minutes later Slade walked up. Slade told Tankersley on the day of the inspection that he picked up the fuel truck fully loaded and went automatically to the CLAIR-bay for fuel. Tr. 105; Ex. S-10. He testified at hearing, however, that he called for fuel after he picked up the truck, then helped load a shot, called again for fuel and was headed back toward the second blast area when he met the fuel truck in the CLAIR-bay, apparently just prior to Tankersley arriving the area. Tr. 232-33. This later statement is difficult to believe when Tankersley testified that he had been to all the working headings and none of them were ready to load explosives. In one heading, Redpath was preparing to drill holes in the face. In the other headings, they were performing ground control, bolting and mucking. Tr. 90.

I find based upon the credible testimony of record that Slade was not in the cab of the truck and had left it unattended in the CLAIR-bay for some period of time after fueling was completed.

The issue is whether this route Slade took in transporting the explosive materials, including refueling and leaving the powder truck unattended in the CLAIR-bay for a period of time, involved undue delay.

The Secretary's position is, any delay in the direct route between the storage area or blasting site that is not necessary, such as in an emergency situation, is undue delay. *Sec'y's Post-Hearing Brief*. Inspector Tankersley testified that had refueling been absolutely necessary to prevent running out of gas along the route it would not have been a violation. Tr. 109-112. Had Slade been in the process of fueling when he arrived, Tankersley would likely not have issued the citation, but again, he emphasized that this should be only in the case of absolute necessity and not a deviation from the direct route. Tr. 114, 152, 133. His primary concern in this instance was that the operator was engaging in a hazardous practice. Slade did not recognize the hazard involved in making deviations from his route to the magazine or blast site nor did he recognize the danger in transporting the explosives in powder boxes that were severely damaged exposing the explosives. Tr. 138. When Slade was questioned about the damaged powder boxes, his response was that new parts were on order and it was a judgment call between him and his shift boss to use the damaged ones in the meantime. Tr. 244. Tankersley expressed that the dangerous work practice engaged in by Redpath was poor planning and not recognizing and mitigating the hazards involved in the transportation of explosives from point A to point B. Tr. 111, 138. The refueling could have been done before the truck was loaded with explosives. Tr. 139.

Respondent argues that the CLAIR-bay was in the direct route between the blast site and the magazine. While neither the regulation nor case law defines "undue delay," momentary stops while in route are not prohibited. In the context of a request for an expedited hearing, the Commission has stated that the term "forthwith" does not require immediacy in all situations but favors discretion under the circumstances presented. *Resp.'s Post-Hearing Brief* citing *Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 28, 1992).

I agree that undue delay is a question of reasonableness under the circumstances. Looking to the legislative history of the cited standard, the proposed rule in 1988 used the

language “without avoidable delay.” The language was changed to the present “undue delay” based upon comments that every delay could be construed as avoidable. MSHA agreed to take a less stringent approach in recognizing that some delays would be justified. *53 FR 45487-01 (Nov. 10, 1988)*. In determining what is reasonable under the circumstances one has to recognize the danger posed by the activity itself and measure it against the actions of the operator to determine whether those actions unreasonably or unjustifiably increased or ignored the inherent hazards.

“Historically, hazards associated with the storage, transportation, and use of explosive materials have caused or contributed to serious injuries and fatalities in metal and nonmetal mines. Precautions to safeguard against these hazards are an essential part of any effective mine safety program.” *61 FR 36790-0 (July 12, 1996)*. (*Emphasis added.*) Tankersley recognized not just an isolated incidence that caused him concern, but an apparent work practice that did not take circumstances into consideration. Slade was traveling with fully loaded explosive boxes that were damaged and gaping open. Management made the decision to operate with the damaged boxes while new parts were on order. Instead of minimizing the hazard this posed by either unloading the explosives and traveling to the fuel truck or having it fueled before it was loaded during the prior shift, the operator chose to refuel in route, leaving the truck unattended for an unknown period of time adding to, rather than minimizing, the hazards involved in the transportation of explosives. Tankersley was also aware that none of the headings were prepared for a shot at the time the loaded powder truck was found in the CLAIR-bay. Tr. 153-54. Tankersley concluded that, taking the totality of circumstances into account, Redpath’s refueling in the CLAIR-bay was a hazardous practice that constituted undue delay in the transportation of explosives in violation of the cited standard.

The operator argues that there are always some explosive materials onboard so that refueling at any time poses the same risk. I do not agree. First, there is a difference between explosives and explosive materials. Explosive materials may be left on the truck in small quantities but they do not detonate. Explosives, which can self-detonate, are required to be returned to the magazine for safe storage after a shot has been made which presents an opportunity to refuel safely. Tr. 154-56.

The operator also raised the point that Tankersley allowed Slade to leave the CLAIR-bay to find his supervisor and this further delay was condoned by Tankersley. As Tankersley testified, he and two corporate representatives remained with the vehicle at the time. Tankersley was engaged in the investigation of the matter and Slade needed to find his supervisor so that they could take care of the powder boxes because Slade didn’t know what to do on his own. Tr. 115. This was not a delay; it was a step to abate the powder box violation and the overall hazardous situation and issue the appropriate citations.

The Secretary acknowledged that there would have been instances where refueling along the route to/from the magazine and blast site would have been justified. However, those situations involve emergency situations where not doing so would have posed greater hazards such as running out of fuel and being stranded somewhere in the mine. Even in these situations, refueling should be done in the most expeditious manner possible, which would not include the driver leaving the truck unattended for some period of time with exposed explosives on board.

In this instance, there were no headings ready for a shot which indicates that the driver had some considerable period of time to wait before the truck was needed at the blast site. The conclusion that he could have planned to remain in the CLAIR-bay until the shot was ready becomes apparent. Furthermore, management knowingly allowed the explosives to be transported in damaged boxes in clear violation of the regulations which is indicative of their total disregard for safe work practices. In this instance, any amount of time the truck was left unattended in the CLAIR-bay with damaged powder boxes was unjustified and constituted undue delay.

I find the Secretary's interpretation of the term "undue delay" in this instance to be consistent with the purpose of the Act and in accord with the legislative history of the cited regulation and it is entitled to deference. *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192–93 (10th Cir. 2008) (finding that Secretary's interpretation of own regulation is entitled to deference); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681–82, 1685 (Dec. 2010) (examining context and comparable regulations to determine that the Secretary's interpretation of a term is reasonable). I also find that Redpath should have been on notice of being in violation of the cited standard. A reasonably prudent person familiar with the mining industry, and in particular the use and transportation of explosives, would have recognized refueling and leaving unattended a fully loaded powder truck with damaged powder boxes in the CLAIR-bay created an unjustifiable hazard and was violative conduct within the meaning of the cited regulation. *See, e.g. Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 16 (2d Cir. 1999) (A reasonably prudent mine operator would take the Mine Act's objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder.).

The Secretary has established a violation of mandatory standard 30 C.F.R. §57.6200 by a preponderance of the evidence.

Significant and Substantial

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

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal*,

Inc. v. MSHA, 52 F.3d 133,135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015,2021 (Dec. 1987) (approving *Mathies* criteria).

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

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899,905 (Dec. 2005); *U.S. Steel Mining Co.*, 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.*, 10FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007(Dec. 1987).

I have found the violation has been established. The Secretary contends that there existed a reasonable likelihood under continued normal mining operations that delaying transportation of explosives to refuel in the CLAIR-bay when coupled with the damaged powder boxes would have contributed to the hazard of an unintended detonation of the explosives. Such an event would more than likely produce fatal injuries. I agree.

Tankersley testified that he saw welding equipment and torches in the CLAIR-bay. Tr. 88, 95-97; S-12. He further testified that although he did not see any welding taking place on the day of the inspection, it was a permissible activity in that area. Tr. 97-98. Welding, cutting or other maintenance work could produce an ignition. Tr. 162-63. Tankersley also considered the fact that when he spoke with Slade about the conditions of the boxes, he didn't seem to understand the hazard involved. Tr. 119.

While the Respondent denied that any welding was done in the CLAIR-bay, I find that there was nothing preventing it. The presence of the equipment in the area leads to the conclusion that it could be done in that area and under continued mining operations was likely to be performed there. It is also reasonably likely that other types of light maintenance regularly done in the CLAIR-bay heightened the hazards of detonation. Changes in the environment can also detonate the boosters, particularly with the explosives being improperly stored in damaged boxes.

It is clear from the circumstances here that the Respondent was aware that it was engaging in unsafe practices in the transportation of explosives by making unnecessary and undue deviations and would have continued to do so had Tankersley not issued this citation. I therefore find that with continued normal mining operations it was reasonably likely that a reasonably serious hazard would result causing serious, if not fatal, injuries to the powder truck driver. The S&S level of gravity has been established.

Negligence

The Secretary assessed the negligence involved in this citation as moderate, meaning the operator knew or should have known of the violation but there were mitigating circumstances. 30 C.F.R. §100.3(d), Table X. When Tankersley spoke with Slade about the hazards involved in making deviations from the route and using damaged boxes, he told Tankersley that he was a trainee. By that Tankersley believed the operator had in good faith given him a block of training which he found to be a mitigating factor. Tr. 119-20.

I agree with the Secretary's assessment of moderate negligence.

Citation No. 8608114

The condition or practice cited in this alleged violation is:

Upon the inspection of the Redpath CLEARBAYS (sic) it was found (sic) an explosives truck. (Sic) The operator of this truck had received the equipment loaded with explosives for the days (sic) shot from another Redpath employee when he noticed the fuel gauge was low, he drove the explosive truck to the CLEARBAYS (sic) to get fuel. At the time of inspection the truck was not being fueled and not attended in such a manner. (Sic) There is (sic) explosives on the equipment. I ask (Sic) the operator why he did not go directly to the shot and he was unaware of the standard of 57.6200.

Ex. S-9.

The gravity of the citation is marked as reasonably likely to result in a fatal injury to one person, S&S and of moderate negligence. The proposed penalty is \$5503.00.

The mandatory standard requires that “[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material.” 30 C.F.R. §57.6300(b).

Tankersley wrote this citation in conjunction with the previously discussed citation. The focus of this was that when Slade was interviewed at the scene, his answers indicated to Tankersley that he was unaware of the blasting powder storage requirements. Slade indicated that he had been recently trained over the preceding six months by Redpath. Tr. 124. He had received his certification for handling and transporting of explosives the day before the

inspection. Ex. S-16. When Slade did his walk-around inspection of the truck, he should have seen the damaged powder boxes and taken the truck back to the magazine, in Tankersley's opinion. He should have also noticed that the fuel was low. Tr. 128-29. When asked if he knew he needed to go directly to the blast site without undue delay, he did not know that either. Tr. 151-52. He testified that he could not recall if he used the term "undue delay" when questioning Slade. Tr. 152. Slade, on the other hand, recalled Tankersley talking about "undue delay" and a work procedure. Tr. 237. Tankersley admitted that the cited standard refers only to the use of explosives, not the transportation of them. Tankersley also conceded that the standard would not require the supervisor of the trainee to ride in the truck with him while transporting explosives. Tr. 150-51. Tankersley said, "I stand corrected on the use of the standard." Tr. 151. Tankersley later checked the training record for Slade and saw that he had completed his training. He also was aware that the operator provides "toolbox" training on the standards. Ex. S-16.

Slade testified that he was provided task training by Redpath that began in August 2011 and completed in October. He then started experienced miner training in September 2011 which was completed in October as well. Tr. 241. The experienced miner training focused on the powder truck which included learning how the emulsion tanks worked, checking water pressure, knowing the blind spots, checking all the gauges for hydraulic and engine oil and operating the boom as well as doing a pre-operational safety check. Tr. 241-42. On the day of the inspection, he completed his safety check and was aware of the damaged boxes. He and his shift boss made the decision to operate with the boxes in that condition. Tr. 244.

Based upon the testimony of Tankersley and Slade as well as the training record received into evidence, I do not find this mandatory standard has been violated. Slade was adequately trained by Redpath. He may have been nervous or not understood the questions Tankersley was asking him. The decision to drive the fuel truck with damaged powder boxes and refuel while fully loaded were poor choices and exemplify the operator's unsafe work practices which caused Tankersley's concern. They do not rise to the level of proof necessary to meet the Secretary's burden to establish that Slade was not properly trained. I also find that the cited standard applies to the handling of explosives, not the operation of the powder truck. For both these reasons, I vacate this citation.

Docket WEST 2012-486

MSHA Inspector Charles Snare has five and one half years' experience as an inspector. Prior to joining MSHA, he worked in various jobs in surface and underground mines including tours as a nipper, driller and blaster in metal/nonmetal mines. Tr. 21-22. He was conducting a regular inspection on October 12, 2011 when he issued this citation.

Citation No. 8608727

The condition or practice of this alleged violation states as follows:

The 4855 level was posted "Danger No Ventilation," "Do Not Enter," and a snow fence barrier was in place. The area was not barricaded

to obstruct vehicle parking. If a miner were to unknowingly enter an unventilated area fatal injuries could be expected.

Ex. S-2.

The citation is marked as unlikely to produce an injury (fatal) and non-S&S affecting one person and the result of moderate negligence. The proposed penalty is \$1203.00.

The cited mandatory standard requires that unventilated areas be sealed or barricaded and posted against entry. 30 C.F.R. §57.8528.

On the day of this inspection, Snare was accompanied by mine representative Jim Wilde, safety superintendent for Barrick. Tr. 25. When Snare entered the area known as the 4855 level, he found the cited condition. The cited area located off the End Zone (“EZ”) Decline. Located at a 90 degree turn to the right off the End Zone (“EZ”) Decline and up a 12% grade ramp is a second 90 degree turn to the left that leads to an area that was used for parking mine equipment such as drills, haul trucks, mucking machines, tractors and personnel carriers. Ex. R-30; Tr. 34, 176-78. Adjacent to the parking area is an entry that was no longer ventilated. Between the parking area and this entry, Snare found that Redpath had erected a barrier and warning signs. Tr. 28; Ex S-4. The barrier was constructed of one strand of rope running from rib to rib that had PVC pipe zip-tied to the inside of the rope. Tr. 30-31. Attached to the PVC pipe was orange plastic snow fence material that hung underneath the PVC piping. Tr. 31. The PVC pipe did not frame the sides of the snow fence. Snare could not recall how the rope was attached to the ribs but said normally it is attached with anything available such as loosely tying it to a rock bolt or wire. Tr. 32-33. Snare took several photographs of the barrier. Exs. S-4, 5 and 7. He described the center section of the barrier as bowed due to slack in the rope holding it up. Tr. 37, Ex. S-5. In viewing photographs of the barrier, it is apparent there was a gap between the snow fence and the rib and another one towards the center where two pieces of fencing were needed to stretch across from rib to rib. Exs. S-4 & S-7. Theron Harper, Redpath’s superintendent, confirmed the same. Tr. 197-98.

Snare determined that the barrier was insufficient to meet the mandatory standard. As he explained, a barricade as defined in the regulations is designed to “prevent the passage of persons, vehicles, or flying materials.” Tr. 28; 30 C.F.R. §57.2. The manner in which this barrier was constructed would have been “easily defeated.” Tr. 38. To abate the citation, Redpath erected a three to four foot berm behind the existing barrier. Tr. 42. In Snare’s mind, the berm would function better to impede vehicular traffic. *Id.* It would slow down a vehicle and be very obvious to the driver. It would not, however, be as effective with someone on foot. Tr. 43. The barrier on its own would not stop a miner on foot who had the intention to go through it. Tr. 44. The ideal barrier would be a wall sealing off the area completely. However, he understood that this area was on geological hold where additional work could be performed in the future. Tr. 30.

Snare was aware that Barrick had a company-wide policy at Meikle mine dictating the manner in which barriers and barricades were to be constructed. Tr. 33 Ex. R-9. Usually, it would be a double strand of rope with PVC framework along the sides and bottom as well as the

top with the snow fence securely tied to it. Tr. 33-34. The rope would run through the PVC pipe to give the frame additional strength. Tr. 34. Upon issuing this citation, Snare spoke with Randy McFatrige, the mine superintendent at the time, about the condition. McFatrige commented that he missed this one and didn't follow through. Tr. 45; Ex. S-3 pg.1.

Barrick's superintendent, Wilde, made notes from the inspection, which were recorded on *Redpath's Citation Summary* sheet, Ex. R-7. His notes state that the signs and snow fence as cited by Snare was a barrier which could be made of snow fence, a warning sign or tape. However, under the standard cited by Snare, it needed to be a barricade. The author of the Citation Summary indicated that Redpath was in agreement with the citation. Referring to Barrick's Policy and Procedures document on barricades and barriers, it states that barriers which are designed to impede unauthorized traffic can be made of various materials such as muck piles, large boulders or timbers. In contrast, barricades are designed to prevent passage of persons, vehicles or flying material and are depicted in the policy manual as being constructed as Snare described. Non-ventilated areas are listed as a hazard that requires such a barricade. Ex. R-9 (emphasis added).

Respondent argued that a proper barricade was erected. Referring to the definition of a barricade, it argues that it was not required to prevent the passage of persons, vehicles *and* flying objects. The definition is written in the disjunctive and not all three items need to be prevented from entering the area. Citing the decision in *Newmont USA Ltd.* 34 FMSHRC 146 (Jan 2011) (ALJ), it asserts that the ALJ found fault with the barricade because it did not prevent entry of any of the items listed; it did not conclude that it had to prevent two or three of them. *Resp's Post-Hearing Brief*. This argument is hinged upon the various assertions made by Snare as to why the barricade needed to be comprised of the berm and the snow fence to prevent vehicles, objects and foot traffic from entering the unventilated area.

I find this argument nonsensical. The clear and universally-understood purpose of the Act is to protect the health and safety of miners. Entry into an unventilated area poses a risk of death. Miners travel in and operate mine vehicles or are on foot in this area. The risk posed by not having a proper barricade was persons being exposed to breathing harmful gases in an unventilated area. Therefore the barricade in this instance had to be designed primarily to prevent entry of vehicles as well as miners on foot. This barrier would also not prevent the entry of objects; however, under the circumstances, that was not its main purpose. That Snare required a berm to be erected to ameliorate the hazard posed by the very poorly constructed snow fence-PVC barricade is not basis upon which I find this mandatory standard has been violated. What is determinative is the fact that the barricade as Redpath had constructed it was a sorry excuse for a barricade. It was sagging, had gaps along the ribs, was comprised of two separate pieces of fencing that did not meet or join in the middle, was not constructed with a rigid frame around all sides and was attached to the rib in a non-permanent unsecure manner. It would not have prevented the entry of persons, vehicles or objects. Clearly, management for Barrick was of the same opinion as expressed in the Wilde's notes. This barricade did not remotely resemble the barricade construction depicted in Barrick's policy manual which I would have found sufficient to meet the mandatory standard cited by Snare.

I find the Secretary has met his burden of proving the mandatory standard has been violated. I find the gravity of this violation to be of moderate severity.

Negligence

The Secretary has assessed this violation as moderate in negligence. The fact that some form of barrier had been erected with signage indicating the danger present in the area is a mitigating factor. I also find McFatridge's statement that they missed this barricade indicates that they were aware of the issue and had not yet attended to it as a mitigating factor. I find moderate negligence is appropriate.

II. PENALTIES

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo, including proposed special assessments, for violations of the Mine Act are well established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. §820(i). The Act requires that in assessing civil monetary penalties, the Commission or ALJ shall consider the six statutory penalty criteria:

1. The operator's history of previous violations;
2. The appropriateness of such penalty to the size of the business of the operator charged;
3. Whether the operator was negligent;
4. The effect on the operator's ability to continue in business;
5. The gravity of the violation; and,
6. The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties have stipulated that the proposed penalties would not affect the operator's ability to continue in business. There is no dispute that the conditions were abated in good faith. I have considered the operator's history of violations which I do not consider significant. Ex. S-1. The findings with regard to the gravity and negligence involved are discussed at length above. I find the following penalties to be appropriate:

Docket WEST 2012-485

Citation No. 8608112- I find the penalty of \$5503.00 proposed by the Secretary to be appropriate.

Citation No. 8608114 – For the reasons set forth above, I VACATE this citation.

Docket WEST 2012-486

Citation No. 8608727 – I find the penalty of \$1203.00 proposed by the Secretary to be appropriate.

III. ORDER

Docket WEST 2012-485 Citation Number 8608112 is affirmed as written with the penalty proposed by the Secretary; Citation Number 8608114 is **VACATED**. Docket WEST 2012-486 Citation Number 8608727 is affirmed as written with the penalty proposed by the Secretary. J.S. Redpath Corporation is **ORDERED** to pay civil penalties in the sum of \$6706.00 within thirty (30) days of this decision.⁵

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 16, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2011-168
Petitioner,	:	A.C. No. 36-05466-242679
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Michael Doyle, 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

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA, for Respondent

Before: Judge Harner

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns two Orders (Nos. 8007973 and 8007974) issued under Section 104(d)(2) of the Act and served on Emerald Coal Resources, LP, (“Emerald” or “Respondent”). A hearing was held in Pittsburgh, Pennsylvania on December 11-12, 2012, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

JOINT STIPULATIONS¹

The parties have stipulated to the following:

1. Emerald Coal Resources, LP operates the Emerald Mine No. 1 where the Orders in contest were issued.
2. Emerald Mine No. 1 is an underground coal mine in Greene County, Pennsylvania.
3. Emerald Mine No. 1 produced 4,901,640 tons of coal in 2010.
4. Emerald produces coal using longwall methods and continuous miners.
5. Emerald is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Act”), 30 U.S.C. § 803(d), at the coal mine at which the Orders at issue in this proceeding were issued.
6. Emerald’s operations at Emerald No. 1 are subject to the jurisdiction of the Act.
7. 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.
8. The individual whose signature appears in Block 22 of the Orders at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
9. True copies of the Orders at issue in this proceeding were served on Emerald as required by the Act.
10. Emerald demonstrated good faith in the abatement of the Orders.
11. The penalties that have been proposed will not affect Emerald’s ability to continue in business.

¹ The following stipulations are contained in Joint Exhibit No. 1. Joint exhibits will hereinafter be designated JX followed by a number; the Secretary’s exhibits will be designated as GX followed by a number; and Respondent’s exhibits will be designated as RX followed by a letter. Pages of the official hearing transcript are designated “Tr.” followed by the appropriate page reference(s).

Respondent Exhibits C, D, E and G were marked for identification, but were not offered or admitted into evidence.

12. The appropriateness of the penalty, if any, to the size of Emerald's business should be based on the fact that Emerald's controller produced over 10 million tons of coal in 2009, including 5,558,640 tons of coal produced at Emerald No. 1 Mine.
13. The appropriateness of the penalty, if any, to the size of Emerald's violation history should be based on the fact that Emerald had 301 assessed violations over the course of 1,260 inspection days during the 15-month period preceding the issuance of the Orders in this case (May 5, 2009, through August 4, 2010).
14. When the inspector arrived on the Section, mining was still progressing in the No. 3 to 2 entry, No. 16 crosscut, and an air connection was made late in the day but the connection was not yet strapped through.
15. The mining equipment was still in place to finish mining the cited area when MSHA Inspector Boring arrived on the section, but the continuous miner had not yet been operated.
16. Concerning the issue of whether there was an "intervening clean inspection" as that term is applied in the context of the Section 104(d) graduated enforcement scheme, between April 12, 2010 and the issuance of Order Nos. 8007973 and 8007974 on August 5, 2010, there were four Section 104(d) orders issued, and all such orders are under contest.

Those orders are:

- No. 7065170, issued April 12, 2010 (PENN 2010-445-R; hearing held May 15, 2012);
- No. 7065171, issued April 12, 2010 (PENN 2010-446-R; hearing held May 15, 2012);
- No. 7073102, issued June 15, 2010 (PENN 2011-125, stayed pending Commission decision in *Wolf Run*); and
- No. 7073103, issued June 15, 2010 (PENN 2011-194, no hearing scheduled yet).

If any of the above orders are upheld as Section 104(d) orders, then there will not have been an intervening clean inspection period between the date of the predicate Order (April 12, 2010) and the date of the Orders under review in this proceeding (August 5, 2010).²

² On April 29, 2013, I issued a decision in PENN 2010-647 which covered, in part, Order Nos. 5065170 and 7065171 (Contest Nos. PENN 2010-445-R and -446-R). In that decision, I found that Respondent violated Section 104(d)(1) with respect to each of those Orders. The impact of this decision on the findings herein will be discussed more fully later in this Decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

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

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard

contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

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

With respect to citations or orders alleging an accumulation of combustible materials, the Commission has recognized that ignitions and explosions are major causes of death and injury to miners. *Windsor Coal Co.*, 21 FMSHRC 997, 1007 (Sept. 1999). The question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965,970-71(May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC, at 970-71; *Texasgulf, Inc.*, 10 FMSHRC 498, 500-03 (Apr. 1988).

B. Negligence and Unwarrantable Failure

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard”,

“intentional misconduct”, “indifference”, or a “serious lack of reasonable care”. *Emery Mining Corp.*, 9 FMSHRC at 2003; see also *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering all the facts and circumstances of each case to determine if any aggravating factors exist, or if any 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 *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC at 1001; *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Company*, 31 FMSHRC 1346, 1351.(Dec. 2009)

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Orders which are alleged to be S&S and unwarrantable failures meet the above noted criteria.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8007973

On August 5, 2010,³ Inspector Shannon Boring wrote Order No. 8007973 (GX-1) citing a Section 104(d)(2) violation of 30 C.F.R. § 75.400 stating:

Dangerous accumulations of float dust, loose coal, and hydraulic oil were permitted to accumulate at various locations in the C-4 Section (MMU 029-0). In the 16 x-cut (3 to 2) there were accumulations of loose coal and float coal dust ranging 2 to 5 inches in depth in the middle of the entry, 18 inches in depth along the ribs, for a distance of 38 feet. Also, the #1021 Joy miner had accumulations of hydraulic oil on both sides of the miner under the top covers ranging from a film to 1/16 inch in depth, and a steady stream of hydraulic oil could be seen running down the side cover on the right side of the miner. This condition has

³ Unless otherwise indicated, all dates herein refer to 2010.

existed for 3 weeks. Finally, the face of the #2 entry had accumulations in it ranging 4 to 6 feet high, rib to rib, and for a distance of 17 feet outby. This condition constitutes more than ordinary negligence, and exposes miners to the hazard of a mine fire. This violation is an unwarrantable failure to comply with a mandatory standard.

This Order was designated as S & S as the cited conditions were highly likely to cause injuries that would result in lost workdays or restricted duties to four miners. The inspector evaluated the operator's negligence as high and a penalty of \$41,500.00 was assessed. The predicate Order cited by Boring for his Section 104(d)(2) Order was Order No. 7065170 dated April 12, 2010.⁴

The Order was terminated on August 6 after the operator removed the coal accumulations, rock dusted the two areas and had the miner's oil leak repaired and the miner degreased.

30 C.F.R. § 75.400, entitled "Accumulations of combustible materials," provides, "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel powered and electric equipment therein." 30 C.F.R. § 75.400-2 requires operators to establish and maintain a cleanup program that is available to the Secretary or authorized representative.

Boring has worked as an inspector for the Mine Safety and Health Administration ("MSHA") in the Ruff Creek, Pennsylvania, field office for 5-1/2 years and had previously worked in the mining industry for approximately ten years where he had experience working on a continuous miner. Tr. 19-21. On August 5, Boring was one of several inspectors who went to Respondent's Mine No. 1 to conduct an impact inspection of the mine as part of the regular quarterly E01 inspection. Tr. 22-23. He was accompanied by his supervisor, Robert Newhouse, who attends all impact inspections and who was evaluating Boring's performance.⁵ Tr. 26, 153-154. Impact inspections are performed to get an overall view of conditions in a mine and the focus of these inspections is determined by MSHA District Managers after considering a number of factors. Tr. 22, 153. Newhouse testified that the focus of the impact inspection at Respondent on August 5, as determined by District 2 Manager Thomas Light, was to look at cleanup, ventilation and other conditions in the working sections. Tr. 152-153.

⁴ As noted previously in Joint Stipulation #16 (JX-1) and at footnote 2, *infra*, this Order was litigated in Docket No. PENN 2010-647.

⁵ Newhouse has been employed by MSHA and its predecessor since 1977 and had worked in the mining industry for approximately 10 years before that. He is currently a supervisory coal mine inspector at the Ruff Creek field office where he is responsible for overseeing 6-10 inspectors in the mines assigned to his work group. It is not unusual for Newhouse to travel with his inspectors to the mines as his job includes mentoring and evaluating inspectors that he supervises. Tr. 147-150.

Boring testified that he and Newhouse arrived at the mine at 3:15 PM on August 5, and upon arriving at the mine, Boring examined the mine records above ground and not seeing anything, he and Newhouse went into the mine. Tr. 26-28. He and Newhouse traveled to the C-4 section⁶ in the mantrip with the afternoon shift production crew.⁷ Tr. 28-30. When Boring, Newhouse and the crew arrived at the section, they all walked up the track entry to the dinner hole, where they stopped so Boring could conduct a safety talk. Tr. 30, 89-90. After finishing the safety talk, Boring proceeded to do an imminent danger run in the faces throughout the C-4 section. Tr. 30. During this run, Boring first observed the violative conditions that constitute the subject Order.

Boring testified that as he and Newhouse walked up the No. 3 entry they observed about 18 oil cans in the overdrive area near the 16 crosscut. Tr. 38-39, GX-3, page 5. When he and Newhouse turned into the crosscut, the bottom was uneven and rutted and they observed three distinct piles of coal material that were 18 inches high at each of the ribs and from 2 to 5 inches high in the center of the crosscut, with all three piles extending 38 feet behind the continuous miner, which was located near the No. 2 entry. Tr. 39-41, 173, GX-3, page 5, GX-4. Boring testified that he measured the piles with a tape measure and that the accumulation of material consisted of loose coal, coal dust and a “little bit of rock”, but the material “mainly consisted of coal”.⁸ Tr. 42. His notes, taken at the time of the inspection, describe the accumulation as “loose coal and float coal dust”. Tr. 25, GX-3, page 5. The coal was not rock-dusted. Tr. 64. At the hearing, I asked Boring how he knew what the accumulation consisted of, and he explained that he dug around in the piles and picked up the material to examine it. Tr. 43. Before moving on, Boring believes he told afternoon shift Section Foreman Lloyd Birt that the accumulations had to be cleaned up. Tr. 44. Boring testified when he walked up the No. 3 entry,

⁶ The Respondent uses a full-face continuous miner with integral bolters in the C-4 section. The continuous miner makes a cut into the coal seam 16 feet wide and about 7-8 feet high and the coal and other material (e.g. rock) cut by the miner is then carried from underneath the miner on a conveyor out of the back of the miner. The coal is then picked up by a loader, loaded onto a shuttle car and transported to the belt tailpiece where it is transferred to a conveyor belt and taken out of the mine. The continuous miner is powered by AC electricity from a mine power center via a trailing power cable running along the rib to the back of the miner. Tr. 32-37, 151. The miner requires an operator, who uses a remote device from the rear of the miner to control the miner, and two bolters who are at the front of the miner. Tr. 50-51. Loaders are approximately 10 feet wide and 20 feet long, while shuttle cars are 10-12 feet wide and 20 feet long and able to hold 20 tons of coal material. Tr. 52.

⁷ The mine operates three shifts from 8 AM to 4 PM; from 4 PM to 12 AM; and from 12 AM to 8 AM. Tr. 29.

⁸ On cross-examination, Boring estimated that 30 percent of the material was rock. Tr. 105. No testing samples were taken. Tr. 104.

he believed the loader was in the No. 3 entry, but it was not in the 16 crosscut.⁹ Tr. 94-95, 131. Rather, based upon his experience, he believed Respondent was not using a loader in the 16 crosscut to load coal from the miner as there were tire tracks that were consistent with using a shuttle to load coal from the miner and the spillage pattern of this accumulation was different than a loader would produce. Tr. 115, 132-133. Boring testified that coal cannot just be left behind the miner to accumulate; it has to be “reasonably removed” so there is not enough to propagate a fire. Tr. 135-136. In his opinion, based on his experience, Boring believed the 38 feet of coal in the 16 crosscut was thick enough to propagate a fire. Tr. 136.

After examining the accumulation in the 16 crosscut, Boring testified that he and Newhouse looked at the miner and observed hydraulic oil on the miner. Tr. 44. Although there was a light film of oil on both the right and left side, there was a “steady stream” of oil running down over the top of the right side of the miner, then over the cover down onto the mine floor where it was absorbed.¹⁰ Tr. 44-46, 174-175, GX-3, page 5. The area where the oil was leaking was on the outby side of the bolter unit where there are area lights and power cables. Tr. 46. Boring testified that when he examined the miner, it was energized but no production was occurring as the day shift had already left and the afternoon shift had not yet started.¹¹ Tr. 46-47. Boring felt the leaking oil to ensure that it was oil and not water and the oil was “warm” to the touch. Tr. 54. Newhouse and union representative Gary Corcoran observed Boring’s examination of the oil. Tr. 54. After looking at the miner and observing the oil leak, Boring and Newhouse and Corcoran proceeded to the No. 2 entry to finish the imminent danger run. Tr. 55.¹²

Boring testified that as he and the others walked up the No. 2 entry toward crosscut 16, he saw an accumulation of coal material pushed up to the face from the direction of the entry. The material was black in color, “dried out” and not rock-dusted and was 4-6 feet high, rib to rib, and extending 17 feet back from the last strap at the face. Tr. 61-63, GX-3, page 6. As he did with the accumulation in crosscut 16, Boring measured the accumulation with a tape measure and examined the accumulation to determine its content.¹³ Tr. 62. Boring testified that he

⁹ Newhouse testified that the loader was in the 15 crosscut. Tr. 169. Newhouse explained that if the loader had been in the 16 crosscut at the time of the inspection, at the shift change, the accumulation in the 16 crosscut probably wouldn’t have been a violation as the coal would have been there as part of the normal mining process. Tr. 454.

¹⁰ At the time Boring and Newhouse examined the miner, it was still energized as the day shift crew had recently stopped their production activities. Tr. 47-48.

¹¹ Respondent utilizes a hot-seat change out where one shift does not leave their work area until the replacement shift arrives. Tr. 46.

¹² To get to the No. 2 entry, Boring and the others walked to the No. 3 entry and then walked outby to crosscut 15 where they walked over to the No. 2 entry. The miner in crosscut 16 had not yet mined through to the No. 2 entry. Tr. 60-61, 129-131, JX-1, Stipulation 14.

¹³ Boring estimated that this material was less than 30 percent rock. Tr. 105.

believed this accumulation had existed for several shifts as Respondent was not mining in the No. 2 entry and the miner had not yet fully mined through the 16 crosscut so as to cause an accumulation in the No. 2 entry. Tr. 62-65.

Boring testified that he did not tell Section Foreman Birt about the oil leak on the miner until they were all in the No 2 entry looking at the accumulation there. Tr. 57. When he issued the instant Order, and told Birt about the oil leak on the miner, Birt replied that the miner had been leaking oil for 3 weeks, that they had been putting in 10-12 cans of oil per shift and that he had reported it to management but nothing had been done. Tr. 55-59, 177, GX-3, pages 5 and 7. Birt also agreed about the accumulations and did not offer any argument. Tr. 66. Newhouse and union representative Corcoran were present for this conversation with Birt. Tr. 56.

At the hearing, and in his notes taken at the time of the inspection at GX-3, page 7, Boring explained why he issued the instant Order (GX-1) and listed his findings with respect to gravity and negligence. With respect to gravity, Boring explained that he believed an injury was “highly likely” as the accumulations “were in the direct vicinity where mining was taking place.” Tr. 67. In further explanation, he pointed out that there were power cables, lighting and other components beneath the covers of the miner, the fact that the mine is on a 5-day spot inspection for methane¹⁴, the miner was cutting in sandstone and there were two different coal accumulations and the oil leak on the miner, all of which were combustible. Tr. 67-68. Boring assessed the likely injury as lost work days or restricted duty as there was the potential for mine fires where miners could suffer burns, smoke inhalation or sprains/strains from moving around to fight a fire which would result if there were an ignition. Tr. 69-70. He also believed the violation was S & S because there was a reasonable likelihood that an accident of a serious nature could occur. As to the number of persons affected, Boring determined “4” persons, likely the continuous miner operator, the two bolters and either the loader operator, shuttle car operator or utility man.¹⁵ Tr. 71. Boring testified that he determined the negligence to be high because of the extensiveness and obviousness of the violations and also taking into account Birt’s comments about the oil. Tr. 71. Finally, he determined that the Order was required to be a 104(d)(2) order because there had not been a clean inspection since the predicate 104(d)(1) Order No. 7065170 that was issued on April 12. Tr. 72-73, GX-19. As previously noted, this Order has been upheld in my Decision at Docket No. PENN 2010-647.

As a result of the Order written by Boring, this part of the mine (Section C-4) was shut down beginning at 5:40 PM on August 5 until the instant Order was terminated on August 6 at 2:30 PM. Tr. 77, GX-1. During the shut down of the section, Respondent removed the accumulations and repaired the miner.

¹⁴ If a mine liberates more than one million cubic feet of methane in a 24 hour period, it is subject to a 5-day spot inspection. Tr. 74.

¹⁵ Production crews consist of the section foreman, 1 operator, 2 bolters, 1 loader operator, 2 shuttle car operators, 1 mechanic, and 1-2 utility men. Tr. 52.

Supervisory Inspector Newhouse also testified at the hearing. In general, he fully corroborated inspector Boring's testimony. However, his testimony more fully explained the nature of the violations found on August 5 and gave an overview of the continuous mining process from a historical perspective. Newhouse testified at length about his numerous discussions with Respondent management about coal accumulations and particularly pushing coal to the face and not cleaning it up.¹⁶ These discussions have occurred at pre-inspection conferences, post-inspection conferences, quarterly inspections and other times. Tr. 154-157. These discussions pre-dated August 2010 and many occurred with William Schifko, Respondent's Compliance Manager for MSHA issues. Tr. 162. There is little question that Respondent knew what MSHA's view was regarding accumulations. In fact, as a result of these discussions, and in order to address cleanup with the use of the full face miners, Respondent created a new "Cleanup Program" dated April 27.¹⁷ Tr. 162, GX-5. Although the cleanup plan was not required to be approved by MSHA, it was nevertheless acknowledged by it as being appropriate and at the hearing, Newhouse testified that if the plan was complied with, it would meet the requirements of § 75.400. Tr. 163-164. Specifically, paragraph 4 of this cleanup plan (GX-5) provides:

... Reasonable amounts of the cleaned up material may be deposited in an overdrive area provided that it does not impede the ventilation of or examination of the face area. In addition, any cleaned up material shall be rock dusted over until it can be loaded out. When leaving coal bottoms, extra attention will be given to eliminate accumulations of loose or fine coal.

Newhouse opined that the problem with clean-up has occurred with the institution of full-face miners in the late 1980's. Tr. 160. Before this, Respondent and other operators used place-change miners which did not have integral bolters. These miners were required to be backed out of an entry so the bolters could then go in and bolt the roof in place. When the roof was bolted to the face, a scoop would then come in and remove the coal promptly. Tr. 157. The cut made by the change-place miner was square and any remaining coal pushed to the face was there for only a short time.¹⁸ Tr. 202. With the full-face miners, this does not happen as the miner has less maneuverability and is meant to mine coal in a straight line with the cutter expanding out to the full width of the entry, about 16 feet. As the full-face miner moves forward, the coal it mines exits at its rear to be cleaned up by a loader. When operators, including Respondent, finish an area, they "wedge that face down" so that the gas at the face can come back to the last roof strap. Tr. 158. The bottom of the wedge on the coal floor is usually 14 feet back from the last strap. Tr. 452. Newhouse explained at the hearing that with the change over to full-face miners, the

¹⁶ At one point in the hearing, during questioning by Respondent's counsel, Newhouse testified that he probably discussed the accumulation problem with Respondent's management more than 30 times. Tr. 238.

¹⁷ Respondent's prior cleanup program was instituted when Respondent used place-change miners. Tr. 164.

¹⁸ There was no wedge to trap methane in it as now exists with the full-face miners.

problems with ventilation did not become readily apparent, but over the years, MSHA realized that coal stockpiling and accumulations at the face created numerous problems with ventilation as the wedges were getting blocked up as they were not properly ventilated. Tr. 160, 205. At the hearing, Newhouse explained that pushing large amounts of coal into the wedge at the face impedes ventilation because no air can get to the face and when the wedge is eventually cleaned out, methane will be released. Tr. 159-161, 450, 461. Newhouse further testified that if the material at the face is 4-6 feet high, an inspector has to crawl to the top of the pile to inspect for methane and there is no way to get in the wedge to check for methane except to crawl around into an unbolted area.¹⁹ Tr. 159, 206.

At the hearing, Newhouse credibly testified that his discussions with Schifko about pushing coal to the face have stressed that the “reasonable amount” allowed is the amount of coal that the miner is sitting on when it leaves an entry or crosscut. Tr. 159, 162, 164-165. The amount of coal behind the miner when it finished mining in an entry or crosscut should be cleaned up and removed and not pushed to the face. Respondent was on notice that a larger amount of coal pushed to the face was not acceptable. Tr. 159. Newhouse explained to Schifko in their discussions, as he did at the hearing, that accumulations at the face should be level and not impede ventilation at the face or an examination of the face area. Further any coal deposited at the face should be heavily rock-dusted.²⁰ Tr. 159, 164-165.

As previously noted, Newhouse accompanied Inspector Boring on the August 5 inspection. His testimony further explains why he deemed the conditions found to be violative of § 75.400. The coal in the 16 crosscut was accumulated along the ribs and in the center of the crosscut, there was pulverized coal up to 5 inches in depth. Tr. 173. He believed the production crew was using shuttle cars to load the coal from the miner because of the terrain of the crosscut and the tire tracks in the crosscut indicated that a rubber-tired vehicle, like a shuttle car or scoop was being utilized. Tr. 171-172, 456. Such a vehicle pulverized the coal under its wheels into fine coal dust. Tr. 454-455. When he and Boring examined the miner, he also observed a steady stream of oil coming from the miner. Tr. 174-175. Newhouse’s testimony also pointed out that Respondent’s Cleanup Program required Respondent to report all hydraulic oil leaks to the mechanic for repair and to clean up hydraulic oil spills as they occur.²¹ Tr. 179, GX-5, paragraphs 6 and 7. Newhouse also confirmed the size of the accumulation at the No. 2 entry (4-6 feet high and rib to rib) and determined that it was “well beyond” the parameters of the reasonable amount of coal that was allowed as it was blocking ventilation and any examination

¹⁹ It seems axiomatic that crawling around on these large accumulations of coal and other material would create a safety hazard for the inspector while performing his duties.

²⁰ I note that these same conditions are set forth in Respondent’s Cleanup Program. See paragraph 4 of GX-5.

²¹ Newhouse also testified that Section Foreman Birt said that the miner was using 10-12 cans of hydraulic oil per shift for 3 weeks and that he had reported the problem to management or maintenance. Tr. 177.

required crawling around in a large pile of coal. Tr. 166. He observed that only 20-30 percent of the material was rock and there was no rock-dusting of the accumulation. Tr. 167-168.

Finally, Newhouse testified why he considered the violation written on August 5 to be S & S. First, he noted that there was a history of face ignitions at Respondent's Mine (see GX-14-17) and Respondent's 5-day spot inspection status due to methane liberation. He testified on August 5 there were two areas of impermissible coal accumulations, one in the 16 crosscut and the other in the No. 2 entry. Tr. 190. In addition, there were the following possible ignition sources present: hydraulic oil was leaking from the miner and running over the power cables of the miner; the miner was engaged in hard cutting (sandstone and sulfur balls) in the crosscut so there was the potential for sparks; and because of the abnormal tramming conditions²² in the crosscut, the loader or shuttle could damage the miner's power cable. Tr. 189-191. In summary, he concluded that it was highly likely that a face ignition could occur. Tr. 191. And because the miner had punched a small hole measuring 3 feet by 5 feet through into the No. 2 entry, there was no way to tell where the methane would travel. Tr. 176, 192. Unlike Inspector Boring, Newhouse testified that he believed there would be fatalities if there was an explosion or fire. Tr. 194. His rationale for so concluding was that an explosion would have put coal dust in suspension with a lot of fuel available for propagation. Tr. 194. Newhouse did not, however, overrule Boring as to the injury reasonably expected by the violation. Tr. 194.

In defense, Respondent presented the testimony of William Schifko, Donald Gruber, Lloyd Birt, Matthew Lee, Kenneth Haftman and John White. Schifko has been employed by Respondent for about 35 years. He started as an hourly employee (miner operator, roof bolter and general inside labor) and progressed to various positions in production, including longwall foreman and shift foreman. In the early 1990's, he assumed the position of compliance foreman and in about 2006, he became manager of safety. In about 2008 or 2009, he assumed the position of managing compliance issues for Respondent. Tr. 416-417. He has 39 plus years of mining experience and has a two-year degree in mining from Penn State University. Tr. 417. Part of his duties as compliance manager is reviewing citations and staying on top of new laws and regulations affecting the mining industry. He makes the decision on behalf of management as to whether a citation should be contested. Tr. 418.

Schifko became aware of the orders written by Inspector Boring after the fact and in his investigation of the situation, he spoke to various individuals to get a picture of what had occurred. He discovered that in the 16 crosscut, there was hard cutting²³ and a "big mud hole"

²² There were elevation changes in the 16 crosscut and Newhouse believed the production crews had difficulty with the miner being stuck so they had to do a lot of different things to mine in the crosscut. Tr. 219. Because of this Newhouse opined that the crew was using the shuttle to load coal from the miner instead of the loader. Tr. 171-172. The production report for August 4 (GX-12) shows that the continuous miner was stuck and there were "bad bottoms" with the consequence that there was limited mining on the two production shifts.

²³ Although many witnesses described the rock as sandstone, Schifko believed it was hard dark shale. Tr. 420.

causing a dip in the mine floor for about 25-30 feet. The result was that on August 3-5, there were several operational delays, including the miner being stuck on the mine floor. Tr. 419-421, 435. He estimated that the seam in the 16 crosscut was about nine feet, but six feet of it was rock. Tr. 420.

As to whether coal behind the miner was a hazard, Schifko denied that such was a hazard as long as “the job is in progress”. Tr. 423. He further explained that there should always be coal on the mine floor, until the mining cycle is done when there is a connection to the entry and a finished strapping through. Tr. 424. At that point, the loader will make a pass down both ribs for an initial cleanup and then scoops and shovels are used if needed. Tr. 424. Both the miner and loader will then be removed and the crosscut rock-dusted. Tr. 424.

Regarding the coal accumulation in the No. 2 entry, Schifko likewise testified that he did not believe this was a violation. When asked why not, he testified that Section Foreman Don Gruber told him there was only about two feet of coal, or one scoop-bucket.²⁴ Tr. 425. Schifko said he did not examine the coal material, but opined that most of it was rock given that six feet of the nine foot seam was rock.²⁵ Tr. 426-427.

Schifko did not deny the substance of or the number of his conversations with Newhouse regarding accumulations, but he did indicate that he disagrees with MSHA’s determination as to what constitutes a “reasonable amount”. Tr. 429, 443-447. He testified that the amount is “so minimal. I mean, it’s next to nothing.” Tr. 429. Schifko believes a reasonable amount is an amount that permits ventilation of the face and does not impede examination of the face. Tr. 429. Schifko does not believe there is any harm in pushing coal to the face because “[i]t’s not going to get up in suspension if there was a problem.” Tr. 430. To impede ventilation at the face, Schifko testified that in his opinion there would have to be a total blockage of the face. Tr. 448. Finally, Schifko noted that the only time Respondent does not leave coal material at the face is if the production crew is leaving an entry never to return. Tr. 430.

Schifko also testified briefly about the hydraulic oil that Respondent uses. He stated that no chemicals are used at Respondent unless they are approved by the environmental and safety groups. Tr. 432. The oil used in the continuous miner is Conoco Super Hydraulic Oil 68 that is rated as having a flashpoint of 320 degrees Fahrenheit. Tr. 432, 434.

²⁴ Although Gruber testified at the hearing, he only testified about the extent of the accumulation in the No. 2 entry, which he stated was two to two and a half feet high with “a lot of rock in there”. Tr. 278, 287. He did not testify about the length or the width of that accumulation or about the dimensions of the cited accumulation in the 16 crosscut. He did not view either accumulation as a hazard. Tr. 276, 279. Gruber also testified that the accumulation in the No.2 entry had been there for “[a] couple days”. Tr. 287.

²⁵ This estimate by Schifko seems at odds with Respondent’s own production records at GX-12. Those records, from July 22 to August 5, generally report clean coal compared with total coal mined to be at around 80 percent.

Lloyd Birt, the afternoon C-4 section foreman on August 5, also testified. Birt has 31 years of mining experience, and has been with Emerald for about eight years. He was certified as an assistant mine foreman in 1993. Tr. 302-303. Birt testified that when he arrived at the 16 crosscut on August 5, he found the miner in the crosscut with the loader behind it and the miner had just “holed through” into the No. 2 entry sometime before the end of the day shift. Tr. 307, 309. His testimony was that he observed the accumulation behind the miner which consisted of coal, rock and a little mud and the length of the accumulation exceeded the length of either a shuttle car or loader. Tr. 312, 331. He explained that it was not uncommon to find a buggy with coal on it at the start of a shift because of Respondent’s hot seat shift change policy. Tr. 313.

As to the oil on the miner, Birt testified that he did not see oil flowing out of the miner, but only saw a film of oil on the miner. Tr. 317. He admitted telling the inspectors that the crew was putting in 10-12 cans of oil per shift for 3 weeks. Tr. 318. Although he first denied reporting the oil leaks to management, he later admitted, on cross-examination, that he had been reporting the condition to management for 3 weeks, but nothing was done. His motivation for making the reports was to let management know about the large amount of oil being used and that continually refilling the miner with oil takes time from production. Tr. 320, 324. Birt confirmed that the miner was out of service on the afternoon shift from 5:05 PM to 11:30 PM to repair the oil leak. Tr. 340.

Finally, Birt testified that he knew there was coal material in the No. 2 entry but he could not speculate as to the dimensions since he did not measure the accumulation. Tr. 332. He did testify that the accumulation in the entry was probably there “a few days”. Tr. 335. He opined that when the day shift had holed through into the No. 2 entry, the miner likely kicked some coal into the entry from the crosscut. Tr. 334.

Matthew Lee, an electrician at Respondent, testified regarding the oil leak on the continuous miner.²⁶ His duties as an electrician include maintenance of outby equipment and handling electrical problems that section mechanics cannot solve. Tr. 350. On August 5, Lee was working on the afternoon shift and was called by maintenance foreman John White to report to the C-4 section as there was a work order on the continuous miner. Tr. 350-352. He and White traveled together to the section and they, along with section mechanic Kenneth Haftman, were to repair the miner. As they went down to the section, they encountered the inspectors coming out and the inspectors told White that there was an oil leak that needed fixed. Tr. 352-353, 365.

Lee testified that when he arrived at the miner it was not running and he observed only a light film of water with oil in it on top of the cover on the right side of the miner.²⁷ Tr. 354, 363.

²⁶ Lee, who has been employed by Respondent for 4 years, received his MSHA electrical card in 2004 and is certified in West Virginia as an electrician, foreman and shop fire. Tr. 348-349.

²⁷ Lee testified that he did not see any oil running down the side of the miner nor any oil pooled on the miner or the mine floor. Tr. 356.

When he and the others removed the covers of the miner, he observed “a couple oil drips like where the oil was dripping, but nothing where it was pouring or accumulating anywhere.” Tr. 355. The oil drips were from a filter housing and from one of the hundreds of hoses in the miner. Tr. 355-356. Lee testified that they (he, White and Haftman) serviced the miner by repairing any oil leaks they saw and then degreased and hosed off the entire miner. Tr. 357, 366. Lee was shown a copy of the Maintenance Foreman’s Shift Report for August 5²⁸ and testified that the work performed on the continuous miner was greasing the miner, tightening the JIC fitting that was loose, changing the O-ring fitting and tearing apart the O-ring as the O-ring was cracked, and tightening the middle drillers diversion valve and counter balance valve. Tr. 358-359, 372-373. Lee testified that the repair of the miner took five hours. Tr. 366. On cross-examination, Lee was asked if an oil leak would be consistent with a steady stream of hydraulic oil running down the side cover as described in Exhibit GX-1 and whether a cracked O-ring could have caused oil leaking and in both instances, Lee answered in the affirmative. Tr. 368-369, 371. Lee testified that the type of work done to repair the miner on August 5 is usually done when the miner is rebuilt. Tr. 360, 369-370. Finally, he testified that no one had reported any problems to him about the miner prior to August 5. Tr. 360.

Kenneth Haftman, the section mechanic on the August 5 afternoon shift, also testified.²⁹ On August 5, when Haftman arrived at the section, he was told by the inspectors that there were oil leaks that needed repaired on the miner. Tr. 384-385. He observed only a layer of water on top a layer of oil, but did not see any “puddling” or running of oil.³⁰ Tr. 385. Haftman testified that he, maintenance foreman White and mechanic Lee found a couple of oil drips, but nothing excessive. He testified that he took off the covers of the miner and replaced two O-ring fittings and tightened up two loose hoses. Tr. 387, 395. He testified that when the miner is cutting rock, there is a tendency for fittings to loosen up from vibration and that when the hydraulic oil gets hot, the oil will deteriorate the O-rings and the fitting will wear out. Tr. 387-388. Haftman further testified that section foreman Birt never reported to him that there was an oil leak on the miner, but if Birt had reported using 10-12 cans of hydraulic oil per shift, he would have reported it to the maintenance shop as such would have indicated an extensive oil leak. Tr. 393, 398-399.

John White, a continuous miner maintenance foreman, also testified on behalf of Respondent. White has worked for Respondent for about five years and has about 35 years of mining experience primarily in maintenance or mechanic positions. He has certifications from the Commonwealth of Pennsylvania as assistant foreman and mine electrician. Tr. 401-403. His duties as a maintenance foreman at Respondent include covering breakdowns on the mining

²⁸ This document was marked Exhibit D but was not introduced into evidence by Respondent.

²⁹ Haftman has been employed by Respondent for about 25 years and in 2010 was an underground mechanic. Tr. 377. He has 35 years of total mining experience in various positions. Tr. 377-378.

³⁰ The miner was idle and not running at this time. Tr. 384.

units, performing inspections, maintaining parts and supplies for repairs and directing a crew of 8-10 persons. Tr. 403.

White testified that he worked the second or afternoon shift on August 5. He received a call that a citation had been written by MSHA for an oil leak on the miner in the C-4 section and so he and outby mechanic Lee went to the section to assist the section mechanic. Tr. 404. When he arrived at the section, he started the miner up to check where the leak was, but he did not see a “whole lot of oil” or a steady stream of oil. Tr. 405, 406. He observed a lot of water in the area, and a lot of oil/water mixture with a film of oil floating on it. Tr. 405. He testified that when they took the covers off, they saw “a few oil drips here and there”. Tr. 405. The crew tightened up a couple fittings and repaired a leak at the cap on the filter housing by putting a new O-ring in it. Tr. 406. White testified that the only problem with the miner that was reported to him prior to August 5 was a leak in the drum extension jack³¹ and it was on the schedule to be fixed. Tr. 407.

After considering all of the evidence, I find that Respondent has violated 30 C.F.R. § 75.400, a mandatory safety standard under the Act, and this violation is S&S in nature. During the impact inspection, Inspector Boring found a coal accumulation in the No. 16 crosscut that was 2 to 18 inches deep for a distance of 38 feet,³² an oil accumulation on the continuous miner and a second coal accumulation in the No. 2 entry ranging 4 to 6 feet in depth, rib to rib, for a distance of 17 feet. His observations were confirmed by Supervisory Inspector Newhouse. Further, the two coal accumulations were intentionally created, even though Respondent clearly had notice that these types of accumulations were a violation of § 75.400. *See* JX-1, No. 16. Any one of these accumulations standing alone would have violated § 75.400. *See Emerald Coal Resources, LLP*, 33 FMSHRC 2776 (Nov. 2011) (ALJ) (accumulation of coal eight inches in center and up to 14 inches by the ribs caused by shuttle car traffic); *Consolidation Coal Company*, 33 FMSHRC 283, 291-295 (Jan. 2011) (ALJ) (uncorrected leaks of hydraulic oil on continuous miner) (*Cannelton Indus., Inc.*, 20 FMSHRC 726, 730 (July 1998) (Commission affirmed ALJ’s finding that coal material measuring 10 feet long, 10 feet wide and 4 feet deep was an unlawful accumulation).

Respondent argues that the coal accumulations were not violations of the standard, because mining was still in progress, the accumulations would have been cleaned up per its cleanup plan at the conclusion of the mining cycle, and the accumulations were mostly comprised of rock. I am not persuaded. As has been discussed with Respondent in the past, continued mining does not afford operators the right to allow accumulations of combustible materials to amass within the mine. Further, Newhouse testified to explaining to Schifko that only “reasonable amounts” of coal may be left for future cleanup. He credibly testified that he defined reasonable amount as the amount of coal that the miner is sitting on when it exits the

³¹ The drum extension jack pushes the cutter drums out to a full face width and retracts them back to move the miner from place to place. Tr. 407. This leak was not the cause of the incident set forth in the instant citation.

³² None of the Respondent witnesses disputed the measurements of the accumulation in the 16 crosscut.

entry or crosscut. When questioned on cross-examination by counsel for the Secretary about his conversations on accumulations with Supervisory Inspector Newhouse, Schiffko, an experienced witness, became argumentative and even belligerent. Tr. 442-447. When asked if he understood in April 2010 what MSHA's view of a reasonable amount was, Schiffko incredibly declaimed "No, I didn't. No, I don't understand that at all to this day." Tr. 444. Also, Boring and Newhouse credibly testified that the composition of the accumulations was mostly coal. Further, in contradiction to Schiffko and Respondent's other witnesses, Respondent's own production reports showed that about 80 percent of the material mined for weeks including on August 5 was clean coal. GX-12.

The reason for Respondent's recalcitrance to follow the MSHA allowed cleanup plan of a "reasonable amount" is found in the testimony of Schiffko wherein he asserted that such amount is "so minimal. I mean, it's next to nothing." Tr. 429. I draw from that testimony that Respondent is more interested in production than in cleaning up hazardous accumulations of coal and other combustible material. Respondent and its management is simply ignoring MSHA's strictures and allowing coal to accumulate at will and to be left for an indefinite period of time. It cannot hide behind the excuse of engaging in continued mining operations. It has long been held by the Commission and the courts that operators are not permitted a reasonable period of time to remove coal from the mine once it reaches an accumulation. *See Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990); *Black Beauty Coal Co. v. FMSHRC*, 703 F3d 553, 558-59. Once an accumulation of combustible material exists, it must be removed no matter where the operator is in its mining cycle. And the testimony of Birt and Gruber establishes that Respondent's malevolent policy on accumulations is being handed down to its production supervisors as they saw nothing wrong with the accumulations in the 16 crosscut or the No. 2 entry.

Respondent further argues that no oil accumulation existed on the miner, and its witnesses testified to such. However, Respondent's witnesses also eventually testified that there was oil dripping from a filter housing and from one of the hoses. They also stated that miner was out of service for more than 5 hours after the issuance of the Order. For a piece of equipment that was asserted to have no issues, its maintenance took a disproportionate amount of time. At best, Respondent's witnesses gave conflicting testimony. At worst, they often recanted their own statements at hearing. But ultimately all of the witnesses (Lee, Haftman and White) did admit to the repair of leaks and damaged O-rings. Further, Section Foreman Birt admitted that he had been putting 10-12 cans of oil in the miner for 3 weeks. Because of this, I afford much more credibility to testimony of the Secretary's witnesses regarding the oil leak.

Having concluded that a violation exists, I also find that the cited conditions contribute to the discrete safety hazard of an ignition and fire. Boring and Newhouse both credibly testified that the coal accumulations were extensive and although there was some rock, they mainly were coal that was not rock-dusted. Boring's contemporaneous notes described them as "loose coal and float coal dust." The accumulations were in the direct vicinity of coal mining activities, and Respondent was engaging in hard cutting in the 16 crosscut which could create sparks. Newhouse testified that the coal in the center of the No. 16 crosscut was being pulverized by traveling equipment, exacerbating the problem of float coal dust. Further, because wedge cuts are made by full face miners, coal pushed to the face impedes ventilation in the wedge. When

the accumulations are later cleaned up, the methane that has built up in the wedge is suddenly released. The oil leaking from the miner was in an area where lights and power cables were observed. When Boring touched the oil to ensure that it was not simply water, he testified that it was warm. Given the mining conditions at the time, as well as the cited hazards, I find that a discrete safety hazard of an ignition or fire existed.

The third and fourth factors of the *Mathies* test are also met. Should an ignition or fire occur, it would propagate in an area where mining activities are taking place. At the very least, it would endanger the miner operator, the scoop operator and the roof bolter operators. Should an ignition or fire occur, the likely injuries would be burns and/or smoke inhalation, both of which can result in anything from lost workdays or restricted duty type injuries or possible fatalities. This was highly likely given that there were several potential ignition sources, including mechanized equipment, lights and power cables and sparks occurring due to the cutting of sandstone. Although Newhouse disagreed with Boring's assessment of the injuries, I find no reason to alter Boring's assessment. Based on the mining conditions at the time that the Order was issued and the evidence that several miners would be working in close vicinity to the accumulations, I agree with the Secretary that it was highly likely that the hazards contributed to would result in injuries of a reasonably serious nature.

I further find that the violation was the result of Respondent's high negligence, and that this violation was an unwarrantable failure to comply with a mandatory safety standard. According to Boring and Newhouse, both accumulations had existed for more than a shift, and in the case of the accumulation in the No. 2 entry, for several shifts. Newhouse testified that MSHA had discussed the issue of large coal accumulations with Respondent several times in the past, probably as many as 30 times. Emerald had also received citations and orders concerning this particular activity prior to the instant Order. Even though it had prior warning, including the issuance of at least four other citations or orders, Respondent continues to encourage the very activity that it has been cited for in the past. All of the evidence and history tends to show that regardless of the number of warnings received from MSHA, Respondent continues to essentially ignore the standard and, instead, substitute its own judgment for the clean up, or lack thereof, of accumulations, as indicated by Schifko in his testimony. Concerning the oil leaking from the miner, Birt admitted telling the inspectors that the condition had existed for 3 weeks. Although he first denied reporting the leak, he later admitted that it had been reported when the condition was first brought to Birt's attention, but Respondent had done nothing. Respondent's actions constitute at least "indifference," if not "intentional misconduct." Considering all of the factors, and noting particularly the high degree of danger, the notice Respondent had that greater efforts were necessary for compliance and the extensiveness of the violative conditions, I find that Respondent's conduct was "aggravated" and constituted an unwarrantable failure.³³

Based on the foregoing, I find that Respondent violated 30 C.F.R. § 75.400, and this violation was S&S in nature and the result of Respondent's unwarrantable failure to comply with a mandatory standard.

³³ I also note that the undisputed evidence shows that Respondent knew the oil leaks had existed for three weeks and the accumulation in the No. 2 entry had been there for at least a couple days.

B. Order No. 8007974

On August 5, Inspector Boring also wrote Order No. 8007974 (GX-2) citing a Section 104(d)(2) violation of 30 C.F.R. § 75.360(b)(3) stating:

The preshift examination conducted on August 5, 2010, for the 16:01 shift in the C-4 Section (MMU 029-0) was not adequate. The hazard that is depicted in Order #8007973 was not recorded in the preshift exam record book located on the surface. This exposes miners entering the section to unknown hazards, which constitutes more than ordinary negligence. The violation is an unwarrantable failure of an operator to comply with a mandatory standard. This order will not be terminated until mine management reviews the requirements of 30 CFR 75.360 with all certified persons at this mine.

This Order was designated as S & S as the alleged failure was highly likely to cause injuries that would result in lost workdays or restricted duties to four miners. The inspector evaluated the operator's negligence as high and a penalty of \$32,800.00 was assessed. As with the earlier order discussed herein, Boring cited Order No. 7065170 dated April 12, 2010, as the predicate order for the Section 104(d)(2) violation herein.

The Order was terminated on August 9 after the operator had reviewed the requirements of 30 CFR §.75.360 with all certified persons at the mine.

30 CFR § 75.360 is entitled "Preshift examination" and (b)(3) of that section provides:

The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

...

(3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

Boring testified that he wrote the order on the preshift examination because the conditions that he and Newhouse found at the beginning of the second shift were not noted on the preshift report. Tr. 80. That report, at GX-6³⁴, shows "None" under both violations observed and reported and under dangers and hazardous conditions noted. The report was signed by Don Gruber with the time of exam noted from 1 to 2 PM. Lloyd Birt received the report at 2:45 PM.

³⁴ GX-6 contains a number of preshift reports from July 22 to August 5. The pertinent report that Boring relied upon to write the violation has a large "70" on it and is the next to the last page of the exhibit.

Tr. 83, GX-6. In Boring's opinion, the 38 feet of coal material found behind the miner in the 16 crosscut would have taken "probably close to a shift ... to accumulate". Tr 84-85. As to the oil leak in the miner, that had existed for a while, according to Section Foreman Birt. Boring also concluded that the accumulation at the face in Entry No. 2 had been there for some time as the production crew had moved out of there and the coal that had been pushed to the face was dry.³⁵ Tr. 85. Supervisory Inspector Newhouse also believed that he accumulations behind the miner in the 16 crosscut existed for more than one shift based on his observations and a review of the production reports. Tr. 219.

Boring testified that the purpose of a preshift examination is "[t]o check for hazards and dangers and to make sure that miners entering the section, that it's safe for them to come into the section." And in his opinion, there was not an adequate preshift because it failed to list the violative conditions found by the inspection. Tr. 87. Boring further testified that he assessed the violation as highly likely to cause an injury where the injury would cause lost workdays or restricted duty because the accumulations were in the vicinity where mining was taking place and there were power cables and area lights present. Tr. 86-87. He assessed the operator's negligence as "high" because the oil leak on the miner had existed for 3 weeks which shows aggravated conduct and high negligence. Tr. 87-88.³⁶

Donald Gruber, the section foreman on the dayshift on August 5, testified on behalf of Respondent. Gruber has been employed by Respondent for about 6 years, and has about 28 years of mining experience. Tr. 251-252. He received a mine examiner's certification from the Commonwealth of Pennsylvania in 1980, and also is certified as an assistant mine foreman and as an EMT. Tr. 252. At the time of the hearing, Gruber occupied the position of outby foreman. Tr. 253.

Gruber testified that his duties as a section foreman was to make gas checks, insure air flow through the last open crosscut and in the return, check the continuous miner for water pressure and other parameters and to make sure the other crew members are performing their duties. A crew usually has 13 persons in it. Tr. 253

Gruber testified that upon starting a shift he performed an onshift exam and that on August 5 this exam disclosed no hazardous conditions or violations. Tr. 255, 257, GX-7, page 3, RX-L, page 3. He also testified that he performed a preshift exam before ending his shift and that on August 5 this exam was performed between 1:00 and 2:00 PM. Tr. 255, 259-261, GX-6 and RX-K (page marked "70"). Gruber stated that he did not observe any hazards or dangerous conditions during this examination. Tr. 261. He did not detect any methane and the airflow was "good." Tr. 261. He did not remember seeing an accumulation behind the miner but if there was coal behind the miner that was part of the mining cycle. Tr.275-276. He did not view the coal behind the miner as a danger as the afternoon shift would have cleaned it up. Tr. 294.

³⁵ Freshly mined coal is wet or damp to the touch. Tr. 86.

³⁶ With respect to the oil leak and the testimony regarding it, none of the preshift reports between July 22 and August 5 identify the oil leak on the miner as being a hazard. GX-6.

Gruber testified that his crew was mining in the 16 crosscut on August 5 and that the conditions in the crosscut were not good. He pointed out that on August 4, the miner had been stuck for a few shifts, there was a bad bottom,³⁷ and they were cutting sandstone. Tr. 263. Production reports admitted into evidence show that on August 4, only four feet of coal was mined due to various conditions. Tr. 264-267, GX-12, RX-F. On August 5, the crew was able to mine 31 feet, but the production report showed continued difficulty with keeping the miner level due to the bottom (the right side of the miner had to be blocked), hard cutting, only using one shuttle car and the miner out of oil. Tr. 268-269, RX-F, page 18. At the end of the dayshift on August 5, Gruber testified that the crew had just “holed through” into the No. 2 entry. Tr. 270.

Gruber testified that the mining cycle consists of the miner moving forward to mine coal and every four feet the roof is strapped with two roof bolts. The coal is being dumped behind the miner where it is loaded up and dumped into a shuttle car to be taken out of the mine. Tr. 269-270. Respondent utilizes a “hot seat” practice so that miners continue working until they are relieved by the next shift. Tr. 254.

Based on the foregoing evidence, I find that Respondent violated 30 C.F.R. § 75.360(b)(3), and the violation was S&S in nature. In pertinent part, 30 C.F.R. § 75.360(b)(3) requires the operator to examine working areas and areas where mechanized equipment will be installed or removed for any hazardous conditions. Accumulations of combustible materials certainly fall within the category of hazardous conditions. *See Enlow Fork Mining Company*, 19 FMSHRC 5, 14 (Jan. 1997)(citing S. Rep. No. 411, 91st Cong., 1st Sess., Ess. 65 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975)). The testimony at hearing revealed that three separate accumulations existed in the Mine at the time of the inspection. The two coal accumulations were large enough that it was the opinion of Inspectors Boring and Newhouse that they had to have existed for more than one shift. Further, Respondent’s own witness admits that the miner had been leaking oil for three weeks without repair. Given these facts, the accumulations should have been noted during the preshift examination. However, they were not. In light of this, I find that a violation of 30 C.F.R. § 75.360(b)(3) existed.

This violation contributed to the hazard of the occurrence of an ignition or fire within the subject area. Since the accumulations were not listed in the preshift examination report, miners entering the working area would have no idea that hazardous conditions existed and would likely take no additional precautions. As stated above, the coal in the No. 16 crosscut was being pulverized by mechanized equipment, and methane was likely trapped in the wedge where the coal in the No. 2 entry had been pushed to the face. Further, the hydraulic oil was leaking down over the electrical components of the continuous miner. Any or all of these could have resulted in the propagation of a fire had a spark been emitted or enough heat generated, which would likely result in injuries or death due to smoke inhalation or burns.

³⁷ Because of the bad bottom, the miner sunk into the mine floor as the bottom was clay and water, making for a messy condition. Tr. 263-264.

I also find that the violative condition was the result of Respondent's high negligence and was an unwarrantable failure to comply with a mandatory standard. The accumulations of coal were extensive and obvious; however, Respondent failed to report them as hazardous conditions. Further, Respondent was already on notice that MSHA considered the accumulations to be a serious issue, as Newhouse had discussed them with Respondent's agents numerous times in the past. The miner's leak had begun 3 weeks earlier, and had been reported to management by Birt. Yet, Respondent felt no need to either correct the condition or report it to higher management and the miners entering for their shift. This shows, at the very least, a serious lack of care for the safety of its employees.

Based on the above testimony and evidence, I find that Respondent violated 30 C.F.R. § 75.360(b)(3). I further find that this violation was S&S in nature and was the result of Respondent's unwarrantable failure to comply with a mandatory standard for the reasons discussed with respect to the previous order.

C. Impact of Previous Decision on these Orders

Respondent argues that these violations can only be found to be orders issued under Section 104(d)(2) if at least one of the orders in JX-1, No. 16 is upheld. In Docket No. PENN 2010-647, in a Decision issued on April 29, 2013, I upheld Order Nos. 7065170 and 7065171, issued under Section 104(d)(1) of the Act. Respondent filed for discretionary review with the Commission. While the Commission agreed to take review of a separate citation included in the same docket, it refused review of both of these orders. As such, my decision in PENN 2010-647 with respect to those Orders became the final decision of the Commission 40 days after its issuance. Given this fact, there has been no intervening clean inspection, and the issuance of the orders herein under Section 104(d)(2) of the Act is appropriate.

III. THE APPROPRIATE CIVIL PENALTIES

As previously noted herein, the Secretary seeks penalties for Order No. 8007973 and Order No. 8007974 of \$41,500.00 and \$32,800.00, respectively. Both of these penalties were assessed pursuant to the Secretary's special assessment process as permitted by Regulation. See 30 CFR § 100.5(a). The general procedures the Secretary utilizes for his special assessments can be found at <http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf>.³⁸ If the regular assessment process under § 100.3 had been utilized, the penalties would have been \$8,421.00 (based on 114 penalty points) and \$6,624.00 (based on 111 penalty points), respectively. The Secretary's special assessment added 20 more points (5 for negligence, 5 for likelihood of occurrence, 5 for severity of injury, 3 for unwarrantable failure and 2 for number of persons affected) to each of the orders in dispute resulting in substantially increased penalties.³⁹

³⁸ This procedure is also set forth as Exhibit A in the Secretary's post-hearing brief.

³⁹ See Secretary's post-hearing brief, pages 50-51 and Respondent's post-hearing brief, page 55.

In his post-hearing brief, counsel for the Secretary asserts that the Secretary has broad discretion to devise a scheme implementing the Act's civil penalty guidelines, relying on *Coal Employment Project v. Dole*, 889 F.2d 1127, 1129 (D.C. Cir. 1989). In exercising that discretion, the Regulations at 30 CFR § 100.5(a) provide that the regular assessment process may be waived when there is a determination that "conditions warrant a special assessment." Counsel further asserts that the decision to waive the regular assessment was "eminently reasonable" considering the facts herein, particularly the fact that Respondent "had been on notice for a lengthy period of time that accumulations were a problem at this mine and needed to be corrected."

Respondent's counsel contends in his post-hearing brief that there is no justification for the special assessments levied on the two orders herein. While noting that the Commission and its judges determine the appropriate penalties and are not bound by the Secretary's reasoning in assessing penalties, counsel argues that the Secretary has not satisfied his burden of showing why the orders herein were specially assessed as the Secretary has not shown any additional facts beyond what would be considered in a regular assessment.

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:

[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In the recent case of *American Coal Company*, LAKE 2011-183 et al, 2013 WL 3865347 (June 2013)(ALJ), Judge Zielinski made clear that whether or not the Secretary proposes a regularly or specially assessed penalty is not relevant to the Commission's determination of a penalty amount. Rather the Commission and its judges must apply the criteria set forth in Section 110(i) of the Act.

In *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012), the Commission reaffirmed that:

[u]nder this clear statutory language, the Commission alone is responsible for assessing final penalties. See *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties

. . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”) While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Also to be considered in assessing penalties is the deterrent purposes of the statutory penalty scheme under the Mine Act. The legislative history of the Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Act to induce compliance with the health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates. *See, Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865 (Aug. 2012); *Sellersburg Stone*, 5 FMSHRC at 294. Federal courts have also acknowledged and approved of the deterrent effect of penalties. *See, Nat’l Independent Coal Operators’ Ass’n*, 423 U.S. 388, 401 (1976). The D. C. Circuit concluded, that after reviewing the legislative history, that “Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations.” *Coal Employment Project v. Dole*, 889 F2d 1127, 1133 (D.C. Cir. 1989). That Court also found that to properly deter future violations, the penalty must “be of an amount which is sufficient to make it more economical for an operator to comply with the Act’s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.” *Coal Employment Project*, at 1132.

a. The Operator’s History of Past Violations.

As set forth above, the parties stipulated that Respondent had 301 assessed violations over the course of 1,260 inspection days during the 15-month period (May 5, 2009, through August 4, 2010) preceding the issuance of the Orders in dispute. JX-1, Stipulation 13. Of the

301 violations, 27 were for hazardous accumulations under § 75.400.⁴⁰ Two additional violations of § 75.400 have been found to be violations in decisions issued by Judge Andrews in PENN 2009-697 and by myself in PENN 2010-647 and both are pending review by the Commission pursuant to Respondent's requests for discretionary review. Both of these dockets involved the same type of activity, i.e. Respondent's practice of pushing coal to the face until it could be later cleaned up as part of the mining cycle, as occurred herein. Further, *Emerald Coal Resources, LP*, 33 FMSHRC 2776 (Nov. 2011) involved facts that are analogous to the pattern of the coal accumulation in the 16 crosscut herein. In that case Judge Barbour found that a similar accumulation on the shuttle car roadway was S & S and an unwarrantable failure to comply with a mandatory standard.⁴¹

Respondent therefore has an extensive history in its violations of § 75.400, apart from my findings herein regarding Order No. 8007973. I shall consider this factor to be of considerable significance.

b. Appropriateness of the Penalty to the Size of the Operator's Business.

As set forth in 30 CFR § 100.3(b), this factor requires consideration of "both the size of the mine cited and the size of the mine's controlling entity." Respondent's controlling entity is Alpha Natural Resources, Inc., which in 2009 produced over 10 million tons of coal. More than half of that amount, or 5,558,640 tons of coal, was produced at the mine involved herein. JX-1, Stipulation 12. Accordingly, I find that the Respondent is the operator of a large mine and that the penalties found herein are appropriate to this operator's size.

c. The Operator's Negligence.

Respondent's level of negligence has been found herein to be "high" with respect to both Orders. There can be little dispute that Respondent and its Compliance Manager Schifko knew MSHA's view about its continuing practice of pushing large quantities of coal to the face that impeded inspection and ventilation. Further, this large quantity of coal at the face has the potential to trap methane in the wedge cut made by the continuous miner. Nevertheless, the Respondent has continued its practice despite MSHA's repeated efforts to obtain its compliance. Its reason for continuing this practice is simply its fundamental disagreement with MSHA regarding the safety of the practice. Finally, Respondent's supervisors who perform on-shift and pre-shift examinations have apparently not been advised by Respondent's management of MSHA's policy regarding clean-up of accumulations of coal even though Respondent's management knew that MSHA considered these accumulations to be violative.

⁴⁰ Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission are included in an operator's history of previous violations. See 30 CFR § 100.3(c).

⁴¹ Respondent's request for discretionary review was denied by the Commission.

It is also significant that Respondent's negligence regarding accumulations of the same type as involved herein is ongoing and has been the subject of repeated litigation. And to date, Respondent has not prevailed in its arguments.

d. Effect on the Operator's Ability to Continue in Business.

The parties have stipulated that the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. JX-1, Stipulation 11. Although I have substantially increased the penalty beyond that sought by the Secretary for Order No. 8007973, I find that this increase will not have an affect on the operator's ability to continue in business. My basis for so concluding is the size of Respondent's business and the large amount of coal it continues to mine.⁴²

e. The Gravity of the Violation.

As noted above, I find that the violations herein are S & S as well as unwarrantable failures to comply with mandatory standards. It has long been accepted that § 75.400 is violated "when an accumulation of combustible materials exists". *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) Such a violation exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980).

Here, there were three distinct accumulations (two coal and the third hydraulic oil) present in a gassy mine with a history of face ignitions (GX-14-17) with multiple ignition sources. And in the judgment of MSHA's inspector and supervisory inspector, possessing a combined total of 60 years of mining experience, such was highly likely to propagate a fire or an explosion which would cause serious injuries or fatalities.⁴³ This record herein presents a grave situation affecting the safety of miners which Respondent's agents failed to remedy or even report on the pre-shift examination.⁴⁴

⁴² In 2010, 2011 and 2012, the Respondent mined in excess of 4, 900,000 tons, 3,710,000 tons and 4, 380,000 tons of coal, respectively, according to MSHA's Mine Data Retrieval System.

⁴³ Violations can be established by the credible testimony of experienced inspectors. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1270, 1290 (Dec. 1998); *Emerald Coal Resources*, 33 FMSHRC at 2784.

⁴⁴ The record herein also cast some doubt on the adequacy of Respondent's pre-shift reports in general. Section foreman Birt testified that he had been putting 10-12 cans of oil in the continuous miner for three weeks before the inspection on August 5 (Tr. 318), yet this condition was not noted on any pre-shift report by him or others (GX-6).

f. Demonstrating Good Faith in Abating the Violation.

Respondent abated the violative conduct in less than 24 hours after the Orders were issued which shut down the C-4 section.⁴⁵ It first repaired the oil leak in the continuous miner which took approximately 5 hours and then turned its attention to the other accumulations in the 16 crosscut and the No. 2 entry. Although there is scant evidence in the record about the clean-up of these accumulations, the length of time involved shows the large amount of coal involved. I consider this to be a neutral factor.

Applying the above findings, I agree with the Secretary that Respondent's violations herein should not be assessed using the regular assessment process set forth in 30 CFR § 100.3. Although the special assessment process can result in variable amounts of penalty that can be set by adding or subtracting 25 percent from the Special Assessment Penalty Adjustments, it is not a transparent process that can be easily understood. As previously noted, the Secretary's special assessment added 20 more points (5 for negligence, 5 for likelihood of occurrence, 5 for severity of injury, 3 for unwarrantable failure and 2 for number of persons affected) to each of the orders in dispute. *See* Secretary's post-hearing brief, pages 50-51. I find, given the circumstances herein, that the Secretary was warranted in assessing additional points given the egregious nature of Respondent's violations and its continued refusal to adhere to MSHA's requirements on accumulations or to report accumulation hazards as part of its pre-shift examinations. By so doing, it has exposed its miners to ongoing and continuous hazardous working conditions. This conduct clearly contravenes the purposes of the Mine Act. As set forth in Section 2(a) of the Act "the **first priority** and concern of all in the coal ... industry **must be the health and safety of its most precious resource – the miner.**" 30 U.S.C. § 801 (emphasis supplied). In my view, Respondent has failed in this purpose.

Notwithstanding the Secretary's special assessment, I find that the appropriate penalty for Order No. 8007973 is \$90,000.00. For Order No. 8007974, I find that the appropriate penalty is \$40,000.00. In considering the Act's Section 110(i) criteria, I give the most weight to Respondent's history of past violations, its continuing and ongoing high negligence and the gravity of the violations. But, as noted above, I have considered all six criteria. I am increasing the penalties beyond what the Secretary seeks because Respondent is a recidivist operator that has chosen to ignore MSHA's §75.400 standard, i.e. large amounts of coal and other combustible materials cannot be left accumulate and stockpile in the mine until Respondent wishes to remove the accumulations. Also, its failure to report such violative accumulations and conditions on its pre-shift examinations exposes miners to unknown hazards. Respondent must be deterred before a tragic accident occurs.

⁴⁵ The abatement of the pre-shift examination order did not occur until August 9 after the requirements of § 75.360 were reviewed with all certified persons.

IV. ORDER

It is **ORDERED** that Order Nos. 8007973 and 8007974 are **AFFIRMED** as written, with only modifications to the penalties as stated above. It is further **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of \$130,000.00 within 30 days of the date of this Decision.⁴⁶ Upon receipt of payment, this case is hereby **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 16, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1825
Petitioner,	:	A.C. No. 46-08436-150504
	:	
v.	:	
	:	Mine: Upper Big Branch-South
PERFORMANCE COAL COMPANY,	:	
Respondent.	:	Mine ID: 46-08436
	:	

DECISION ON REMAND

Before: Judge David F. Barbour

This case is before the court on remand. On November 22, 2010, the court issued a decision assessing a penalty of \$4,329 for the violation of 30 C.F.R. § 75.400 alleged in Citation No. 7279729.¹ 32 FMSHRC 1797, 1808 (Nov. 2010) (ALJ). On December 22, 2010, the Secretary filed a petition seeking review of the decision. The Secretary noted that the \$4,329 penalty was lower than the \$34,653 penalty proposed by the Secretary in his post-hearing brief. The Secretary argued that the court erred by failing to adequately explain the reduction. On December 28, 2010, the Commission granted the Secretary’s petition. Direction for Review.

In its decision on review the Commission noted that while the court made findings with respect to each of the statutory penalty criteria set forth in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), it did not directly address the arguments in the Secretary’s post-hearing brief regarding the negligence of the operator, the number of persons affected by the violation and the effect of these factors on the penalty assessed for the violation.² 35 FMSHRC __ (Aug. 2, 2013),

¹ The other three violations at issue in Docket No. WEVA 2008-1825 were settled prior to hearing, and on November 23, 2009, the court issued a decision approving the partial settlement. *Performance Coal Company*, Decision Approving Partial Settlement (November 23, 2009).

² The company did not reply to the Secretary’s post-hearing brief.

slip op. 3. The Commission observed that although neither the Commission nor its administrative law judges are bound by the Secretary's proposed penalties (slip op. 2 (*citations omitted*)), the Commission requires its judges to explain in light of the statutory civil penalty criteria any substantial deviation from the Secretary's penalty proposals. *Id.* 3 (*citations omitted*). The Commission remanded the case and instructed the court to "expressly address the Secretary's argument [made in the Secretary's post-hearing brief] in favor of the increased proposed penalty."³ *Id.* 3.

In its initial decision, the court described the circumstances giving rise to the proceeding. Mine Safety and Health Administration ("MSHA") Inspector, Keith Sigmon, conducted an inspection of Performance Coal Company's ("Performance's") Upper Big Branch-South mine on February 11, 2008. During the inspection Sigmon issued Citation No. 7279729 for a violation of 30 C.F.R. § 75.400, which prohibits the accumulation of coal dust, including float coal dust, in active workings and on electrical equipment. Sigmon observed accumulations of float coal dust inside and on top of the No. 1 North Main belt conveyor power center and on the mine floor, roof, and ribs in the cross cut where the power center was located. Gov't Ex. 3. Performance contested the citation and the matter was heard in Beckley, West Virginia.

Inspector Sigmon noted on the citation that one person was likely to be affected by the violation. Gov't Ex. 3. This person was the fire boss who had to travel to and examine the cited area and equipment. Tr. 52-53. Sigmon also testified that there was a maintenance person who worked on the belt at night and that there were six persons who were working on the belt during the day he cited the accumulation. *Id.* His testimony implied that anywhere from one to six miners could be affected at any point in time by a fire or explosion caused by the accumulated float coal dust. Inspector Sigmon believed that such an accident was reasonably likely to result in a fatal injury or injuries and that the operator's negligence was moderate. Tr. 52, 54; Gov't Ex. 3.

³ As the court understands it, the purpose of a party's post-hearing brief is to present arguments, to cite points and authorities and to identify evidence supporting positions alleged by a party in its pleadings. The court does not understand a brief to be a vehicle to modify a party's pleadings. In the court's view, if the Secretary wished to amend the citation at issue to allege a higher level of negligence and/or additional persons affected, or if he wished to amend his civil penalty petition to propose a higher penalty, the Secretary should have moved to do so. In directing me to expressly address arguments raised for the first time in the Secretary's post-hearing brief the Commission appears to have treated the brief as a motion to amend and to have implicitly granted the motion. The Secretary is advised that the court views the Commission's action as *sui generis*, a view that may well be shared by the Commission, and not as a precedent the court must necessarily follow. *See* slip op. 3 n. 1.

The court found that Inspector Sigmon reasonably exercised his judgment in citing the company for a violation of Section 75.400 and that his testimony established the violation. 32 FMSHRC at 1804-1805. The court credited Sigmon's description of the existence of black, dry, float coal dust both on and inside the power center, on the catheads at the power center, and in the crosscut. Tr. 19-21, 51, 84; 32 FMSHRC at 1805. The court also credited Sigmon's contention that the float coal dust ranged in depth from "paper thin" to one eighth inch or more and that the float coal dust easily could be put into suspension. Tr. 21-23; 32 FMSHRC at 1805.

The court held that the violation was a significant and substantial contribution to a mine safety hazard ("S&S"). The court concluded that there was a "confluence of factors" that made an injury producing fire and/or explosion reasonably likely. 32 FMSHRC at 1806. The court agreed with Sigmon that the float coal dust was dangerous and contributed to a distinct safety hazard, specifically that the accumulation served as the fuel source for a fire and/or as the propagator of an explosion. *Id.* at 1805. The court noted that both Inspector Sigmon and MSHA Supervisory Engineer Larry Cook, who in addition to Sigmon testified for the Secretary, believed arcs or sparks could serve as an ignition source. The court found Cook's testimony that arcs or sparks occurred each time the circuit breaker tripped to be particularly telling. *Id.* at 1806. The court further found that the violation was serious and that it was likely to result in grave injuries up to and including a fatality or fatalities. *Id.* at 1807. The Commission did not disturb the court's findings regarding the fact of violation and the inspector's S&S findings.

With regard to the company's negligence, the court concluded that Performance did not meet the standard of care required by the circumstances. 32 FMSHRC at 1808. The court found that the evidence established the company was aware there was a problem with float coal dust at and around the power center, but that the steps it took to alleviate the problem – rock dusting the area on a regular basis and placing curtains across the holes in a stopping near the power center to inhibit the passage of dust – were inadequate. *Id.* at 1807-08. The court concluded the company "should have taken more aggressive steps to make sure that [the cited area] was kept clean." *Id.* at 1808. Like the court's findings as to the existence of the violation and its S&S nature, the court's negligence findings were not disturbed by the Commission on review.

In his post-hearing brief to the court the Secretary recognized that if a violation was found, the court had to assess a penalty *de novo* based upon the six penalty criteria set forth in Section 110(i) of the Mine Act and on the record of the proceeding. Sec. Br. 20. Nonetheless, the Secretary stated that the original proposed penalty of \$4,329 was predicated in part upon the inspector's finding that the violation was the result of Performance's moderate negligence and his finding that one person was affected. Sec's Br. 20-21. (Based on these findings and the

criteria in 30 C.F.R. § 100.3, MSHA calculated 107 penalty points and proposed a penalty of \$4,329.00. *Id.* at 21.) The Secretary contended that the evidence at hearing demonstrated that the Respondent's negligence was more properly characterized as high and that seven persons rather than one were potentially affected by the violation. *Id.* at 21. As a result, the Secretary recalculated the penalty points at 133 and asserted that the court should assess a penalty of \$34,653, over eight times the initial proposed penalty. *Id.*

The court declined to assess the much higher penalty. Rather, given the serious nature of the violation, the moderate negligence of the company and the other civil penalty criteria, it found the Secretary's original (and only [4]) penalty "proposal [to be] appropriate." 32 FMSHRC at 1808. The court still believes this to be true. First, the court found, and it continues to find, that the company's negligence was properly characterized as "moderate." 32 FMSHRC at 1807-1808. No part of the record highlighted by the Secretary in his brief persuades the court to reconsider. While the court concluded the company knew there was a problem with float coal dust in the area and while Performance should have taken more aggressive steps to keep the cited area clean (32 FMSHRC at 1808), the court found that mitigating factors existed. Specifically, the company placed curtains across the holes in the stoppings near the power center to reduce the amount of coal dust entering the power center and the company rock dusted the area on a regular, albeit too infrequent, basis. In short, although its efforts were inadequate, the company attempted to address the problem.

Second, the court noted, and it continues to note, that the parties agreed that the primary location of the float coal dust and its possible ignition source, the power center, was in an area where miners only occasionally worked and traveled. 32 FMSHRC at 1807 (*citing* Stip 8). Sigmon's testimony established that the miner most subjected to danger and therefore his primary concern was the fire boss who would "be examining that area." Tr. 53. This was the person he had in mind when he issued the citation and indicated one person was reasonably likely to be affected. *Id.* As previously noted, Sigmon also spoke of a "maintenance person" who might be present on the midnight shift and six miners whom he observed working on the one south main belt the day he issued the citation. Tr. 52-53. Sigmon was focused on the hazard the violation posed to the fire boss, but his testimony also implied that at any point in time up to six miners might be affected. The Secretary failed to show that more than six miners might be affected by a fire and/or explosion in the cited entry in that the Secretary failed to provide evidence that the fire boss or maintenance person would be in the area at the same time as the six

⁴ As noted, the Secretary never moved to amend her pleadings to propose a different penalty.

miners. Thus, the record establishes that depending on when the feared fire or explosion occurred it was reasonably likely to affect one person or up to six persons.⁵ This stated, there is no gainsaying the fact that, as the court found, the violation was serious. 32 FMSHRC at 1807. It appeared to the court at the time, and it continues to appear to the court, that a serious violation with the potential to affect the one to six miners as identified by Sigmon (32 FMSHRC at 1802, 1803), that was caused by the company's moderate negligence (32 FMSHRC at 1808) and that was cited under section 104(a) of the Act warranted and continues to warrant a penalty of \$4,329.⁶

ORDER

Within 40 days of the date of this decision, Performance **IS ORDERED** to pay a civil penalty of \$4,329 for the violation of Section 75.400 set forth in Citation No. 7279729.⁷ Upon payment of the penalty, this proceeding **IS DISMISSED**.

/s/ David F. Barbour

David F. Barbour

Administrative Law Judge

⁵ In concluding a civil penalty of \$4,329 was appropriate the court, like Sigmon, focused on the danger to the fire boss, while recognizing that up to any point in time up to six miners could be in the area. The court used the adjective "numerous" to describe the miners. 32 FMSHRC at 1802. The court weighed negligence and the associated mitigating factors more heavily than it weighed the number of persons affected.

⁶ Interestingly, the Secretary did not choose to offer as an exhibit a certified copy of Performance's prior history of violations. Rather, he relied on the parties' stipulation regarding the total number of violations assessed in the 15 months immediately preceding February 11, 2008. Stip. 7; Sec. Br. 20. The court observes that a copy of the history might have afforded the court and the Commission with helpful comparative assessments.

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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 19, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-362-D
on behalf of REUBEN SHEMWELL,	:	MADI CD 2013-01
Complainant,	:	
	:	
	:	
	:	
v.	:	
	:	
	:	
ARMSTRONG COAL COMPANY, INC. &	:	Parkway Mine Surface Facilities
ARMSTRONG FABRICATORS, INC.,	:	Mine ID 15-19356
Respondents	:	

ORDER DENYING JOINT MOTION TO APPROVE SETTLEMENT
DECISION ON CIVIL PENALTY
AND
SUPPLEMENTAL DECISION ON RELIEF

Appearances: Matt S. Shepherd, Esq., Mary Beth Zamer, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Tony Oppeward, Esq., Lexington, Kentucky, for Reuben Shemwell; Mason L. Miller, Esq., Adam K. Spease, Esq., Miller Wells, PLLC, Louisville, Kentucky, for Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.; and Daniel Z. Zaluski, Esq., Madisonville, Kentucky, for Armstrong Coal Company, Inc.

Before: Judge Feldman

This matter is before me based upon a discrimination complaint brought by the Secretary of Labor (“the Secretary”) on behalf of Reuben Shemwell (“Shemwell”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”). 30 U.S.C. § 815(c)(2). This matter presents the novel question of whether a suit brought by Armstrong Coal Company and/or Armstrong Fabricators (collectively referred to as “Armstrong”) under Kentucky state tort law for misuse of a Commission proceeding initiated

by a complaint filed pursuant to section 105(c)(1) of the Act¹ is immune from Mine Act liability based on an assertion of a First Amendment right to petition.

An interim Decision on Liability issued on June 19, 2013, determined that Armstrong's Kentucky civil suit brought in Muhlenberg County is: contrary to federal law in that it is both preempted, and baseless and retaliatory; contrary to Kentucky state law which requires a final decision on the merits in the discrimination proceeding Armstrong alleges has been misused; contrary to the provisions of sections 105(c)(1) and 506(a) of the Mine Act that prohibit interference with the exercise of a miner's protected statutory right through use of conflicting state laws, 30 U.S.C. §§ 815(c)(1), 955(a); and contrary to legislative intent that seeks to promote and encourage miner participation in safety-related matters. 35 FMSHRC ___, slip op. (June 19, 2013) (ALJ). Consequently, the Decision on Liability was accompanied by a Cease and Desist Order requiring Armstrong to withdraw its civil suit.

The interim Decision on Liability noted that it “[shall] not become final until a Decision on Civil Penalty and Supplemental Decision on Relief is issued.”² *Id.*, slip op. at 23 (emphasis in original). The interim decision provided the parties with the opportunity to file a Joint Stipulation on Relief, on or before August 23, 2013. The interim decision noted that “[any] agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.” *Id.*

¹ Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

² On July 19, 2013, Armstrong Coal Company and Armstrong Fabricators filed a Joint Petition for Discretionary Review. The Commission denied the joint petition on July 26, 2013, citing section 113(d) of the Mine Act that only allows for review of final decisions. 30 U.S.C. § 823(d). The Commission noted that the judge retains jurisdiction in this matter until a final Decision on Civil Penalty and Supplemental Decision on Relief is issued, at which time the decision is appealable. *Order Denying Petition for Discretionary Review*, slip op. at 2 (July 26, 2013).

I. Settlement Motion

The Decision on Liability granted the relief sought by the Secretary by finding that Armstrong's civil suit violates section 105(c) of the Act. Nevertheless, on August 8, 2013, the Secretary joined Armstrong in filing a Joint Motion for Approval of Settlement. The settlement terms reflect that, at Armstrong's request, the Muhlenberg County Circuit Court civil action against Shemwell has been dismissed with prejudice. Consequently, the parties' proposed settlement terms reflect that the Secretary has "agreed to accept a reduced penalty [from \$70,000.00 to \$35,000.00] *in exchange for . . . the dismissal of the state court action.*" Mot. at 3 (emphasis added). The Secretary's agreement to accept a reduced civil penalty is also based on settlement terms that require Armstrong to take remedial actions that include providing miner training and the posting of miner protections under section 105(c)(1). *Id.* Finally, the settlement terms include exculpatory language that allows Armstrong to deny that its civil suit violates section 105(c) in any legal matter involving any local, state, or federal statute, or any principle of common law, provided that the legal matter is not brought under the Mine Act. *Id.*

a. *Procedural Dismissal*

The propriety of approving the subject settlement motion must be viewed in the context of the circumstances in this case. In non-discrimination cases, judges lack jurisdiction to consider motions for approval of settlement after issuance of their written decisions, because their decisions are final and may only be challenged by filing a Petition for Discretionary Review ("PDR") with the Commission. Commission Rule 69, 29 C.F.R. § 2700.69. In discrimination cases, a decision on liability is not a 'final decision' that is ripe for appeal until a decision on relief is issued. *See, e.g., Order Denying Petition for Discretionary Review*, slip op. at 2 (July 26, 2013). While not 'final' procedurally with respect to its capability of being appealed, a decision on liability is a final decision on the merits as contemplated by Rule 69 that is not subject to modification or withdrawal through settlement agreements by the parties. In other words, judges' decisions are not advisory opinions that are subject to alternative resolution by the parties. Consequently, the June 19, 2013, decision on liability is binding, as it is the law of the case.³ An aggrieved mine operator challenging a determination of 105(c) liability may file a PDR within 30 days after both the related decisions on liability and relief have been issued. Commission Rule 70, 29 C.F.R. § 2700.70.

³ The "law of the case" doctrine holds that an adjudicative decision issued following a hearing becomes the final disposition of the matter, unless it is challenged on appeal. *See, e.g., Pepper v. United States*, 131 S.Ct. 1229, 1250 (2011); *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993). As a general proposition, a judge may only modify a finding in exceptional circumstances, such as where the prior decision is clearly in error and would work a manifest injustice, *Pepper v. United States*, 131 S. Ct. at 1250-51 (citations omitted), or there has been a drastic change in legal authority, *United States v. Bell*, 988 F.2d at 251 (citations omitted).

In the final analysis, there are two circumstances where settlement motions can be considered by the Commission or its judges. These situations are: (1) by a judge when the proposed settlement is submitted for approval prior to a written decision on the merits; and (2) by the Commission upon withdrawal of a PDR by an aggrieved party. Neither of these circumstances are present in this case. Consequently, the motion to approve the joint settlement agreement shall be dismissed as the filing of the settlement motion is contrary to Commission Rules 69 and 70.⁴

b. *Alternative Dismissal as Contrary to the Public Interest*

Assuming that the parties' proposed settlement agreement is not procedurally improper, for the reasons discussed below, approval of the settlement agreement shall also be denied on the merits because the settlement agreement is contrary to the public interest in that it conflicts with the statutory goal and enforcement scheme of the Mine Act. In addition, the settlement agreement shall be denied because its approval would avoid a final decision on the legality of civil actions that conflict with the Mine Act, invoking the doctrine of "capable of repetition yet evading review."

In this case, the operative exculpatory settlement terms for consideration are:

Respondents assert that *except for proceedings under the Act*, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations. Further, Respondents assert that *except for proceedings under the Act*, nothing contained herein is intended to constitute an admission of civil liability under any local, state, or federal statute or any principle of common law.

Mot. at 3 (emphasis added).

Assuming that the parties' proposed settlement agreement is not procedurally improper, the Commission long ago articulated its authority to review settlements. The Commission stated:

[W]e emphasize the Commission's authority to review settlements entered into between the parties in contested penalty proceedings. The source of our authority is section 110(k) of the Mine Act. 30 U.S.C. § 820(k). Section 110(k) in part provides, "No proposed

⁴ While the motion for settlement shall be denied, as discussed herein, I construe the parties' settlement terms with respect to civil penalty and remedial relief as a Joint Stipulation for Relief filed pursuant to the directive in the June 19, 2013, Decision on Liability that established August 23, 2013, as the deadline for filing such stipulations.

penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission.” Accordingly, it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or to reject settlements in contested penalty proceedings. As we observed in *Co-op Mining Company*, 2 FMSHRC 3475, 3475-3476 (1980), “[S]ection 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements.”

Amax Lead Co., 4 FMSHRC 975, 977 (June 1982).

The Commission has concluded that its authority in section 110(k) to review settlement terms also applies to proposed settlements in discrimination cases. *Secretary of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998) (citing *Secretary of Labor on behalf of Hopkins v. ASARCO, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390, 390 (Mar. 1993); *Secretary of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 197, 198 (Feb. 1987); *Secretary of Labor on behalf of Gabossi v. Western Fuels—Utah, Inc.*, 11 FMSHRC 134, 135 (Feb. 1989)). In this regard, the broad grant of Commission oversight authority conferred in section 110(k):

. . . must of necessity include the authority to review settlement agreements arising under section 105(c), for if no such authority existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be severely curtailed, a result at odds with the intent of the Mine Act. All the more compelling a reason for Commission review of settlements is the chance of an agreement being made that is “inconsistent with the enforcement scheme of the Act.” *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 978 (June 1982).

Leeco, Inc., 20 FMSHRC at 708 (footnote omitted).

Mine operators are free to admit or deny liability *for an alleged violation* under the Mine Act in a settlement agreement submitted for a judge’s approval. *Amax Lead Co.*, 4 FMSHRC at 977-78. Settlement terms that contain limitations of liability, such as language limiting liability only to proceedings under the Mine Act, are frequently approved based on the vagaries of litigation when they are submitted prior to the issuance of a decision. *See, e.g., Id.* at 978-79 (noting the propriety of pre-decisional exculpatory settlement language that is not inconsistent with the enforcement scheme of the Mine Act with respect to an operator’s history of violations and exposure to liability for a pattern of violations). In ruling on the propriety of such settlement terms, the judge must consider the overriding Commission responsibility to ensure that proposed settlement terms are in the public interest because they are consistent with the enforcement

scheme of the Act. *Id.*; *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981) (noting that Commission judges must ensure that settlements are consistent with the Act's objectives).

In addressing whether settlements are consistent with the public interest, a judge must examine "all relief . . . not just the [monetary] provisions of the settlement . . ." *Madison Branch Mgmt.*, 17 FMSHRC 859, 868 (June 1995) (quoting *Luevano v. Campbell*, 93 F.R.D. 68, 86 (D.D.C. 1981)). As noted in the Decision on Liability, the plain language of the Mine Act as well as its legislative history reflect that its fundamental goal is to achieve a safer working environment by ensuring that miners are not retaliated against or otherwise discouraged from engaging in safety related protected activity. The filing of civil actions seeking compensatory and punitive damages in response to a miner's exercise of protected statutory rights is a direct assault on the achievement of this goal. Mine operators must be dissuaded from filing civil actions that interfere with the exercise of protected federal statutory rights under the pretense that such law suits are protected by the First Amendment. Thus, the public interest requires ensuring that the proffered settlement terms do not provide a colorable basis for Armstrong, or any other mine operator, to file similar civil actions in the future that conflict with federal law.

The parties' settlement agreement seeks to limit the substantive significance of Armstrong's liability by including language that Armstrong is only admitting liability with respect to "proceedings under the [Mine] Act," excluding proceedings "under any local, state, or federal statute or any principle of common law."⁵ Mot. at 3. Ordinarily, such settlement terms limiting admissions of liability to only Mine Act proceedings while relieving complainants of the adverse effects of discrimination are not contrary to the public interest, in that they acknowledge rather than undermine the protections afforded under the Mine Act.⁶ However, this matter

⁵ By inserting this language in a proposed settlement, rather than filing a joint petition for relief, Armstrong obviously is seeking to limit the substantive significance of the liability decision.

⁶ For example, in *Sec'y o/b/o Hopkins v. Asarco*, 19 FMSHRC at 2, the Commission stated it would favorably entertain a settlement motion which included Asarco's withdrawal of its PDR of Judge Manning's decision that Asarco had violated section 105(c) of the Act by discharging Hopkins. During the pendency of the PDR, the parties reached a settlement agreement with respect to minor modifications of the monetary relief awarded to Hopkins and the amount of civil penalty imposed by Judge Manning. *Asarco* was a routine discrimination matter that did not involve the novel circumstances in this case concerning preempted civil actions. Moreover, the settlement terms in *Asarco* did not conflict with the public interest.

Significantly, *Asarco* involved a *quid pro quo* not present in this case. By withdrawing its appeal, Asarco agreed to accept liability if the Secretary agreed to the settlement terms concerning the civil penalty and backpay. The *Asarco* settlement agreement was in the public interest as withdrawal of the PDR promoted judicial economy. Here, there is no furtherance

(continued...)

involves more than an adverse action inflicted upon a particular complainant miner. It involves an adverse action inflicted upon the essence of the Mine Act - the achievement of a safer mining environment through participation of miners in safety related matters. I am unconvinced that this broad exculpatory language that seeks to shield Armstrong from responsibility for discriminatory conduct in virtually any statutory or common law matter that may arise outside of a Mine Act proceeding, can reasonably be construed as a means of dissuading Armstrong, or any other mine operator similarly motivated, from filing similar civil actions that will be in violation of section 105(c)(1).

The exculpatory language is not the sole reason why the proposed settlement may not effectively deter future violative civil actions. The parties' settlement terms include reducing the proposed penalty from \$70,000.00, the maximum allowable under section 110(a)(1) of the Act, to \$35,000.00. There are no mitigating circumstances to justify the proposed reduction. Armstrong was obligated to withdraw its Kentucky lawsuit pursuant to the Cease and Desist Order issued in this matter. The other settlement remedies, such as relevant postings and training, are routine actions required of mine operators as a consequence of discriminatory conduct. The Commission recently addressed its responsibility in assuring that civil penalties must be sufficient to deter mine operators from similar violative conduct. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865 (Aug. 2012). The Commission stated:

The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates.

Id.

The insidious nature of such civil actions cannot be overstated if Armstrong or other mine operators are not effectively deterred from initiating similar lawsuits. These civil actions are contrary to the public interest goals of the Mine Act due to the potential chilling effect of such suits on miners in general. More specifically, although Armstrong has moved to dismiss its civil suit, it presumably has managed to intimidate mining personnel, who undoubtedly have been aware that they too, like Shemwell, could be a defendant in a civil action if they express unwelcome safety-related complaints. By making an example of Shemwell, Armstrong has managed to effectively discourage its mining personnel from making protected safety-related

⁶(...continued)

of the public interest in allowing Armstrong to escape the findings and conclusions in the Decision on Liability. Approving the settlement agreement after the litigation in this case would waste judicial resources and risk the reoccurrence of similar violative civil suits.

complaints for one year, since it filed its Kentucky lawsuit on August 22, 2012. Any civil penalty imposed in this matter may have been offset by savings from the suppression of safety complaints during the last year, such as complaints requiring remedial measures resulting in lost production, or, complaints requiring additional expenditures for the purchase of new respirator protection.

In summary, settlement agreements can only be approved if they are consistent with the enforcement scheme of the Mine Act. Baseless and retaliatory civil actions that discourage miner participation in achieving a safer mining environment are anathema to the Act's central goal of promoting mine safety. In view of the above, it is clear that the settlement terms with respect to the exculpatory language, as well as the reduction in proposed penalty, cannot meet with Commission approval as any settlement terms that create even the remote possibility of a repetition of this egregious retaliatory conduct must be rejected. Thus, as discussed below, the legality of such civil suits, which are capable of repetition, must not be allowed to evade review.

By submitting their settlement agreement for approval, the parties, in essence, rely on the dismissal of Armstrong's civil suit in Muhlenberg County to support the proposition that all matters in issue have been resolved, and that further proceedings have essentially been rendered moot. However, the Commission has recently noted that "voluntary cessation of a challenged practice does not render a case moot unless there is no reasonable expectation that the wrong will be repeated." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012) (citations omitted). This concept expressed in *North American Drillers* is an exception to the mootness doctrine that is entitled "capable of repetition, yet evading review." *See, Marfork Coal Co.*, 29 FMSHRC 626, 628 (Aug. 2007), *citing* 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3533.8 (2d ed. 1984).

In *Marfork*, the Commission explained that the "evading review" exception to mootness applies where:

"(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, R. dissenting) (alteration in original). For example, election issues are "among those most frequently saved from mootness by this exception." *National Right to Life Political Action Comm. v. Connor*, 323 F.2d 684, 691 (8th Cir. 2003). Similarly, the Commission has stated that "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable." *Mid-Continent*, 12 FMSHRC at 955.

Marfork, 29 FMSHRC at 628.

With regard to the first element of the “evading review” doctrine, duration of the challenged action, *i.e.*, a pending civil suit, is under the exclusive control of the mine operator who could ensure that the subject law suit is dismissed prior to a Commission decision on whether the civil action violates the Act. Looking at the facts, Armstrong had the benefit of the intimidating effects of its civil suit for one year after the suit was filed on August 22, 2012. If an operator’s withdrawal of an offending civil suit rendered a Commission proceeding moot despite the “capable of evading review” doctrine, mine operators could escape liability for similar violative conduct by withdrawing their baseless suits at an opportune moment to preclude continued litigation before the Commission. Once the subject civil lawsuits were dismissed, Commission proceedings could be settled with beneficial exculpatory terms that the Secretary undoubtedly would be tempted to accept, as in this case, to avoid costly litigation in an era of limited resources.

The second element of the “evading review” doctrine requires a showing that the same complaining party will be subject to the same action if mootness were to apply. It is reasonable to assume the Secretary will again be burdened with the necessity of bringing 105(c)(2) discrimination complaints on behalf of miners who find themselves defendants in civil actions brought by their employers if the legality of such suits is not resolved as a matter of law. In this regard, it is obvious that Armstrong’s civil suit was a veiled attempt to intimidate and harass miners in its employ who may wish to engage in protected activities that are disapproved by Armstrong. It would be naive to think that other mine operators would not avail themselves of this tactic if this proceeding does not culminate in a meaningful decision on the merits identifying such civil suits as violations of the Mine Act.

Consequently, in addition to the exculpatory language and penalty reduction terms being contrary to the public interest, approval of the joint settlement motion is also inconsistent with the public interest because such civil suits, absent a Commission finding on the merits with respect to their violative nature, are capable of repetition. Consequently, the parties’ Joint Motion for Approval of Settlement shall be denied.⁷

⁷ Nothing herein shall be construed as a reflection upon the ultimate disposition of the motion to approve settlement currently before me in Shemwell’s section 105(c)(3) private discrimination matter in Docket No. KENT 2012-1497-D.

II. Supplemental Decision on Relief and Civil Penalty

a. *Remedial Measures*

In the Decision on Liability, the parties were instructed to file a joint petition for relief if they could agree on appropriate remedies. In view of the disapproval of the settlement agreement, I view the remedial actions agreed upon by the parties pursuant to their settlement terms as a joint stipulation for relief. While I am not required to impose the relief stipulated to by the parties, the agreed upon remedial actions are reasonable, and will be adopted and incorporated as part of the relief required to be taken in this proceeding. The pertinent remedial actions required of Armstrong are as follows:⁸

[1.] Provide a copy of the MSHA publication titled “A Guide to Miners’ Rights and Responsibilities” to all employees. (MSHA will provide copies of this publication to [Armstrong] for distribution.) A copy of this publication can be found at <http://www.msha.gov/S&HINFO/minersrights/minersrights.asp>;

...

[2.] Provide two (2) hours of training on miners’ rights at each mine operated by Armstrong Coal Company, Inc. (MSHA will provide the topics for the training. Further, MSHA has agreed that the [Armstrong] can provide this training on the same date that it provides its employees with annual retraining. The training on miners’ rights, however, shall not reduce the time that is otherwise required for the annual retraining.) Following the training on miners’ rights, employees will watch the MSHA video titled “A Voice in the Workplace: Miners’ Rights and Responsibilities”; and

[3.] Post a miners’ rights poster about section 105(c) at each mine that is operated by Armstrong Coal Company, Inc. for a period of (2) years. (MSHA will provide copies of these posters to [Armstrong].)

Mot. at 2.

⁸ The subject settlement agreement does not seek any relief with regard to expenses or lost income incurred by Shemwell as a result of this proceeding. On August 27, 2012, Shemwell filed a private section 105(c)(3) discrimination case docketed as KENT 2012-1497-D. A motion for approval of settlement in this private discrimination matter, filed on August 8, 2013, contains settlement terms related to attorney’s fees and other monetary relief. The motion for approval of this settlement agreement is pending before me.

b. *Civil Penalty*

The Secretary initially proposed a civil penalty of \$70,000.00 for Armstrong's violation of section 105(c), the maximum penalty specified in section 110(a)(1) of the Act. 30 C.F.R. § 820(a)(1). The parties' settlement agreement proposes a reduced civil penalty of \$35,000.00. The reduction is based on "the [remedial] actions listed above and the dismissal of the state court action." Mot. at 3. As noted below, Commission judges are not bound by civil penalties proposed by the Secretary in that they assess penalties on a *de novo* basis.

Turning to the issue of the appropriate civil penalty, the Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

22 FMSHRC at 600, *citing* 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria *and the deterrent purposes underlying the Act's penalty assessment scheme.*" *Id.* at 294 (emphasis added), *cited in Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Addressing the criteria in section 110(i), there is no history of similar previous violations that sought to utilize state tort law as a means of intimidation. With respect to the proportionality of the penalty and Armstrong's ability to continue in business, Armstrong is a relatively large mine operator, and, it has neither been contended nor shown that the \$70,000.00 penalty initially proposed in this matter would interfere with Armstrong's continuing operations. With regard to negligence, I view the civil suit as a willful violation. The willfulness is demonstrated by the baseless and retaliatory nature of the Kentucky tort action. Turning to the remaining elements of section 110(i), Armstrong's violation evidences serious gravity, given the chilling effect created during the pendency of the violative civil suit. Finally, Armstrong's conduct in this matter cannot be construed as demonstrating good faith. In this regard, Armstrong has persisted in pursuing its civil case, an action that was flawed even under Kentucky law, which requires Armstrong to have prevailed in Shemwell's discrimination case. Armstrong withdrew its civil suit only after being ordered to cease and desist. The degree of negligence, the degree of gravity and the demonstrable lack of good faith are aggravating factors that support the imposition of a higher civil penalty.

In addition, I am mindful of the deterrent role civil penalties play in discouraging mine operators from engaging in future similar violative conduct. *Black Beauty*, 34 FMSHRC at 1866 (noting that the penalty provisions of the Mine Act are intended to "discourage operators from violating health and safety regulations and laws in the future"). Maximizing the deterrent effect through the imposition of a civil penalty is particularly important in this matter, given Armstrong's assertion that the safety goal of the Mine Act is subordinate to its unfettered right to file a civil action. In this regard, in its Post-Oral Argument Brief, Armstrong contends:

No statute and no public interest, no matter how noble (such as the safety goals of the Mine Act), can infringe upon [Armstrong's right to file suit]. And regardless of what [the Commission] thinks of the merits of Armstrong's state court lawsuit, one thing is always true: Armstrong has a constitutional right to file it, and by definition it therefore cannot be a violation of the Mine Act (or the Mine Act is unconstitutional).

Armstr. Br. at 1 (emphasis added). This contemptuous attitude towards the important role the Mine Act plays in furthering the public interest illustrates the necessity for a meaningful penalty that hopefully will deter the initiation of future similar misguided civil actions.

Turning to the Secretary's justification for accepting a reduction in civil penalty, I do not view Armstrong's "voluntary" dismissal of its civil action in Kentucky as a mitigating factor. Nor are the agreed upon remedial actions noted above mitigating factors, as such actions are routinely required to alleviate the adverse effects of discriminatory conduct. One cannot image a more serious violation than the egregious lawsuit filed against Shemwell that, if left unchecked, would eviscerate the statutory and enforcement goals of the Mine Act.

Bringing a civil action against a miner whose federal statutory right is protected by the Supremacy Clause, while feigning an inviolate First Amendment right to sue, constitutes egregious conduct. Even imposition of the maximum civil penalty provided by statute may not be an adequate deterrent against such wanton behavior. However, I am constrained to imposing the maximum \$70,000.00 civil penalty specified in section 110(a)(1) of the Act.

ORDER

Accordingly, **IT IS ORDERED** that the Joint Motion to Approve Settlement of the captioned proceeding filed on August 8, 2013, **IS DENIED**.

IT IS FURTHER ORDERED that Armstrong comply with the remedial actions noted above with respect to training, the provision to all of its employees of the MSHA publication entitled "A Guide to Miners' Rights and Responsibilities," and the displaying of miners' rights posters detailing the protections afforded under section 105(c) for a period of two years at suitable locations in all of its facilities.

IT IS FURTHER ORDERED that the June 19, 2013, Decision on Liability and this August 19, 2013, Order Denying Joint Motion to Approve Settlement and Supplemental Decision on Civil Penalty and Relief be posted at suitable locations at each of Armstrong's facilities for a period of 90 days.

IT IS FURTHER ORDERED that Armstrong shall pay a civil penalty of \$70,000.00 in satisfaction of the subject section 105(c) violation within 40 days of the date of this decision.

IT IS FURTHER ORDERED that upon receipt of timely payment, this discrimination matter in Docket No. KENT 2013-362-D **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

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/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Telephone: (202) 434-9980 / Fax: (202) 434-9949
August 20, 2013

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

v.

MANALAPAN MINING COMPANY
ET AL.,
Respondent.

CIVIL PENALTY PROCEEDINGS:

Docket No. KENT 2009-240
A.C. No. 15-04331-166529-02

Mine: Prep Plant

Docket No. KENT 2009-562
A.C. No. 15-19102-172530

Prep Plant

Docket No. KENT 2009-1281
A.C. No. 15-17077-188288

Mine: RB #5

Docket No. KENT 2009-1284
A.C. No. 15-18771-188304

Mine: RB #12

Docket No. KENT 2009-1286
A.C. No. 15-19102-188316-02

Mine: P-1

Docket No. KENT 2009-1388
A.C. No. 15-19102-191269

Mine: P-1

Docket No. KENT 2009-1549
A.C. No. 15-18145- 195699

Mine: CM & E No. 3

Docket No. KENT 2009-1601
A.C. No. 15-18771-197255

: Mine: RB #12
: Docket No. KENT 2010-1212
: A.C. No. 15-18771-222910-02
:
: Mine: RB #12
:
: Docket No. KENT 2010-1213
: A.C. No. 15-19102- 222918
:
: Mine: P-1
:
: Docket No. KENT 2010-1214
: A.C. No. 15-19102-222918-02
:
: Mine: P-1
:
: Docket No. KENT 2010-1362
: A.C. No. 15-17077-225927
:
: Mine: RB #5
:
: Docket No. KENT 2010-1364
: A.C. No. 15-18771-225937-02
:
: Mine: RB #12
:
: Docket No. KENT 2010-1365
: A.C. No. 15-18771-225937-03
:
: Mine: RB #12
:
: Docket No. KENT 2010-1436
: A.C. No. 1518771- 226595
:
: Mine: RB #12
:
: Docket No. KENT 2010-1514
: A.C. No. 15-17077-229388
:
: Mine: RB #5
:
: Docket No. KENT 2010-1515
: A.C. No. 15-18771-229396-01
:
: Mine: RB #12
:

: Docket No. KENT 2012-1394
: A.C. No. 15-18725-295419
:
: Mine: RB #11
:
: Docket No. KENT 2012-1499
: A.C. No. 15-19102-298192
:
: Mine: P-1
:
: Docket No. KENT 2012-1501
: A.C. No. 15-18771-298189
:
: Mine: RB #12
:
: Docket No. KENT 2013-17
: A.C. No. 15-19514-300891-01
:
: Mine: D-1
:
: Docket No. KENT 2013-18
: A.C. No. 15-19514-300891-02
:
: Mine: D-1
:
: Docket No. KENT 2013-352
: A.C. No. 15-19102-309285
:
: Mine: P-1
:
:

AMENDED DECISION¹

Before: Judge David F. Barbour

Appearances: Amanda Slater, Esq., U.S. Department of Labor, Office of the Solicitor, Denver,
Colorado
Schean Belton, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville,
Tennessee
John Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington,
Kentucky

¹ This decision is amended solely to address clerical errors present in the decision issued on July 22, 2013.

Benjamin Bennett, 10156 US Hwy 25E, Pineville, Kentucky 40977
Jim Brummett, Jim Brummett, Manalapan Mining Company, Inc., 8174 E. Hwy
72, Pathfork, Kentucky 40863

The above-captioned cases are before me upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. This matter, consolidated under lead Docket No. KENT 2009-1097, consists of 137 cases containing 982 citations and orders involving Manalapan Mining Company Inc. ("Manalapan"), B&S Trucking Company and Cloverfork Mining & Excavating, collectively referred to as Manalapan et al. The companies share common ownership and Manalapan is the Respondent for the majority of the cases.

On May 01, 2012, the parties jointly moved that all of the Respondents' cases pending before the Commission be consolidated to facilitate settlement negotiations and evaluation of the Respondents' claim that payment of the penalties proposed by the Secretary would affect its ability to continue in business. The cases were consolidated and set for hearing on October 16, 2012 in Lexington, Kentucky.

In a status update to the court, the Secretary reported that the parties were unable to reach an agreement regarding the effect of the proposed penalties on the Respondents' ability to continue in business, and that, as a result, settlement negotiations were unable to progress. The parties jointly requested that the court rule on whether the proposed penalties would affect the Respondents' ability to continue in business and hold a hearing on the other civil penalty criteria and the fact of violation at a later date. Accordingly, the court scheduled a bifurcated hearing. Hearing I, which solely addressed the Respondents' ability to continue in business, was scheduled to take place telephonically on December 13, 2012. Any cases not settled during subsequent settlement discussions were scheduled to be heard during Hearing II, in January 2013.

During a subsequent conference call with the court, Respondents' counsel reported that his clients were no longer alleging that the proposed penalties would affect their ability to continue in business. The Respondents' counsel restated this point on the record during the telephonic hearing on December 13, 2012. The parties also requested additional time to discuss settlement. They stated that the focus of their prior discussions had been the Respondents' ability to continue in business and that, as a result, they had little opportunity to engage in substantive settlement discussions. The cases were rescheduled to be heard March 05 - 15, 2013, and April 09 - 19, 2013, in Lexington, Kentucky. On February 11, 2013, the parties reported that they had made significant progress in their global settlement negotiations and requested additional time to conduct in person settlement discussions. On February 15, 2013, the court issued an order, which granted the parties additional time to negotiate and rescheduled the hearing for any outstanding dockets for April 09 - 12, 2013, April 15 - 19, 2013, June 04 - 06, 2013 and June 25 - 28, 2013. In the order, the court also granted the motion filed by Respondents' counsel to withdraw as counsel of record, with his clients' consent, due to their inability to pay additional attorneys' fees. The Respondents proceeded *pro se* and Benjamin Bennett, President of Manalapan Mining Company, represented the Respondents in the global settlement negotiations that took place March 04-05, 2013, March 07-08, 2013 and March 11-13,

2013, in Pineville, Kentucky.² Steven Spitzer, attorney-advisor to Judge Jacqueline R. Bulluck, was available via phone to assist the parties as a settlement attorney. On March 13, 2013, the parties reported that settlement negotiations had been successful and that only 62 citations and orders remained. They requested that the hearing scheduled for April 09 - 12, 2013 be cancelled and that the parties be permitted to use April 15-19, 2013, originally reserved for a hearing, to conduct additional global settlement negotiations. The court granted the request. A subsequent conference call to discuss the outcome of settlement negotiations was scheduled and the remaining cases were set for hearing June 04 - 06, 2013.

During a status call on May 14, 2013, the parties reported that all but nine violations contained in three dockets, KENT 2009-1097, KENT 2010-1363 and KENT 2012-727, had been settled out of the original group of 143 dockets. A related docket, KENT 2012-1133, was consolidated with the three remaining dockets. The four cases were heard beginning June 04, 2013. The parties were directed to file briefs with the court by September 03, 2013.

The Secretary has filed motions to approve the global settlement to which the Respondents have agreed. Total proposed penalty assessment amount was \$1,994,395.00. The total proposed settlement amount is \$1,197,465.00.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement terms are set forth below:

Citation/Order No.	Modification to Citation	Proposed Penalty	Amended Penalty
KENT 2009-1281			
8335781	No Change	\$ 100.00	\$ 100.00
8335782	No Change	\$ 100.00	\$ 100.00
8335783	Penalty Reduction	\$ 1,026.00	\$ 800.00
8335784	Penalty Reduction	\$ 362.00	\$ 200.00
8335785	Modify to Unlikely, Non-S&S	\$ 1,530.00	\$ 1,400.00
8335786	Modify to Unlikely, Non-S&S	\$ 634.00	\$ 500.00
8335787	Penalty Reduction	\$ 108.00	\$ 100.00
8335788	Penalty Reduction	\$ 499.00	\$ 300.00
8335789	No Change	\$ 100.00	\$ 100.00
8335790	Modify to Unlikely, Non-S&S	\$ 1,795.00	\$ 1,600.00

² Docket Nos. KENT 2010-1651, KENT 2012-972 and KENT 2012-973, originally consolidated under lead Docket No. KENT 2009-1097, settled before the global settlement conference. The court dismissed these cases in prior Decisions Approving Settlement.

In addition to the cases originally consolidated under lead Docket No. KENT 2009-1097, the parties also discussed Docket Nos. KENT 2012-1394, KENT 2012-1499, KENT 2012-1501, KENT 2013-17, KENT 2013-18 and KENT 2013-352 during the settlement conference. These dockets are part of the global settlement submitted to the court and, accordingly, are included in the caption.

8335791	Penalty Reduction	\$ 745.00	\$ 600.00
8335792	Penalty Reduction	\$ 108.00	\$ 100.00
8335793	No Change	\$ 100.00	\$ 100.00
8335794	No Change	\$ 100.00	\$ 100.00
8335798	Modify to Unlikely, Non-S&S	\$ 425.00	\$ 300.00
8335799	No Change	\$ 100.00	\$ 100.00
8335800	Penalty Reduction	\$ 425.00	\$ 300.00
8335801	No Change	\$ 100.00	\$ 100.00
8225802	Modify to Unlikely, Non-S&S	\$ 425.00	\$ 300.00
8225803	Penalty Reduction	\$ 425.00	\$ 300.00
8335804	No Change	\$ 100.00	\$ 100.00
8335812	Penalty Reduction	\$ 425.00	\$ 300.00
8335813	Penalty Reduction	\$ 425.00	\$ 300.00
8335814	Penalty Reduction	\$ 425.00	\$ 300.00
8335815	Modify to Unlikely, Non-S&S	\$ 425.00	\$ 300.00
8335819	Penalty Reduction	\$ 425.00	\$ 300.00
	Sub-Total	\$11,432.00	\$ 9,100.00
KENT 2009-1284			
8334580	Modify to Low Negligence	\$ 807.00	\$ 400.00
8334581	Vacate	\$ 2,473.00	\$ 0.00
8334582	No Change	\$ 190.00	\$ 190.00
8334583	Penalty Reduction	\$ 745.00	\$ 376.00
8338394	No Change	\$ 224.00	\$ 224.00
8338395	Penalty Reduction	\$ 1,203.00	\$ 800.00
8334584	No Change	\$ 150.00	\$ 150.00
8338396	No Change	\$ 150.00	\$ 150.00
8334585	No Change	\$ 150.00	\$ 150.00
8334586	No Change	\$ 150.00	\$ 150.00
8334590	Modify to Unlikely, Non-S&S	\$ 745.00	\$ 350.00
8334591	No Change	\$ 745.00	\$ 745.00
8334592	No Change	\$ 150.00	\$ 150.00
8334593	No Change	\$ 150.00	\$ 150.00
8334594	Penalty Reduction	\$ 873.00	\$ 348.00
8403423	No Change	\$ 334.00	\$ 334.00
8403425	No Change	\$ 873.00	\$ 873.00
8403426	No Change	\$ 425.00	\$ 425.00
8403427	No Change	\$ 176.00	\$ 176.00
8403428	No Change	\$ 334.00	\$ 334.00
8403429	No Change	\$ 425.00	\$ 425.00
8334595	No Change	\$ 176.00	\$ 176.00
8403424	Penalty Reduction	\$ 190.00	\$ 162.00
8334596	No Change	\$ 150.00	\$ 150.00
8334597	No Change	\$ 150.00	\$ 150.00
8334598	No Change	\$ 150.00	\$ 150.00

8334599	Modify to Unlikely, Non-S&S	\$ 745.00	\$ 350.00
8403430	No Change	\$ 362.00	\$ 362.00
8403431	No Change	\$ 150.00	\$ 150.00
8403432	No Change	\$ 100.00	\$ 100.00
8403433	No Change	\$ 100.00	\$ 100.00
8334600	No Change	\$ 150.00	\$ 150.00
8334605	No Change	\$ 150.00	\$ 150.00
8334606	No Change	\$ 150.00	\$ 150.00
8403434	No Change	\$ 100.00	\$ 100.00
8403436	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$14,395.00	\$ 9,400.00
KENT 2010-9			
8356316	Modify to 104(a) High, Unlikely, Non-S&S	\$3,689.00	\$3,000.00
KENT 2010-10			
8356289	Penalty Reduction	\$ 138.00	\$ 100.00
8356290	No Change	\$ 100.00	\$ 100.00
8356291	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 300.00
8356292	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 300.00
8356293	No Change	\$ 100.00	\$ 100.00
8356294	Penalty Reduction	\$ 334.00	\$ 300.00
8356295	No Change	\$ 100.00	\$ 100.00
8356296	No Change	\$ 100.00	\$ 100.00
8356297	No Change	\$ 100.00	\$ 100.00
8356298	No Change	\$ 100.00	\$ 100.00
8356299	No Change	\$ 100.00	\$ 100.00
8356816	No Change	\$ 100.00	\$ 100.00
8356300	Penalty Reduction	\$ 334.00	\$ 300.00
8356301	No Change	\$ 100.00	\$ 100.00
8356302	Penalty Reduction	\$ 138.00	\$ 100.00
8356303	Penalty Reduction	\$ 334.00	\$ 300.00
8356304	Penalty Reduction	\$ 334.00	\$ 300.00
8356305	No Change	\$ 100.00	\$ 100.00
8356306	Penalty Reduction	\$ 499.00	\$ 400.00
8356307	Vacate	\$ 100.00	\$ 0.00
8356308	Penalty Reduction	\$ 362.00	\$ 350.00
8356309	Penalty Reduction	\$ 362.00	\$ 350.00
8356310	Penalty Reduction	\$ 425.00	\$ 400.00
8356311	Vacate	\$ 100.00	\$ 0.00
8356312	Vacate	\$ 100.00	\$ 0.00
8356313	Vacate	\$ 334.00	\$ 0.00
8356314	No Change	\$ 100.00	\$ 100.00
8356315	Vacate	\$2,901.00	\$ 0.00

8356317	Penalty Reduction	\$ 263.00	\$ 200.00
8356318	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$8,982.00	\$4,900.00
KENT 2010-148			
8357222	Penalty Reduction	\$ 499.00	\$ 400.00
8357223	Penalty Reduction	\$ 285.00	\$ 200.00
8357224	Modify to Unlikely, Non-S&S	\$1,026.00	\$ 900.00
8357225	No Change	\$ 100.00	\$ 100.00
8357229	Penalty Reduction	\$ 108.00	\$ 100.00
8357230	Penalty Reduction	\$ 176.00	\$ 100.00
8357231	No Change	\$ 100.00	\$ 100.00
8357238	Penalty Reduction	\$ 499.00	\$ 400.00
8357241	Modify to Unlikely, Non-S&S	\$ 499.00	\$ 400.00
8357242	Penalty Reduction	\$ 108.00	\$ 100.00
8357243	Penalty Reduction	\$ 108.00	\$ 100.00
8357244	Penalty Reduction	\$ 108.00	\$ 100.00
8357245	Penalty Reduction	\$ 108.00	\$ 100.00
	Sub-Total	\$ 3,724.00	\$3,100.00
KENT 2010-152			
8356319	Modify to 104(a), Unlikely, Non-S&S, Moderate Negligence	\$2,000.00	\$1,500.00
8356321	Modify to 104(a), Unlikely, Non-S&S, Moderate Negligence	\$2,000.00	\$1,500.00
	Sub-Total	\$ 4,000.00	\$3,000.00
KENT 2010-918			
8356556	No Change	\$ 100.00	\$ 100.00
8356557	No Change	\$ 100.00	\$ 100.00
8356558	No Change	\$ 100.00	\$ 100.00
8356560	No Change	\$ 100.00	\$ 100.00
8356561	Modify to Unlikely, Non-S&S	\$ 308.00	\$ 100.00
8356562	No Change	\$ 308.00	\$ 308.00
8356563	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 1,116.00	\$ 908.00
KENT 2010-1108			
8342692	Penalty Reduction	\$ 460.00	\$ 240.00
8342693	Penalty Reduction	\$ 334.00	\$ 240.00
8342694	Penalty Reduction	\$ 334.00	\$ 240.00
8342695	Modify to Unlikely, Non-S&S	\$ 308.00	\$ 240.00
8342697	Modify to Moderate Negligence	\$ 499.00	\$ 240.00
	Sub-Total	\$ 1,935.00	\$1,200.00
KENT 2010-1214			

8356595	Penalty Reduction	\$ 308.00	\$ 100.00
8356596	Modify to Unlikely, Non-S&S	\$ 308.00	\$ 100.00
8356597	Modify to Unlikely, Non-S&S	\$ 308.00	\$ 100.00
8356598	No Change	\$ 807.00	\$ 807.00
8356599	Modify to Low Negligence	\$ 308.00	\$ 138.00
8342421	No Change	\$ 243.00	\$ 243.00
8342423	Modify to 1 Person Affected	\$ 807.00	\$ 460.00
8319991	Modify to Lost Workdays or Restricted Duty	\$ 499.00	\$ 334.00
8342424	Modify to Low Negligence	\$ 308.00	\$ 100.00
8342425	Modify to 1 Person Affected	\$ 807.00	\$ 460.00
8342426	No Change	\$ 308.00	\$ 308.00
8342430	Modify to Moderate Negligence	\$ 362.00	\$ 108.00
8342431	Modify to 1 Person Affected	\$ 540.00	\$ 308.00
	Sub-Total	\$5,913.00	\$3,566.00
KENT 2010-1362			
8357998	Modify to Unlikely, Non-S&S	\$ 499.00	\$ 100.00
8365013	No Change	\$1,203.00	\$1,203.00
8365014	No Change	\$ 540.00	\$ 540.00
8365015	Modify to Unlikely, Non-S&S	\$1,140.00	\$ 207.00
8365016	Modify to Unlikely, Non-S&S	\$ 403.00	\$ 100.00
8365017	No Change	\$1,203.00	\$1,203.00
	Sub-Total	\$4,988.00	\$3,353.00
KENT 2010-1365			
8341957	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 100.00
8341958	Modify to Unlikely, Non-S&S	\$ 460.00	\$ 113.00
8341964	Penalty Reduction	\$ 687.00	\$ 500.00
8341965	Penalty Reduction	\$ 687.00	\$ 500.00
8341966	Penalty Reduction	\$ 687.00	\$ 500.00
8357587	No Change	\$ 362.00	\$ 362.00
8403782	No Change	\$ 540.00	\$ 540.00
8403783	No Change	\$ 585.00	\$ 585.00
8403800	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$4,470.00	\$3,300.00
KENT 2010-1516			
8405209	No Change	\$ 745.00	\$ 745.00
8364417	Vacate	\$2,106.00	\$ 0.00
8403809	No Change	\$1,203.00	\$1,203.00
	Sub-Total	\$ 4,054.00	\$1,948.00
KENT 2010-1518			
8364049	Modify to Unlikely, Non-S&S	\$ 807.00	\$ 162.00
8364050	Modify to Lost Workdays or Restricted Duty	\$ 745.00	\$ 460.00

8364051	Modify to 3 Persons Affected	\$ 1,203.00	\$ 873.00
8364052	No Change	\$ 873.00	\$ 873.00
8364053	No Change	\$ 745.00	\$ 745.00
8364054	Modify to Unlikely, Non-S&S	\$ 1,944.00	\$ 605.00
8342442	No Change	\$ 308.00	\$ 308.00
8342444	No Change	\$ 1,026.00	\$1,026.00
8342445	No Change	\$ 1,203.00	\$1,203.00
8342448	No Change	\$ 308.00	\$ 308.00
8342449	No Change	\$ 334.00	\$ 334.00
8364416	Modify to Unlikely, Non-S&S	\$ 1,795.00	\$ 362.00
8342450	Modify to Unlikely, Non-S&S	\$ 460.00	\$ 100.00
8342451	Modify to Unlikely, Non-S&S	\$ 460.00	\$ 100.00
9866050	No Change	\$ 499.00	\$ 499.00
8364436	No Change	\$ 308.00	\$ 308.00
8365400	No Change	\$ 243.00	\$ 243.00
	Sub-Total	\$13,261.00	\$8,509.00
KENT 2010-1648			
8357160	No Change	\$ 308.00	\$ 308.00
8357161	Modify to Unlikely, Non-S&S	\$ 585.00	\$ 258.00
8357164	No Change	\$ 334.00	\$ 334.00
	Sub-Total	\$1,227.00	\$ 900.00
KENT 2010-1650			
8338489	Penalty Reduction	\$ 190.00	\$ 100.00
8338490	Penalty Reduction	\$2,106.00	\$1,600.00
8338491	Penalty Reduction	\$ 392.00	\$ 200.00
	Sub-Total	\$2,688.00	\$1,900.00
KENT 2011-143			
8402886	Modify to Unlikely, Non-S&S	\$ 308.00	\$ 100.00
8402887	No Change	\$ 263.00	\$ 263.00
	Sub-Total	\$ 571.00	\$ 363.00
KENT 2011-144			
8364090	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 100.00
KENT 2011-145			
8364094	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 267.00
8364096	Modify to 1 Affected, Lost Workdays or Restricted Duty	\$ 540.00	\$ 267.00
8364098	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 267.00
8364099	Modify to Lost Workdays or Restricted Duty	\$ 362.00	\$ 267.00
8364100	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 267.00
8364101	Modify to 1 Affected, Lost Workdays or Restricted Duty	\$ 540.00	\$ 265.00
	Sub-Total	\$2,528.00	\$1,600.00
KENT 2011-156			

8364462	Penalty Reduction	\$ 392.00	\$ 308.00
8364463	No Change	\$ 100.00	\$ 100.00
8364465	No Change	\$ 392.00	\$ 392.00
8364466	Modify to Unlikely, Non-S&S	\$ 392.00	\$ 100.00
	Sub-Total	\$1,276.00	\$ 900.00
KENT 2011-446			
8405261	Penalty Reduction	\$1,203.00	\$ 687.00
7502302	No Change	\$ 100.00	\$ 100.00
7502303	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$1,403.00	\$ 887.00
KENT 2011-447			
8362842	Penalty Reduction	\$ 190.00	\$ 100.00
8362850	Modify to Low Negligence	\$ 555.00	\$ 400.00
8362854	Penalty Reduction	\$ 540.00	\$ 400.00
8362856	Penalty Reduction	\$ 499.00	\$ 300.00
8362859	Modify to Unlikely, Non-S&S	\$ 499.00	\$ 300.00
8362860	Modify to Unlikely, Non S&S	\$1,026.00	\$ 500.00
8362862	Modify to Unlikely, Non-S&S	\$ 540.00	\$ 400.00
8362863	Penalty Reduction	\$ 499.00	\$ 400.00
8362865	Modify to Low Negligence	\$ 176.00	\$ 100.00
8362866	Penalty Reduction	\$ 873.00	\$ 700.00
8362869	Penalty Reduction	\$ 745.00	\$ 700.00
8362870	Penalty Reduction	\$ 873.00	\$ 700.00
	Sub-Total	\$7,015.00	\$5,000.00
KENT 2011-448			
8364834	Modify to Low Negligence	\$ 243.00	\$ 200.00
9866095	Modify to 2 Affected and Lost Work Days or Restricted Duty	\$ 634.00	\$ 400.00
8342535	Penalty Reduction	\$ 243.00	\$ 200.00
	Sub-Total	\$1,120.00	\$ 800.00
KENT 2011-563			
8362875	No Change	\$ 100.00	\$ 100.00
8404247	No Change	\$ 100.00	\$ 100.00
8404248	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 300.00	\$ 300.00
KENT 2011-564			
8342539	Modify to Unlikely, Non-S&S	\$ 263.00	\$ 100.00
8342540	No Change	\$ 100.00	\$ 100.00
9866114	No Change	\$ 100.00	\$ 100.00
8342545	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 563.00	\$ 400.00
KENT 2011-952			
8365264	Modify to Unlikely, Non-S&S	\$ 362.00	\$ 100.00

8365267	Modify to Unlikely, Non-S&S	\$ 585.00	\$ 117.00
9866162	No Change	\$ 108.00	\$ 108.00
	Sub-Total	\$ 1,055.00	\$ 325.00
KENT 2011-1128			
8365303	Penalty Reduction	\$ 263.00	\$ 100.00
KENT 2009-240			
8333875	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333876	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333878	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333880	Penalty Reduction	\$ 1,026.00	\$ 718.00
8333882	Penalty Reduction	\$ 1,026.00	\$ 718.00
8333883	Penalty Reduction	\$ 1,026.00	\$ 718.00
8333901	Penalty Reduction	\$ 1,026.00	\$ 718.00
8333904	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333905	Penalty Reduction	\$ 1,569.00	\$ 1,098.00
8333907	Penalty Reduction	\$ 1,569.00	\$ 1,098.00
8333908	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333910	Penalty Reduction	\$ 1,140.00	\$ 798.00
8333911	Penalty Reduction	\$ 1,944.00	\$ 1,361.00
8333912	Penalty Reduction	\$ 1,026.00	\$ 718.00
8325401	Penalty Reduction	\$ 1,026.00	\$ 718.00
8325402	Penalty Reduction	\$ 1,026.00	\$ 718.00
	Sub-Total	\$ 19,104.00	\$ 13,371.00
KENT 2009-562			
8319150	Penalty Reduction	\$ 1,412.00	\$ 988.00
8319151	Penalty Reduction	\$ 1,944.00	\$ 1,361.00
	Sub-Total	\$ 3,356.00	\$ 2,349.00
KENT 2010-1024			
8357534	Penalty Reduction	\$ 687.00	\$ 481.00
8357535	Penalty Reduction	\$ 1,026.00	\$ 718.00
8357536	Penalty Reduction	\$ 1,026.00	\$ 718.00
8357538	Penalty Reduction	\$ 1,026.00	\$ 718.00
	Sub-Total	\$ 3,765.00	\$ 2,635.00
KENT 2010-1436			
8341959	Penalty Reduction	\$ 1,026.00	\$ 718.00
8341960	Penalty Reduction	\$ 2,536.00	\$ 1,775.00
8341962	Penalty Reduction	\$ 1,026.00	\$ 718.00
8341963	Penalty Reduction	\$ 2,282.00	\$ 1,597.00
	Sub-Total	\$ 6,870.00	\$ 4,808.00
KENT 2011-991			
8353025	Penalty Reduction	\$ 946.00	\$ 662.00
KENT 2011-992			
8363307	Penalty Reduction	\$ 634.00	\$ 444.00
8363308	Penalty Reduction	\$ 1,026.00	\$ 718.00

	Sub-Total	\$ 1,660.00	\$ 1,162.00
KENT 2011-1053			
8353261	Penalty Reduction	\$ 2,678.00	\$ 1,875.00
KENT 2011-1151			
8353289	Penalty Reduction	\$ 873.00	\$ 611.00
KENT 2011-1375			
8363450	Penalty Reduction	\$ 4,329.00	\$ 3,030.00
8363451	Penalty Reduction	\$ 4,329.00	\$ 3,030.00
	Sub-Total	\$ 8,658.00	\$ 6,060.00
KENT 2009-1549			
7502506	Penalty Reduction	\$ 2,901.00	\$ 1,941.00
7502507	No Change	\$ 100.00	\$ 100.00
7502508	No Change	\$ 100.00	\$ 100.00
7502509	Penalty Reduction	\$ 2,901.00	\$ 1,971.00
7502510	No Change	\$ 100.00	\$ 100.00
8337268	No Change	\$ 100.00	\$ 100.00
8337269	Penalty Reduction	\$ 392.00	\$ 244.00
8337270	No Change	\$ 100.00	\$ 100.00
8337271	No Change	\$ 100.00	\$ 100.00
8337272	No Change	\$ 100.00	\$ 100.00
8337273	Penalty Reduction	\$ 392.00	\$ 244.00
	Sub-Total	\$ 7,286.00	\$ 5,100.00
KENT 2010-767			
8337873	Penalty Reduction	\$ 308.00	\$ 126.00
8337875	No Change	\$ 100.00	\$ 100.00
8337876	No Change	\$ 100.00	\$ 100.00
8337877	No Change	\$ 100.00	\$ 100.00
8337878	Penalty Reduction	\$ 585.00	\$ 410.00
8337879	Penalty Reduction	\$ 308.00	\$ 216.00
8337880	Penalty Reduction	\$ 308.00	\$ 216.00
8337883	Penalty Reduction	\$ 285.00	\$ 200.00
8337884	Penalty Reduction	\$ 285.00	\$ 200.00
	Sub-Total	\$ 2,379.00	\$ 1,668.00
KENT 2011-795			
8350457	Penalty Reduction	\$ 285.00	\$ 200.00
8350465	Penalty Reduction	\$ 263.00	\$ 124.00
8350468	No Change	\$ 100.00	\$ 100.00
8350469	No Change	\$ 100.00	\$ 100.00
7502578	Penalty Reduction	\$ 392.00	\$ 274.00
7502579	Penalty Reduction	\$ 425.00	\$ 298.00
7502581	Penalty Reduction	\$ 392.00	\$ 274.00
	Sub-Total	\$ 1,957.00	\$ 1,370.00
KENT 2011-1343			

8349289	Penalty Reduction	\$ 176.00	\$ 112.00
8349291	Penalty Reduction	\$ 392.00	\$ 274.00
	Sub-Total	\$ 568.00	\$ 386.00
KENT 2012-639			
9867537	Penalty Reduction	\$ 127.00	\$ 100.00
KENT 2009-1601			
8334659	Penalty Reduction	\$ 634.00	\$ 441.00
8354360	Penalty Reduction	\$ 946.00	\$ 710.00
8334664	Penalty Reduction	\$ 634.00	\$ 451.00
8354364	Penalty Reduction	\$ 946.00	\$ 710.00
8354365	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 1,000.00
8334669	Penalty Reduction	\$ 634.00	\$ 476.00
8334670	Penalty Reduction	\$ 634.00	\$ 476.00
8334671	Penalty Reduction	\$ 634.00	\$ 476.00
8334672	Penalty Reduction	\$ 127.00	\$ 100.00
8403484	Penalty Reduction	\$ 127.00	\$ 100.00
8403483	Penalty Reduction	\$ 127.00	\$ 100.00
8334667	Penalty Reduction	\$ 127.00	\$ 100.00
8403485	No Change	\$ 100.00	\$ 100.00
8334666	Penalty Reduction	\$ 127.00	\$ 100.00
8334665	Penalty Reduction	\$ 127.00	\$ 100.00
8334663	Penalty Reduction	\$ 634.00	\$ 476.00
8334661	Penalty Reduction	\$ 138.00	\$ 104.00
8334662	Penalty Reduction	\$ 127.00	\$ 100.00
8334660	Penalty Reduction	\$ 308.00	\$ 231.00
8319909	Penalty Reduction	\$ 190.00	\$ 143.00
	Sub-Total	\$ 8,347.00	\$ 6,494.00
KENT 2010-1211			
8341934	Penalty Reduction	\$38,500.00	\$27,000.00
KENT 2010-1212			
8341937	Penalty Reduction	\$ 946.00	\$ 710.00
8357969	Penalty Reduction	\$ 460.00	\$ 345.00
8341941	Penalty Reduction	\$ 362.00	\$ 272.00
8357970	Penalty Reduction	\$ 460.00	\$ 345.00
8357971	Penalty Reduction	\$ 460.00	\$ 345.00
8402839	Penalty Reduction	\$ 946.00	\$ 710.00
8357972	Penalty Reduction	\$ 460.00	\$ 345.00
8402840	Penalty Reduction	\$ 460.00	\$ 345.00
8402841	Penalty Reduction	\$ 460.00	\$ 345.00
8402842	Penalty Reduction	\$ 460.00	\$ 345.00
8402853	Penalty Reduction	\$ 807.00	\$ 605.00
8341946	Modify to Non-S&S, Unlikely, and 1 Affected	\$ 1,795.00	\$ 900.00
8402843	Penalty Reduction	\$ 946.00	\$ 710.00
8402846	Penalty Reduction	\$ 460.00	\$ 345.00

8357974	Penalty Reduction	\$ 460.00	\$ 345.00
8341948	Modify to Non-S&S, Unlikely, and 1 Affected	\$ 1,530.00	\$ 800.00
8341953	Penalty Reduction	\$ 362.00	\$ 272.00
	Sub-Total	\$11,834.00	\$ 8,084.00
KENT 2010-1364			
8341930	Modify to 104(a) High Negligence	\$27,900.00	\$15,000.00
8341944	No Change	\$13,600.00	\$13,600.00
	Sub-Total	\$41,500.00	\$28,600.00
KENT 2010-1514			
8365019	Penalty Reduction	\$ 1,203.00	\$ 1,000.00
8365020	Penalty Reduction	\$ 1,203.00	\$ 1,000.00
8365039	Penalty Reduction	\$ 362.00	\$ 272.00
8365042	Penalty Reduction	\$ 362.00	\$ 272.00
8365026	Penalty Reduction	\$ 745.00	\$ 559.00
8365027	Penalty Reduction	\$ 362.00	\$ 272.00
8365028	Penalty Reduction	\$ 362.00	\$ 272.00
8320902	Penalty Reduction	\$ 308.00	\$ 231.00
8364415	Penalty Reduction	\$ 807.00	\$ 605.00
8357156	Penalty Reduction	\$ 585.00	\$ 439.00
	Sub-Total	\$ 6,299.00	\$ 4,922.00
KENT 2010-1649			
8341945	Modify to 104(a) Moderate Negligence, and 3 Affected	\$15,900.00	\$12,700.00
KENT 2011-154			
8341942	Penalty Reduction	\$38,500.00	\$34,250.00
8357973	Penalty Reduction	\$38,500.00	\$34,250.00
8357976	Vacate	\$30,200.00	\$ 0.00
	Sub-Total	\$107,200.00	\$68,500.00
KENT 2011-347			
8362587	Penalty Reduction	\$ 499.00	\$ 374.00
8362588	Penalty Reduction	\$ 499.00	\$ 374.00
8362589	Penalty Reduction	\$ 499.00	\$ 374.00
8362590	Penalty Reduction	\$ 499.00	\$ 374.00
8363001	Modify to Non-S&S, Unlikely	\$ 1,795.00	\$ 1,000.00
8363002	Penalty Reduction	\$ 499.00	\$ 374.00
8363003	Modify to Non-S&S, Unlikely	\$ 1,795.00	\$ 1,000.00
8362654	Penalty Reduction	\$ 473.00	\$ 355.00
8362655	Penalty Reduction	\$ 473.00	\$ 355.00
8362656	Penalty Reduction	\$ 473.00	\$ 355.00
8362657	Penalty Reduction	\$ 540.00	\$ 405.00
8362658	Penalty Reduction	\$ 634.00	\$ 476.00
8362659	Penalty Reduction	\$ 634.00	\$ 476.00
8362660	Penalty Reduction	\$ 634.00	\$ 476.00

8362661	Penalty Reduction	\$ 634.00	\$ 476.00
8362671	Penalty Reduction	\$ 317.00	\$ 238.00
	Sub-Total	\$10,897.00	\$ 7,482.00
KENT 2011-348			
8365032	Modify to Lost Workdays	\$ 2,000.00	\$ 1,203.00
KENT 2011-350			
8362832	Penalty Reduction	\$ 634.00	\$ 476.00
8362834	Penalty Reduction	\$ 499.00	\$ 374.00
8362838	Penalty Reduction	\$ 634.00	\$ 476.00
8362840	Penalty Reduction	\$ 634.00	\$ 476.00
	Sub-Total	\$ 2,401.00	\$ 1,802.00
KENT 2011-559			
8356960	Penalty Reduction	\$ 1,800.00	\$ 1,500.00
8365029	Penalty Reduction	\$ 8,209.00	\$ 7,000.00
8365030	Penalty Reduction	\$ 9,122.00	\$ 7,700.00
8365031	Modify to Non-S&S, Unlikely	\$ 7,774.00	\$ 5,000.00
	Sub-Total	\$26,905.00	\$21,200.00
KENT 2011-560			
8364862	Penalty Reduction	\$ 190.00	\$ 124.00
8364863	Penalty Reduction	\$ 108.00	\$ 100.00
8364864	Penalty Reduction	\$ 540.00	\$ 405.00
8364865	Penalty Reduction	\$ 540.00	\$ 405.00
8364866	Penalty Reduction	\$ 540.00	\$ 405.00
	Sub-Total	\$ 1,918.00	\$ 1,439.00
KENT 2011-562			
8364163	Modify to 2 Affected	\$ 2,678.00	\$ 1,500.00
8364164	Modify to 2 Affected	\$ 2,678.00	\$ 1,500.00
8364165	No Change	\$ 2,678.00	\$ 2,678.00
8364166	Modify to Non-S&S, Unlikely	\$ 2,678.00	\$ 600.00
8364167	Modify to Non-S&S, Unlikely	\$ 2,678.00	\$ 600.00
8364168	No Change	\$ 8,893.00	\$ 8,893.00
8364169	Modify to Non-S&S, Unlikely	\$ 1,530.00	\$ 600.00
8364170	Modify to Non-S&S, Unlikely	\$ 8,893.00	\$ 600.00
8364171	Modify to Non-S&S, Unlikely	\$ 5,961.00	\$ 600.00
8364172	No Change	\$ 8,893.00	\$ 8,893.00
8364173	Modify to Non-S&S, Unlikely	\$ 1,412.00	\$ 736.00
8364174	Modify to Non-S&S, Unlikely	\$ 2,106.00	\$ 800.00
8364175	No Change	\$ 100.00	\$ 100.00
8364176	Penalty Reduction	\$ 687.00	\$ 440.00
8364177	No Change	\$ 100.00	\$ 100.00
8364178	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$52,065.00	\$28,740.00
KENT 2011-680			
8335623	No Change	\$ 100.00	\$ 100.00

8335625	No Change	\$ 100.00	\$ 100.00
8335626	Modify to Moderate Negligence	\$ 4,689.00	\$ 2,450.00
	Sub-Total	\$ 4,889.00	\$ 2,650.00
KENT 2011-682			
8364179	Modify to Reasonably Likely, 2 Affected, and Low Negligence	\$13,268.00	\$12,000.00
8335622	Penalty Reduction	\$ 807.00	\$ 605.00
8402951	No Change	\$ 100.00	\$ 100.00
8402952	No Change	\$ 100.00	\$ 100.00
8402953	No Change	\$ 100.00	\$ 100.00
8402954	Penalty Reduction	\$ 687.00	\$ 415.00
8402955	No Change	\$ 100.00	\$ 100.00
8364881	Penalty Reduction	\$ 807.00	\$ 605.00
8364882	Penalty Reduction	\$ 807.00	\$ 605.00
8364883	Penalty Reduction	\$ 807.00	\$ 605.00
8364884	Penalty Reduction	\$ 362.00	\$ 272.00
8364187	Penalty Reduction	\$ 807.00	\$ 605.00
8364188	Penalty Reduction	\$ 2,678.00	\$ 2,500.00
8364189	Modify to Non-S&S, Unlikely	\$ 1,795.00	\$ 1,500.00
8364190	Modify to 1 Affected	\$ 1,657.00	\$ 1,500.00
8364191	Modify to Non-S&S, Unlikely	\$ 1,795.00	\$ 1,500.00
8364192	Modify to Non-S&S, Unlikely	\$ 3,689.00	\$ 3,000.00
8364193	Penalty Reduction	\$ 540.00	\$ 405.00
8364195	Modify to Non-S&S, Unlikely	\$ 2,678.00	\$ 1,500.00
8364197	Modify to Non-S&S, Unlikely	\$ 1,203.00	\$ 1,000.00
8353004	Penalty Reduction	\$ 263.00	\$ 197.00
8346970	Penalty Reduction	\$ 243.00	\$ 182.00
8347841	Penalty Reduction	\$ 745.00	\$ 559.00
8406120	Penalty Reduction	\$ 150.00	\$ 113.00
8346971	Penalty Reduction	\$ 946.00	\$ 710.00
8364198	Penalty Reduction	\$ 1,304.00	\$ 1,000.00
8364199	Penalty Reduction	\$ 2,106.00	\$ 2,000.00
8353000	Penalty Reduction	\$ 3,689.00	\$ 3,000.00
8406123	Penalty Reduction	\$ 745.00	\$ 559.00
8353001	Penalty Reduction	\$ 499.00	\$ 374.00
8347843	Penalty Reduction	\$ 263.00	\$ 197.00
8406124	Penalty Reduction	\$ 150.00	\$ 113.00
8347844	Penalty Reduction	\$ 1,657.00	\$ 1,500.00
8347846	Penalty Reduction	\$ 2,473.00	\$ 2,000.00
8346972	Penalty Reduction	\$ 1,111.00	\$ 1,000.00
8406125	Penalty Reduction	\$ 745.00	\$ 559.00
8406126	Penalty Reduction	\$ 745.00	\$ 559.00
8353002	Penalty Reduction	\$ 150.00	\$ 113.00

8353003	Penalty Reduction	\$ 150.00	\$ 113.00
8406127	Penalty Reduction	\$ 224.00	\$ 168.00
8346973	Modify to Non-S&S, Unlikely	\$ 1,657.00	\$ 1,000.00
8406128	Penalty Reduction	\$ 150.00	\$ 113.00
8347847	Penalty Reduction	\$ 745.00	\$ 559.00
	Sub-Total	\$55,697.00	\$45,705.00
KENT 2011-683			
8362886	Penalty Reduction	\$ 745.00	\$ 559.00
8362887	Penalty Reduction	\$ 117.00	\$ 100.00
8362888	Penalty Reduction	\$ 117.00	\$ 100.00
8362890	No Change	\$ 100.00	\$ 100.00
8362891	Penalty Reduction	\$ 117.00	\$ 100.00
8362892	Penalty Reduction	\$ 117.00	\$ 100.00
8362893	Penalty Reduction	\$ 150.00	\$ 113.00
8403193	Penalty Reduction	\$ 687.00	\$ 515.00
8350237	Penalty Reduction	\$ 334.00	\$ 251.00
8363236	Penalty Reduction	\$ 138.00	\$ 104.00
8403194	Modify to Non-S&S, Unlikely	\$ 1,530.00	\$ 800.00
8403195	No Change	\$ 1,203.00	\$ 1,203.00
8396008	Penalty Reduction	\$ 138.00	\$ 104.00
8363237	Penalty Reduction	\$ 138.00	\$ 104.00
8396009	Penalty Reduction	\$ 138.00	\$ 104.00
8362894	Penalty Reduction	\$ 687.00	\$ 515.00
8396010	Penalty Reduction	\$ 460.00	\$ 345.00
8363238	Penalty Reduction	\$ 138.00	\$ 104.00
8403196	Penalty Reduction	\$ 1,203.00	\$ 900.00
8353221	Penalty Reduction	\$ 687.00	\$ 515.00
8363239	Penalty Reduction	\$ 150.00	\$ 113.00
8353222	Modify to Non-S&S, Unlikely, and 1 Affected	\$ 3,996.00	\$ 2,000.00
8363240	Penalty Reduction	\$ 745.00	\$ 559.00
8363241	Penalty Reduction	\$ 745.00	\$ 559.00
8350238	Penalty Reduction	\$ 263.00	\$ 197.00
8396011	Penalty Reduction	\$ 243.00	\$ 182.00
8363242	Penalty Reduction	\$ 334.00	\$ 251.00
8362898	Penalty Reduction	\$ 176.00	\$ 132.00
8362899	No Change	\$ 100.00	\$ 100.00
8363301	Penalty Reduction	\$ 585.00	\$ 341.00
	Sub-Total	\$16,281.00	\$11,170.00
KENT 2011-684			
8342378	Penalty Reduction	\$ 138.00	\$ 104.00
8342379	Penalty Reduction	\$ 207.00	\$ 155.00
8342548	Penalty Reduction	\$ 425.00	\$ 203.00
8342550	No Change	\$ 100.00	\$ 100.00
8342549	Penalty Reduction	\$ 243.00	\$ 182.00

8342551	No Change	\$ 100.00	\$ 100.00
8342552	No Change	\$ 100.00	\$ 100.00
8342553	Penalty Reduction	\$ 243.00	\$ 182.00
8342554	Penalty Reduction	\$ 112.00	\$ 100.00
8342555	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 1,768.00	\$ 1,326.00
KENT 2011-817			
8365251	Penalty Reduction	\$ 540.00	\$ 405.00
8406405	Penalty Reduction	\$ 243.00	\$ 182.00
8353230	Penalty Reduction	\$ 190.00	\$ 143.00
8406407	Penalty Reduction	\$ 190.00	\$ 143.00
8406408	Penalty Reduction	\$ 190.00	\$ 143.00
8353231	Penalty Reduction	\$ 190.00	\$ 143.00
8365252	Penalty Reduction	\$ 190.00	\$ 143.00
	Sub-Total	\$ 1,733.00	\$ 1,302.00
KENT 2011-823			
8353007	Modify to Non-S&S, Unlikely	\$ 3,143.00	\$ 1,700.00
8353008	Modify to 1 Affected	\$ 3,143.00	\$ 2,645.00
8353009	Modify to Non-S&S, Unlikely	\$ 3,143.00	\$ 1,700.00
8353010	Penalty Reduction	\$ 946.00	\$ 710.00
8353011	Penalty Reduction	\$ 946.00	\$ 710.00
8353012	Modify to Non-S&S, Unlikely	\$ 3,143.00	\$ 1,700.00
8353013	No Change	\$ 1,203.00	\$ 1,203.00
8353016	No Change	\$ 1,052.00	\$ 1,052.00
	Sub-Total	\$16,719.00	\$11,420.00
KENT 2011-824			
8363302	Penalty Reduction	\$ 687.00	\$ 515.00
8363304	Penalty Reduction	\$ 138.00	\$ 104.00
8363306	Penalty Reduction	\$ 745.00	\$ 559.00
8405815	Penalty Reduction	\$ 687.00	\$ 515.00
	Sub-Total	\$ 2,257.00	\$ 1,693.00
KENT 2011-947			
8364682	No Change	\$ 1,235.00	\$ 1,235.00
8364683	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 1,026.00
8353251	No Change	\$ 1,026.00	\$ 1,026.00
8353252	Penalty Reduction	\$ 207.00	\$ 155.00
8353253	Modify to Reasonably Likely, Lost Workdays, 1 Affected	\$ 9,634.00	\$ 3,639.00
8353254	No Change	\$ 1,026.00	\$ 1,026.00
8353255	Penalty Reduction	\$ 207.00	\$ 155.00
8353257	No Change	\$ 1,026.00	\$ 1,026.00
8353258	Modify to Non-S&S, Unlikely	\$ 3,996.00	\$ 2,000.00
8353259	No Change	\$ 1,026.00	\$ 1,026.00

8353260	No Change	\$ 3,996.00	\$ 3,996.00
	Sub-Total	\$24,405.00	\$16,310.00
KENT 2011-948			
8364541	No Change	\$ 1,111.00	\$ 1,111.00
8364544	Vacate	\$ 1,111.00	\$ 0.00
	Sub-Total	\$ 2,222.00	\$ 1,111.00
KENT 2011-949			
8342494	Modify to 1 Affected	\$ 3,200.00	\$ 1,600.00
KENT 2011-950			
8353033	Penalty Reduction	\$ 946.00	\$ 705.00
8353034	Penalty Reduction	\$ 634.00	\$ 476.00
8353035	Penalty Reduction	\$ 634.00	\$ 476.00
8353036	Penalty Reduction	\$ 634.00	\$ 476.00
8365265	Vacate	\$ 1,111.00	\$ 0.00
8365266	No Change	\$ 1,795.00	\$ 1,795.00
8353042	Penalty Reduction	\$ 127.00	\$ 100.00
	Sub-Total	\$ 5,881.00	\$ 4,028.00
KENT 2011-951			
8353235	Penalty Reduction	\$ 138.00	\$ 104.00
8363330	Penalty Reduction	\$ 392.00	\$ 294.00
8364542	Vacate	\$ 1,203.00	\$ 0.00
8364543	Penalty Reduction	\$ 2,678.00	\$ 1,795.00
	Sub-Total	\$ 4,411.00	\$ 2,193.00
KENT 2011-1129			
8404158	Penalty Reduction	\$ 127.00	\$ 100.00
8365301	Penalty Reduction	\$ 807.00	\$ 600.00
8365302	Penalty Reduction	\$ 634.00	\$ 441.00
8365304	Penalty Reduction	\$ 127.00	\$ 100.00
8365305	No Change	\$ 100.00	\$ 100.00
8365306	Penalty Reduction	\$ 127.00	\$ 100.00
8365307	Penalty Reduction	\$ 634.00	\$ 471.00
8365308	Penalty Reduction	\$ 127.00	\$ 100.00
8365309	Penalty Reduction	\$ 634.00	\$ 476.00
8365310	Penalty Reduction	\$ 634.00	\$ 476.00
8353080	Penalty Reduction	\$ 263.00	\$ 197.00
	Sub-Total	\$ 4,214.00	\$ 3,161.00
KENT 2011-1130			
8364923	Penalty Reduction	\$ 207.00	\$ 130.00
8405330	No Change	\$ 100.00	\$ 100.00
8405332	Penalty Reduction	\$ 540.00	\$ 405.00
8405333	Penalty Reduction	\$ 334.00	\$ 251.00
8405334	Penalty Reduction	\$ 362.00	\$ 272.00
8405336	Penalty Reduction	\$ 308.00	\$ 231.00
	Sub-Total	\$ 1,851.00	\$ 1,389.00

KENT 2011-1133			
8363409	Penalty Reduction	\$ 745.00	\$ 509.00
8363410	Penalty Reduction	\$ 224.00	\$ 168.00
8363411	Penalty Reduction	\$ 224.00	\$ 168.00
8363412	Penalty Reduction	\$ 224.00	\$ 168.00
8363413	Penalty Reduction	\$ 687.00	\$ 515.00
8363414	Penalty Reduction	\$ 243.00	\$ 182.00
8363416	Penalty Reduction	\$ 687.00	\$ 515.00
8363417	Penalty Reduction	\$ 687.00	\$ 515.00
8363418	Modify to Non-S&S, Unlikely	\$ 1,412.00	\$ 800.00
8363419	Penalty Reduction	\$ 2,678.00	\$ 2,000.00
8363420	No Change	\$ 100.00	\$ 100.00
8363421	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 8,011.00	\$ 5,740.00
KENT 2011-1234			
8365361	Penalty Reduction	\$ 127.00	\$ 100.00
8365362	Penalty Reduction	\$ 162.00	\$ 112.00
8365364	Penalty Reduction	\$ 243.00	\$ 182.00
8353861	Penalty Reduction	\$ 138.00	\$ 104.00
8406252	Modify to Non-S&S, Unlikely	\$ 1,304.00	\$ 500.00
8353862	Penalty Reduction	\$ 138.00	\$ 104.00
8353863	Penalty Reduction	\$ 634.00	\$ 476.00
8406253	Penalty Reduction	\$ 634.00	\$ 476.00
8365365	Modify to Non-S&S, Unlikely	\$ 1,111.00	\$ 700.00
8406254	Modify to Non-S&S, Unlikely	\$ 1,111.00	\$ 700.00
8406255	Penalty Reduction	\$ 634.00	\$ 476.00
8353864	Penalty Reduction	\$ 634.00	\$ 476.00
8406256	Penalty Reduction	\$ 190.00	\$ 143.00
8406257	Penalty Reduction	\$ 634.00	\$ 476.00
8406258	No Change	\$ 1,111.00	\$ 1,111.00
8365367	Penalty Reduction	\$ 127.00	\$ 100.00
	Sub-Total	\$ 8,932.00	\$ 6,236.00
KENT 2011-1235			
8335669	Penalty Reduction	\$ 207.00	\$ 155.00
KENT 2011-1236			
8352988	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352991	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352992	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352993	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352994	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352995	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352996	No Change	\$ 1,026.00	\$ 1,026.00
8352997	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8352998	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00

8352999	Penalty Reduction	\$ 207.00	\$ 155.00
8363701	No Change	\$ 1,026.00	\$ 1,026.00
8363702	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8363703	No Change	\$ 1,026.00	\$ 1,026.00
8363704	Modify to Non-S&S, Unlikely	\$ 1,140.00	\$ 300.00
8363705	No Change	\$ 1,026.00	\$ 1,026.00
8363706	No Change	\$ 1,026.00	\$ 1,026.00
8363708	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
8363711	No Change	\$ 1,026.00	\$ 1,026.00
8363712	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 300.00
	Sub-Total	\$18,789.00	\$ 9,911.00
KENT 2011-1332			
8363714	Penalty Reduction	\$ 807.00	\$ 605.00
8363715	Penalty Reduction	\$ 807.00	\$ 605.00
8363716	Penalty Reduction	\$ 807.00	\$ 605.00
8363717	Penalty Reduction	\$ 807.00	\$ 605.00
8363718	Penalty Reduction	\$ 1,412.00	\$ 1,200.00
8363719	Penalty Reduction	\$ 807.00	\$ 605.00
8363720	Penalty Reduction	\$ 807.00	\$ 605.00
8406815	Penalty Reduction	\$ 162.00	\$ 122.00
8363723	Penalty Reduction	\$ 807.00	\$ 605.00
8406816	Penalty Reduction	\$ 162.00	\$ 122.00
8363724	Penalty Reduction	\$ 807.00	\$ 605.00
8363725	Penalty Reduction	\$ 807.00	\$ 605.00
8406817	Penalty Reduction	\$ 807.00	\$ 510.00
8406818	Penalty Reduction	\$ 162.00	\$ 122.00
8406819	Penalty Reduction	\$ 162.00	\$ 122.00
	Sub-Total	\$10,130.00	\$ 7,643.00
KENT 2011-1333			
7496996	No Change	\$ 100.00	\$ 100.00
7496997	No Change	\$ 100.00	\$ 100.00
7496998	No Change	\$ 100.00	\$ 100.00
8364993	Penalty Reduction	\$ 207.00	\$ 155.00
8364995	No Change	\$ 100.00	\$ 100.00
8364998	Penalty Reduction	\$ 425.00	\$ 219.00
8368001	Penalty Reduction	\$ 425.00	\$ 319.00
8368002	Penalty Reduction	\$ 460.00	\$ 345.00
8368003	Penalty Reduction	\$ 460.00	\$ 345.00
8368005	Penalty Reduction	\$ 460.00	\$ 315.00
	Sub-Total	\$ 2,837.00	\$ 2,098.00
KENT 2011-1335			
8365369	Penalty Reduction	\$ 127.00	\$ 100.00
8335671	Penalty Reduction	\$ 946.00	\$ 705.00
	Sub-Total	\$ 1,073.00	\$ 805.00

KENT 2011-1336			
8362833	Modify to Non S&S, Unlikely	\$ 1,700.00	\$ 800.00
KENT 2011-1342			
8335670	Penalty Reduction	\$ 207.00	\$ 155.00
KENT 2011-1493			
8406830	Penalty Reduction	\$ 127.00	\$ 100.00
8406831	Penalty Reduction	\$ 127.00	\$ 100.00
8406832	Penalty Reduction	\$ 127.00	\$ 100.00
8406833	Penalty Reduction	\$ 127.00	\$ 100.00
8406838	No Change	\$ 100.00	\$ 100.00
8406839	No Change	\$ 100.00	\$ 100.00
8406840	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 808.00	\$ 700.00
KENT 2011-1494			
8368013	Penalty Reduction	\$ 127.00	\$ 100.00
8368014	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 227.00	\$ 200.00
KENT 2011-1496			
8365393	Modify to Non S&S, Unlikely	\$ 1,412.00	\$ 900.00
8365395	Penalty Reduction	\$ 946.00	\$ 710.00
8365396	Penalty Reduction	\$ 585.00	\$ 439.00
8365397	Penalty Reduction	\$ 150.00	\$ 113.00
	Sub-Total	\$ 3,093.00	\$ 2,162.00
KENT 2012-21			
8347845	Penalty Reduction	\$ 1,944.00	\$ 1,500.00
8365398	Penalty Reduction	\$ 745.00	\$ 559.00
8365399	Penalty Reduction	\$ 150.00	\$ 113.00
8368200	Penalty Reduction	\$ 745.00	\$ 559.00
8368201	Penalty Reduction	\$ 162.00	\$ 122.00
8368202	Penalty Reduction	\$ 745.00	\$ 559.00
8368203	Penalty Reduction	\$ 807.00	\$ 605.00
8368205	Modify to Non S&S, Unlikely	\$ 1,412.00	\$ 800.00
8363957	Penalty Reduction	\$ 150.00	\$ 113.00
8363958	Penalty Reduction	\$ 499.00	\$ 374.00
8363959	No Change	\$ 2,473.00	\$ 2,473.00
8368048	Penalty Reduction	\$ 150.00	\$ 113.00
8363960	Penalty Reduction	\$ 150.00	\$ 113.00
8363961	Modify to 1 Person Affected	\$ 2,473.00	\$ 2,200.00
8368215	Modify to Non S&S, Unlikely, 1 Person Affected	\$ 4,329.00	\$ 1,500.00
8368214	Modify to Non S&S, Unlikely, 1 Person Affected	\$ 4,329.00	\$ 1,500.00
8363962	Penalty Reduction	\$ 150.00	\$ 113.00
8368049	Penalty Reduction	\$ 1,111.00	\$ 800.00

8368050	Modify to Non S&S, Unlikely	\$ 1,657.00	\$ 1,200.00
8368053	Penalty Reduction	\$ 150.00	\$ 113.00
8368221	Penalty Reduction	\$ 807.00	\$ 605.00
8368222	Penalty Reduction	\$ 807.00	\$ 605.00
	Sub-Total	\$25,945.00	\$ 16,639.00
KENT 2012-24			
8405380	No Change	\$ 100.00	\$ 100.00
8405385	No Change	\$ 100.00	\$ 100.00
8405386	No Change	\$ 100.00	\$ 100.00
8365675	Penalty Reduction	\$ 334.00	\$ 151.00
8365674	Penalty Reduction	\$ 207.00	\$ 155.00
8365676	Penalty Reduction	\$ 334.00	\$ 251.00
8365677	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 1,275.00	\$ 957.00
KENT 2012-137			
8353573	Penalty Reduction	\$ 873.00	\$ 555.00
KENT 2012-138			
8368105	Penalty Reduction	\$ 207.00	\$ 105.00
8368106	No Change	\$ 100.00	\$ 100.00
8368107	No Change	\$ 100.00	\$ 100.00
8368108	No Change	\$ 100.00	\$ 100.00
8368109	No Change	\$ 100.00	\$ 100.00
8368110	No Change	\$ 100.00	\$ 100.00
8368111	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 807.00	\$ 705.00
KENT 2012-139			
8368212	Modify to Non-S&S, Unlikely, and Moderate Negligence	\$ 3,689.00	\$ 1,500.00
8404157	No Change	\$ 3,143.00	\$ 3,143.00
	Sub-Total	\$ 6,832.00	\$ 4,643.00
KENT 2012-140			
8364438	Penalty Reduction	\$ 1,000.00	\$ 600.00
8362855	Modify to Non-S&S, Unlikely	\$ 1,800.00	\$ 1,600.00
8362885	Modify to Non-S&S, Unlikely	\$ 2,400.00	\$ 1,600.00
	Sub-Total	\$ 5,200.00	\$ 3,800.00
KENT 2012-141			
8363415	Modify to 2 Affected	\$ 2,901.00	\$ 1,700.00
8406495	Penalty Reduction	\$ 117.00	\$ 100.00
8406272	Modify to Non-S&S, Unlikely	\$ 1,944.00	\$ 1,250.00
8406273	Penalty Reduction	\$ 651.00	\$ 476.00
	Sub-Total	\$ 5,613.00	\$ 3,526.00
KENT 2012-142			
8405331	Penalty Reduction	\$ 540.00	\$ 405.00
8405335	Penalty Reduction	\$ 460.00	\$ 345.00

	Sub-Total	\$ 1,000.00	\$ 750.00
KENT 2012-320			
8352990	Modify to Non-S&S, Unlikely	\$ 4,329.00	\$ 1,000.00
KENT 2012-321			
8368636	Penalty Reduction	\$ 946.00	\$ 710.00
8365368	Modify to Reasonably Likely and Moderate Negligence	\$ 23,229.00	\$15,000.00
8365363	Penalty Reduction	\$ 634.00	\$ 476.00
8365366	Penalty Reduction	\$ 634.00	\$ 476.00
8405748	Modify to 1 Affected	\$ 4,689.00	\$ 4,000.00
8405749	No Change	\$ 1,657.00	\$ 1,657.00
	Sub-Total	\$31,789.00	\$22,319.00
KENT 2012-322			
8363431	Modify to Moderate Negligence	\$ 5,080.00	\$ 3,250.00
8406477	Modify to 1 Affected, and Moderate Negligence	\$11,306.00	\$ 8,000.00
8406478	Penalty Reduction	\$ 1,944.00	\$ 1,575.00
8363678	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$18,430.00	\$12,925.00
KENT 2012-323			
8368622	Penalty Reduction	\$ 207.00	\$ 139.00
8368625	Penalty Reduction	\$ 112.00	\$ 100.00
8368637	Penalty Reduction	\$ 207.00	\$ 130.00
	Sub-Total	\$ 526.00	\$ 369.00
KENT 2012-413			
8364985	No Change	\$ 100.00	\$ 100.00
8363880	Penalty Reduction	\$ 207.00	\$ 130.00
8363881	Penalty Reduction	\$ 207.00	\$ 155.00
	Sub-Total	\$ 514.00	\$ 385.00
KENT 2012-415			
8362889	Penalty Reduction	\$ 1,400.00	\$ 900.00
8363300	Penalty Reduction	\$ 2,700.00	\$ 1,500.00
8363430	Penalty Reduction	\$ 2,500.00	\$ 1,800.00
	Sub-Total	\$ 6,600.00	\$ 4,200.00
KENT 2012-416			
8363454	Penalty Reduction	\$ 873.00	\$ 530.00
8363872	No Change	\$ 100.00	\$ 100.00
8363873	Penalty Reduction	\$ 499.00	\$ 374.00
8363874	No Change	\$ 100.00	\$ 100.00
8363875	No Change	\$ 100.00	\$ 100.00
8363876	No Change	\$ 100.00	\$ 100.00
8363877	No Change	\$ 100.00	\$ 100.00

	Sub-Total	\$ 1,872.00	\$ 1,404.00
KENT 2012-723			
8402059	No Change	\$ 100.00	\$ 100.00
KENT 2012-724			
8404175	Penalty Reduction	\$ 176.00	\$ 132.00
8404176	Penalty Reduction	\$ 263.00	\$ 172.00
	Sub-Total	\$ 439.00	\$ 304.00
KENT 2012-729			
8353163	No Change	\$ 100.00	\$ 100.00
KENT 2012-839			
8368685	Penalty Reduction	\$ 243.00	\$ 157.00
KENT 2012-840			
8363891	No Change	\$ 100.00	\$ 100.00
8363890	Penalty Reduction	\$ 150.00	\$ 113.00
	Sub-Total	\$ 250.00	\$ 213.00
KENT 2012-842			
8363887	Penalty Reduction	\$ 263.00	\$ 197.00
8363894	Penalty Reduction	\$ 263.00	\$ 172.00
8363895	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 626.00	\$ 469.00
KENT 2012-845			
8368677	No Change	\$ 1,657.00	\$ 1,400.00
KENT 2012-847			
8368247	Modify to Non-S&S, Unlikely	\$ 5,503.00	\$ 2,000.00
8368671	Penalty Reduction	\$ 1,944.00	\$ 1,500.00
8368674	Penalty Reduction	\$ 499.00	\$ 374.00
8368675	Penalty Reduction	\$ 224.00	\$ 168.00
8368678	Penalty Reduction	\$ 8,209.00	\$ 6,000.00
8368679	Penalty Reduction	\$ 425.00	\$ 319.00
8368680	Penalty Reduction	\$ 425.00	\$ 319.00
8368681	Penalty Reduction	\$ 334.00	\$ 251.00
	Sub-Total	\$17,563.00	\$10,931.00
KENT 2012-848			
8365678	Modify to 104(a), Moderate Negligence	\$11,000.00	\$ 5,500.00
8365679	Penalty Reduction	\$17,800.00	\$14,000.00
8365680	Penalty Reduction	\$24,600.00	\$19,000.00
	Sub-Total	\$53,400.00	\$38,500.00
KENT 2012-849			
8368331	Penalty Reduction	\$ 150.00	\$ 113.00
KENT 2012-974			
8378200	Penalty Reduction	\$ 150.00	\$ 113.00
8378201	Modify to Non-S&S, Unlikely	\$ 1,111.00	\$ 500.00

8378202	Vacate	\$ 1,111.00	\$ 0.00
8378203	Penalty Reduction	\$ 585.00	\$ 439.00
8378205	Penalty Reduction	\$ 873.00	\$ 655.00
8378206	Penalty Reduction	\$ 243.00	\$ 182.00
8378207	No Change	\$ 100.00	\$ 100.00
8378208	Penalty Reduction	\$ 585.00	\$ 439.00
8378210	No Change	\$ 100.00	\$ 100.00
8378211	No Change	\$ 100.00	\$ 100.00
8378212	Penalty Reduction	\$ 745.00	\$ 559.00
8378213	Penalty Reduction	\$ 807.00	\$ 605.00
8378214	Penalty Reduction	\$ 150.00	\$ 113.00
8402779	No Change	\$ 100.00	\$ 100.00
8402780	No Change	\$ 100.00	\$ 100.00
8402781	No Change	\$ 100.00	\$ 100.00
8402782	No Change	\$ 100.00	\$ 100.00
8402783	No Change	\$ 100.00	\$ 100.00
8402784	Penalty Reduction	\$ 150.00	\$ 113.00
8402785	No Change	\$ 100.00	\$ 100.00
8402786	No Change	\$ 100.00	\$ 100.00
8378216	Penalty Reduction	\$ 745.00	\$ 259.00
8378217	Penalty Reduction	\$ 150.00	\$ 113.00
8378218	No Change	\$ 100.00	\$ 100.00
8378219	Penalty Reduction	\$ 150.00	\$ 113.00
8378220	Penalty Reduction	\$ 150.00	\$ 113.00
8378222	Penalty Reduction	\$ 150.00	\$ 113.00
8378223	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 9,055.00	\$ 5,629.00
KENT 2011-1497			
8363456	Penalty Reduction	\$ 2,282.00	\$ 1,800.00
8363457	Penalty Reduction	\$ 2,282.00	\$ 1,800.00
	Sub-Total	\$ 4,564.00	\$ 3,600.00
KENT 2012-22			
8406482	Penalty Reduction	\$ 585.00	\$ 357.00
8406483	Penalty Reduction	\$ 176.00	\$ 132.00
8406489	Penalty Reduction	\$ 585.00	\$ 439.00
8363473	No Change	\$ 100.00	\$ 100.00
8353911	Modify to 2 Affected	\$ 4,440.00	\$ 2,250.00
8406468	Penalty Reduction	\$ 651.00	\$ 488.00
8406469	Penalty Reduction	\$ 651.00	\$ 488.00
8406470	Penalty Reduction	\$ 131.00	\$ 100.00
8406471	Penalty Reduction	\$ 131.00	\$ 100.00
8406472	Penalty Reduction	\$ 651.00	\$ 488.00
8406473	Penalty Reduction	\$ 971.00	\$ 728.00
8406474	Penalty Reduction	\$ 131.00	\$ 100.00
8406475	Penalty Reduction	\$ 651.00	\$ 488.00

8406476	Penalty Reduction	\$ 131.00	\$ 100.00
8406481	Penalty Reduction	\$ 112.00	\$ 100.00
8406480	No Change	\$ 100.00	\$ 100.00
8406479	Penalty Reduction	\$ 131.00	\$ 100.00
8406484	Penalty Reduction	\$ 403.00	\$ 302.00
8406485	Penalty Reduction	\$ 167.00	\$ 125.00
8406486	Penalty Reduction	\$ 142.00	\$ 107.00
8406487	Penalty Reduction	\$ 651.00	\$ 488.00
8406488	Penalty Reduction	\$ 131.00	\$ 100.00
8406490	Penalty Reduction	\$ 705.00	\$ 529.00
8406491	Penalty Reduction	\$ 705.00	\$ 529.00
8406493	Penalty Reduction	\$ 142.00	\$ 107.00
8406494	Penalty Reduction	\$ 705.00	\$ 529.00
8406497	Penalty Reduction	\$ 651.00	\$ 488.00
8406498	Penalty Reduction	\$ 651.00	\$ 488.00
8406500	Penalty Reduction	\$ 705.00	\$ 529.00
8406501	Penalty Reduction	\$ 131.00	\$ 100.00
8406502	Penalty Reduction	\$ 131.00	\$ 100.00
8406503	Penalty Reduction	\$ 131.00	\$ 100.00
	Sub-Total	\$16,479.00	\$11,279.00
KENT 2012-726			
8363652	Penalty Reduction	\$ 1,412.00	\$ 1,058.00
8368047	Penalty Reduction	\$ 243.00	\$ 132.00
8368451	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 500.00
8368660	No Change	\$ 100.00	\$ 100.00
8368661	No Change	\$ 100.00	\$ 100.00
8368452	Penalty Reduction	\$ 1,026.00	\$ 900.00
8368663	Penalty Reduction	\$ 634.00	\$ 476.00
9867539	Penalty Reduction	\$ 190.00	\$ 143.00
8368670	Penalty Reduction	\$ 946.00	\$ 710.00
9867549	Penalty Reduction	\$ 392.00	\$ 294.00
	Sub-Total	\$ 6,069.00	\$ 4,413.00
KENT 2012-728			
8363455	Penalty Reduction	\$ 1,530.00	\$ 1,100.00
8363458	Modify to Moderate Negligence	\$ 1,530.00	\$ 775.00
8353919	Modify to Reasonably Likely	\$ 3,784.00	\$ 2,000.00
8363882	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 6,944.00	\$ 3,975.00
KENT 2012-885			
8406499	Penalty Reduction	\$ 4,200.00	\$ 2,500.00
8406496	Modify to Non-S&S, Unlikely	\$ 2,800.00	\$ 1,500.00
	Sub-Total	\$ 7,000.00	\$ 4,000.00
KENT 2009-1286			
8320791	No Change	\$ 100.00	\$ 100.00

8320792	No Change	\$ 100.00	\$ 100.00
8320793	No Change	\$ 100.00	\$ 100.00
8320794	Penalty Reduction	\$ 334.00	\$ 251.00
8320795	Penalty Reduction	\$ 334.00	\$ 201.00
8320796	Penalty Reduction	\$ 224.00	\$ 143.00
8356200	Penalty Reduction	\$ 138.00	\$ 104.00
8356201	No Change	\$ 100.00	\$ 100.00
8356204	No Change	\$ 100.00	\$ 100.00
8356205	No Change	\$ 100.00	\$ 100.00
8356207	No Change	\$ 100.00	\$ 100.00
8356208	No Change	\$ 100.00	\$ 100.00
8356211	Penalty Reduction	\$ 687.00	\$ 390.00
8356213	Penalty Reduction	\$ 285.00	\$ 214.00
8356214	Penalty Reduction	\$ 334.00	\$ 201.00
8356215	No Change	\$ 100.00	\$ 100.00
8338397	No Change	\$ 100.00	\$ 100.00
8338398	Penalty Reduction	\$ 334.00	\$ 251.00
8338399	Penalty Reduction	\$ 1,026.00	\$ 770.00
8338400	Penalty Reduction	\$ 634.00	\$ 426.00
8356216	No Change	\$ 100.00	\$ 100.00
8356217	Penalty Reduction	\$ 555.00	\$ 416.00
8356218	No Change	\$ 100.00	\$ 100.00
8356219	Penalty Reduction	\$ 334.00	\$ 201.00
8356220	Penalty Reduction	\$ 334.00	\$ 201.00
8356221	Penalty Reduction	\$ 334.00	\$ 251.00
8356222	Penalty Reduction	\$ 1,203.00	\$ 902.00
8400602	No Change	\$ 100.00	\$ 100.00
8356224	Penalty Reduction	\$ 224.00	\$ 168.00
8356225	Penalty Reduction	\$ 224.00	\$ 168.00
8356226	Penalty Reduction	\$ 585.00	\$ 439.00
8356227	Penalty Reduction	\$ 334.00	\$ 251.00
8356228	No Change	\$ 100.00	\$ 100.00
8356229	No Change	\$ 100.00	\$ 100.00
8356230	Penalty Reduction	\$ 540.00	\$ 405.00
8356231	Penalty Reduction	\$ 334.00	\$ 251.00
9887160	Penalty Reduction	\$ 499.00	\$ 374.00
8356232	No Change	\$ 100.00	\$ 100.00
8356234	Penalty Reduction	\$ 362.00	\$ 272.00
8356235	Penalty Reduction	\$ 334.00	\$ 251.00
8356236	Penalty Reduction	\$ 334.00	\$ 251.00
8356237	Penalty Reduction	\$ 334.00	\$ 251.00
8356238	Penalty Reduction	\$ 334.00	\$ 251.00
8356239	No Change	\$ 100.00	\$ 100.00
8356240	Penalty Reduction	\$ 334.00	\$ 201.00
8356241	No Change	\$ 100.00	\$ 100.00

8356242	Penalty Reduction	\$ 334.00	\$ 201.00
8356243	No Change	\$ 100.00	\$ 100.00
8356244	Penalty Reduction	\$ 334.00	\$ 251.00
8356245	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 14,530.00	\$ 10,907.00
KENT 2009-1388			
9887162	Penalty Reduction	\$ 392.00	\$ 294.00
8403439	No Change	\$ 100.00	\$ 100.00
8403435	No Change	\$ 362.00	\$ 362.00
8356246	No Change	\$ 100.00	\$ 100.00
8403440	No Change	\$ 334.00	\$ 334.00
8403441	No Change	\$ 334.00	\$ 334.00
8403442	No Change	\$ 100.00	\$ 100.00
8356247	No Change	\$ 100.00	\$ 100.00
8356248	No Change	\$ 362.00	\$ 362.00
8303443	No Change	\$ 100.00	\$ 100.00
8356249	No Change	\$ 362.00	\$ 362.00
8356250	No Change	\$ 334.00	\$ 334.00
8356259	No Change	\$ 100.00	\$ 100.00
8335344	No Change	\$ 100.00	\$ 100.00
8335345	No Change	\$ 362.00	\$ 362.00
8335346	No Change	\$ 100.00	\$ 100.00
8403446	No Change	\$ 100.00	\$ 100.00
8335347	No Change	\$ 100.00	\$ 100.00
8403447	No Change	\$ 100.00	\$ 100.00
8335348	Penalty Reduction	\$ 362.00	\$ 272.00
8403448	No Change	\$ 100.00	\$ 100.00
8335351	Modify to Non-S&S, Unlikely	\$ 1,795.00	\$ 538.00
	Sub-Total	\$ 6,199.00	\$ 4,754.00
KENT 2010-1515			
8341943	Modify to 104(a), Reasonably Likely and 2 Affected	\$ 47,200.00	\$ 25,000.00
KENT 2010-1517			
8356594	Penalty Reduction	\$ 2,300.00	\$ 1,200.00
8364000	Modify to 104(a), Reasonably Likely	\$ 53,800.00	\$ 32,500.00
8364002	Modify to Non-S&S, Unlikely	\$ 2,300.00	\$ 1,500.00
	Sub-Total	\$ 58,400.00	\$ 35,200.00
KENT 2011-155			
8402897	Penalty Reduction	\$ 150.00	\$ 113.00
8405235	Penalty Reduction	\$ 745.00	\$ 559.00
8342492	Penalty Reduction	\$ 162.00	\$ 122.00
8342493	Penalty Reduction	\$ 162.00	\$ 122.00

8342495	Penalty Reduction	\$ 499.00	\$ 374.00
8342496	Penalty Reduction	\$ 460.00	\$ 345.00
8342497	Penalty Reduction	\$ 807.00	\$ 605.00
9866073	Penalty Reduction	\$ 540.00	\$ 405.00
8402891	Penalty Reduction	\$ 460.00	\$ 345.00
8402892	Penalty Reduction	\$ 745.00	\$ 559.00
8335494	Penalty Reduction	\$ 745.00	\$ 559.00
8335495	Penalty Reduction	\$ 745.00	\$ 559.00
8342501	Penalty Reduction	\$ 807.00	\$ 605.00
	Sub-Total	\$ 7,027.00	\$ 5,272.00
KENT 2011-349			
8405157	Penalty Reduction	\$ 138.00	\$ 104.00
8404215	Penalty Reduction	\$ 362.00	\$ 272.00
8405158	Penalty Reduction	\$ 540.00	\$ 405.00
8404218	No Change	\$ 100.00	\$ 100.00
8405159	Penalty Reduction	\$ 362.00	\$ 272.00
8405160	Penalty Reduction	\$ 150.00	\$ 113.00
8405161	Penalty Reduction	\$ 873.00	\$ 655.00
8402902	Penalty Reduction	\$ 687.00	\$ 515.00
8402905	Penalty Reduction	\$ 540.00	\$ 405.00
8342512	Penalty Reduction	\$ 634.00	\$ 476.00
8342515	Non-S&S, Unlikely	\$ 2,106.00	\$ 1,100.00
8357184	Penalty Reduction	\$ 392.00	\$ 294.00
8342522	Penalty Reduction	\$ 127.00	\$ 100.00
8342523	Penalty Reduction	\$ 392.00	\$ 294.00
8342524	Penalty Reduction	\$ 745.00	\$ 559.00
8342526	Penalty Reduction	\$ 540.00	\$ 405.00
8364117	Penalty Reduction	\$ 540.00	\$ 405.00
8364118	Penalty Reduction	\$ 540.00	\$ 405.00
8364119	No Change	\$ 100.00	\$ 100.00
8364120	Penalty Reduction	\$ 946.00	\$ 710.00
8364121	Penalty Reduction	\$ 540.00	\$ 338.00
9866085	Penalty Reduction	\$ 117.00	\$ 100.00
	Sub-Total	\$11,471.00	\$ 8,127.00
KENT 2011-561			
8403810	Modify to 104(a), 1 Affected	\$ 9,122.00	\$ 6,000.00
8403811	Modify to 104(a), Moderate Negligence	\$ 4,810.00	\$ 1,304.00
	Sub-Total	\$13,932.00	\$ 7,304.00
KENT 2011-681			
8403812	Penalty Reduction	\$25,800.00	\$ 12,900.00
8403813	Modify to 104(a), High Negligence Citation	\$19,300.00	\$ 13,000.00
	Sub-Total	\$45,100.00	\$ 25,900.00

KENT 2011-1132			
8364680	Modify to Reasonably Likely, Lost Workdays	\$ 25,163.00	\$ 17,000.00
8364681	Modify to Reasonably Likely. Lost Workdays	\$ 25,163.00	\$ 17,000.00
8353256	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 550.00
8353266	Penalty Reduction	\$ 207.00	\$ 155.00
8353267	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 800.00
8404009	Penalty Reduction	\$ 207.00	\$ 155.00
8353286	Modify to Non-S&S, Unlikely	\$ 3,405.00	\$ 800.00
8353287	No Change	\$ 2,901.00	\$ 2,901.00
8353288	Penalty Reduction	\$ 425.00	\$ 319.00
8353290	Penalty Reduction	\$ 807.00	\$ 605.00
8352977	Penalty Reduction	\$ 207.00	\$ 155.00
8352978	Modify to Non-S&S, Unlikely	\$ 1,026.00	\$ 897.00
8352979	No Change	\$ 1,026.00	\$ 1,026.00
8352980	No Change	\$ 1,026.00	\$ 1,026.00
	Sub-Total	\$ 63,615.00	\$ 43,389.00
KENT 2011-1237			
8363422	No Change	\$ 100.00	\$ 100.00
8363423	Penalty Reduction	\$ 138.00	\$ 104.00
8363427	Penalty Reduction	\$ 117.00	\$ 100.00
8363428	Modify to Non-S&S, Unlikely	\$ 1,203.00	\$ 900.00
8363429	Penalty Reduction	\$ 585.00	\$ 402.00
8363432	Penalty Reduction	\$ 117.00	\$ 100.00
8363433	Penalty Reduction	\$ 585.00	\$ 413.00
8363434	Penalty Reduction	\$ 117.00	\$ 100.00
8363435	Penalty Reduction	\$ 745.00	\$ 559.00
8363436	Penalty Reduction	\$ 2,282.00	\$ 1,282.00
8363437	Penalty Reduction	\$ 131.00	\$ 100.00
8363441	Penalty Reduction	\$ 585.00	\$ 439.00
8363442	Penalty Reduction	\$ 585.00	\$ 439.00
	Sub-Total	\$ 7,290.00	\$ 5,038.00
KENT 2011-1334			
8342516	Modify to No Lost Workdays	\$ 8,600.00	\$ 4,000.00
KENT 2011-1337			
8406459	Penalty Reduction	\$ 117.00	\$ 100.00
8363443	Penalty Reduction	\$ 127.00	\$ 100.00
8363444	Penalty Reduction	\$ 117.00	\$ 100.00
8363445	Penalty Reduction	\$ 585.00	\$ 374.00

8363446	Penalty Reduction	\$ 2,282.00	\$ 1,500.00
8363447	Penalty Reduction	\$ 460.00	\$ 345.00
8363448	Penalty Reduction	\$ 117.00	\$ 100.00
8363449	Penalty Reduction	\$ 117.00	\$ 100.00
8363452	Penalty Reduction	\$ 460.00	\$ 345.00
8363453	Penalty Reduction	\$ 117.00	\$ 100.00
		\$ 4,499.00	\$ 3,164.00
KENT 2011-1495			
8364181	Modify to 104(a), 2 Affected	\$ 52,500.00	\$ 20,000.00
8364194	Modify to Non-S&S, Unlikely and 1 Affected	\$ 13,600.00	\$ 6,800.00
	Sub-Total	\$ 66,100.00	\$ 26,800.00
KENT 2011-1498			
8363459	Penalty Reduction	\$ 263.00	\$ 197.00
8363460	Modify to Moderate Negligence	\$ 1,700.00	\$ 750.00
8353925	Modify to Non-S&S, Unlikely	\$ 2,536.00	\$ 750.00
	Sub-Total	\$ 4,499.00	\$ 1,697.00
KENT 2012-20			
8347842	Modify to Non-S&S, Unlikely	\$ 4,000.00	\$ 4,000.00
8406122	Modify to 1 Affected	\$ 10,705.00	\$ 8,000.00
	Sub-Total	\$ 14,705.00	\$ 12,000.00
KENT 2012-23			
8342546	Modify to Reasonably Likely, Lost Workdays	\$ 38,500.00	\$ 25,000.00
8342557	Modify to Non-S&S, Unlikely	\$ 1,800.00	\$ 1,300.00
	Sub-Total	\$ 40,300.00	\$ 26,300.00
KENT 2012-414			
8368064	Modify to Reasonably Likely	\$ 70,000.00	\$ 35,000.00
KENT 2012-725			
8368065	Modify to 104(a), Moderate Negligence and Reasonably Likely	\$ 70,000.00	\$ 39,000.00
8368211	No Change	\$ 14,373.00	\$ 7,200.00
8368213	Modify to 104(a), Moderate Negligence, and Reasonably Likely	\$ 35,543.00	\$ 17,771.00
8368218	Vacate	\$ 13,609.00	\$ 0.00
8368054	Modify to 104(a), Moderate Negligence, and Reasonably Likely	\$ 30,288.00	\$ 15,144.00

8368219	Modify to High Negligence and Reasonably Likely	\$ 70,000.00	\$ 35,000.00
8368220	Modify to 104(a), High Negligence, and Reasonably Likely	\$ 60,000.00	\$ 30,000.00
	Sub-Total	\$293,813.00	\$144,115.00
KENT 2012-841			
8406504	Modify to 104(a), Unlikely	\$ 7,176.00	\$ 5,000.00
8353920	Modify to 104(a), Lost Workdays	\$ 56,929.00	\$ 16,000.00
8353935	Modify to Lost Workdays	\$ 2,000.00	\$ 2,000.00
	Sub-Total	\$ 66,105.00	\$ 23,000.00
KENT 2012-846			
8368063	Modify to 104(a), Moderate Negligence, and Reasonably Likely	\$ 70,000.00	\$ 35,800.00
8368051	Modify to Reasonably Likely	\$ 70,000.00	\$ 35,000.00
8368217	Modify to Reasonably Likely	\$ 70,000.00	\$ 40,000.00
	Sub-Total	\$210,000.00	\$110,800.00
KENT 2012-1394			
8378048	Penalty Reduction	\$ 575.00	\$ 431.00
KENT 2012-1499			
8363896	Penalty Reduction	\$ 293.00	\$ 170.00
8408540	No Change	\$ 100.00	\$ 100.00
8408541	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 493.00	\$ 370.00
KENT 2012-1501			
8368676	Penalty Reduction	\$ 1,657.00	\$ 600.00
KENT 2013-17			
8378081	Penalty Reduction	\$ 1,100.00	\$ 500.00
KENT 2013-18			
8378204	Penalty Reduction	\$ 585.00	\$ 439.00
8378215	Penalty Reduction	\$ 224.00	\$ 172.00
8378124	No Change	\$ 100.00	\$ 100.00
8378125	Penalty Reduction	\$ 745.00	\$ 459.00
	Sub-Total	\$ 1,654.00	\$ 1,170.00
KENT 2013-352			
8369645	No Change	\$ 100.00	\$ 100.00
8369647	No Change	\$ 100.00	\$ 100.00
8369648	No Change	\$ 100.00	\$ 100.00
	Sub-Total	\$ 300.00	\$ 300.00

KENT 2010-1213			
8364001	Modify to Permanently Disabling & Moderate Negligence	\$ 9,122.00	\$ 6,122.00
GLOBAL SETTLEMENT TOTAL		\$1,994,395.00	\$1,197,465.00

WHEREFORE, the motions to approve settlement for the above-captioned cases are **GRANTED**. The modifications made to the citations and orders in each docket are set forth below.

KENT 2009-1281

It is **ORDERED** that Citation Nos. 8335785, 8335786, 8335790, 8335798, 8335802 and 8335815 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2009-1284

The Secretary has vacated Citation No. 8334581. It is **ORDERED** that Citation No. 8334580 be **MODIFIED** to reduce the level of negligence to “low.” It is **ORDERED** that Citations Nos. 8334590 and 8334599 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-9

It is **ORDERED** that Citation No. 8356316 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. The level of negligence remains “high.”

KENT 2010-10

The Secretary has vacated Citation Nos. 8356307, 8356311, 8356312, 8356313 and 8356315. It is **ORDERED** that Citation Nos. 8356291 and 8356292 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-148

It is **ORDERED** that Citation Nos. 8357224 and 8357241 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-152

It is **ORDERED** that Order Nos. 8356319 and 8356321 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to “moderate,” to

reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-918

It is **ORDERED** that Citation No. 8356561 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-1108

It is **ORDERED** that Citation No. 8342695 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation No. 8342697 be **MODIFIED** to reduce the level of negligence to “moderate.”

KENT 2010-1214

It is **ORDERED** that Citation Nos. 8356596 and 8356597 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation Nos. 8356599 and 8342424 be **MODIFIED** to reduce the level of negligence to “low.” It is **ORDERED** that Citation No. 8319991 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “lost workdays or restricted duty.” It is **ORDERED** that Citation No. 8342430 be **MODIFIED** to reduce the level of negligence to “moderate.” It is **ORDERED** that Citation Nos. 8342423, 8342425 and 8342431 be **MODIFIED** to reduce the numbers of persons affected to “one person.”

KENT 2010-1362

It is **ORDERED** that Citation Nos. 8357998, 8365015 and 8365016 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-1365

It is **ORDERED** that Citation Nos. 8341957 and 8341958 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-1516

The Secretary has vacated Citation No. 8364417.

KENT 2010-1518

It is **ORDERED** that Citation Nos. 8364049, 8364054, 8364416, 8342450 and 8342451 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s

significant and substantial finding. It is **ORDERED** that Citation No. 8364050 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “lost workdays or restricted duty.” It is **ORDERED** that Citation No. 8364051 be **MODIFIED** to reduce the number of persons affected to “three persons.”

KENT 2010-1648

It is **ORDERED** that Citation No. 8357161 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-143

It is **ORDERED** that Citation No. 8402886 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-144

It is **ORDERED** that Citation No. 8364090 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-145

It is **ORDERED** that Citation Nos. 8364094, 8364098 and 8364100 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation Nos. 8364096 and 8364101 be **MODIFIED** to reduce the number of persons affected to “one person,” and to reduce the injury that could reasonably be expected to occur to “lost workdays or restricted duty.” It is **ORDERED** that Citation No. 8364099 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “lost workdays or restricted duty.”

KENT 2011-156

It is **ORDERED** that Citation No. 8364466 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-447

It is **ORDERED** that Citation Nos. 8362850 and 8362865 be **MODIFIED** to reduce the level of negligence to “low.” It is **ORDERED** that Citation Nos. 8362859, 8362860 and 8362862 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-448

It is **ORDERED** that Citation No. 8364834 be **MODIFIED** to reduce the level of negligence to “low.” It is **ORDERED** that Citation No. 9866095 be **MODIFIED** to reduce the

number of persons affected to “two persons,” and to reduce the injury that could reasonably be expected to occur to “lost work days or restricted duty.”

KENT 2011-564

It is **ORDERED** that Citation No. 8342539 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-952

It is **ORDERED** that Citation Nos. 8365264 and 8365267 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2009-1601

It is **ORDERED** that Citation No. 8354365 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-1212

It is **ORDERED** that Citation Nos. 8341946 and 8341948 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding, and to reduce the number of persons affected to “one person.”

KENT 2010-1364

It is **ORDERED** that Order No. 8341930 be **MODIFIED** to change the type of action to a section 104(a) citation. The level of negligence remains “high.”

KENT 2010-1649

It is **ORDERED** that Order No. 8341945 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to “moderate,” and to reduce the number of persons affected to “three persons.”

KENT 2011-154

The Secretary has vacated Order No. 8357976.

KENT 2011-347

It is **ORDERED** that Citation Nos. 8363001 and 8363003 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-348

It is **ORDERED** that Citation No. 8365032 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “lost workdays or restricted duty.”

KENT 2011-559

It is **ORDERED** that Order No. 8365031 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-562

It is **ORDERED** that Citation Nos. 8364166, 8364167, 8364169, 8364170, 8364171, 8364173 and 8364174 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation Nos. 8364163 and 8364164 be **MODIFIED** to reduce the number of persons affected to “two persons.”

KENT 2011-680

It is **ORDERED** that Citation No. 8335626 be **MODIFIED** to reduce the level of negligence to “moderate.”

KENT 2011-682

It is **ORDERED** that Citation Nos. 8364189, 8364191, 8364192, 8364195, 8364197 and 8346973 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation No. 8364179 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely,” to reduce the number of persons affected to “two persons,” and to reduce the level of negligence to “low.” It is **ORDERED** that Citation No. 8364190 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2011-683

It is **ORDERED** that Citation No. 8403194 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation No. 8353222 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” to remove the inspector’s significant and substantial finding, and to reduce the number of persons affected to “one person.”

KENT 2011-823

It is **ORDERED** that Citation Nos. 8353007, 8353009 and 8353012 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and

substantial finding. It is **ORDERED** that Citation No. 8353008 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2011-947

It is **ORDERED** that Citation Nos. 8364683 and 8353258 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation No. 8353253 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely,” to reduce the injury that could reasonably be expected to occur to “lost workdays,” and to reduce the number of persons affected to “one person.”

KENT 2011-948

The Secretary has vacated Citation No. 8364544.

KENT 2011-949

It is **ORDERED** that Citation No. 8342494 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2011-950

The Secretary has vacated Citation No. 8365265.

KENT 2011-951

The Secretary has vacated Citation No. 8364542.

KENT 2011-1133

It is **ORDERED** that Citation No. 8363418 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1234

It is **ORDERED** that Citation Nos. 8406252, 8365365 and 8406254 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1236

It is **ORDERED** that Citation Nos. 8352988, 8352991, 8352992, 8352993, 8352994, 8352995, 8352997, 8352998, 8363702, 8363704, 8363708 and 8363712 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1336

It is **ORDERED** that Citation No. 8362833 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1496

It is **ORDERED** that Citation No. 8365393 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-21

It is **ORDERED** that Citation Nos. 8368205 and 8368050 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation Nos. 8368215 and 8368214 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” to remove the inspector’s significant and substantial finding, and to reduce the number of persons affected to “one person.” It is **ORDERED** that Citation No. 8363961 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2012-139

It is **ORDERED** that Citation No. 8368212 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” to remove the inspector’s significant and substantial finding, and to reduce the level of negligence to “moderate.”

KENT 2012-140

It is **ORDERED** that Citation Nos. 8362855 and 8362885 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-141

It is **ORDERED** that Citation No. 8363415 be **MODIFIED** to reduce the number of persons affected to “two persons.” It is **ORDERED** that Citation No. 8406272 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-320

It is **ORDERED** that Citation No. 8352990 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-321

It is **ORDERED** that Citation No. 8365368 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely,” and to reduce the level of negligence to “moderate.” It is **ORDERED** that Citation No. 8405748 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2012-322

It is **ORDERED** that Citation No. 8363431 be **MODIFIED** to reduce the level of negligence to “moderate.” It is **ORDERED** that Citation No. 8406477 be **MODIFIED** to reduce the number of persons affected to “one person,” and to reduce the level of negligence to “moderate.”

KENT 2012-847

It is **ORDERED** that Citation No. 8368247 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-848

It is **ORDERED** that Citation No. 8365678 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to “moderate.”

KENT 2012-974

The Secretary has vacated Citation No. 8378202. It is **ORDERED** that Citation No. 8378201 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-22

It is **ORDERED** that Citation No. 8353911 be **MODIFIED** to reduce the number of persons affected to “two persons.”

KENT 2012-726

It is **ORDERED** that Citation No. 8368451 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-728

It is **ORDERED** that Citation No. 8363458 be **MODIFIED** to reduce the level of negligence to “moderate.” It is **ORDERED** that Citation No. 8353919 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely.”

KENT 2012-885

It is **ORDERED** that Citation No. 8406496 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2009-1388

It is **ORDERED** that Citation No. 8335351 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2010-1515

It is **ORDERED** that Order No. 8341943 be **MODIFIED** to change the type of action to a section 104(a) action, to reduce the likelihood of injury to “reasonably likely,” and to reduce the number of persons affected to “two persons.”

KENT 2010-1517

It is **ORDERED** that Citation No. 8364000 be **MODIFIED** to change the type of action to a section 104(a) action, and to reduce the likelihood of injury to “reasonably likely.” It is **ORDERED** that Citation No. 8364002 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-349

It is **ORDERED** that Citation No. 8342515 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-561

It is **ORDERED** that Order No. 8403810 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the number of persons affected to “one person.” It is **ORDERED** that Order No. 8403811 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the level of negligence to “moderate.”

KENT 2011-681

It is **ORDERED** that Order No. 8403813 be **MODIFIED** to change the type of action to a section 104(a) citation. The level of negligence remains “high.”

KENT 2011-1132

It is **ORDERED** that Citation Nos. 8364680 and 8364681 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely,” and to reduce the injury that could reasonably be expected to occur to “lost workdays.” It is **ORDERED** that Citation Nos. 8353256, 8353267,

8353286 and 8352978 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1237

It is **ORDERED** that Citation No. 8363428 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2011-1334

It is **ORDERED** that Order No. 8342516 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “no lost workdays.”

KENT 2011-1495

It is **ORDERED** that Order No. 8364181 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the number of persons to “two persons.” It is **ORDERED** that Citation No. 8364194 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” to remove the inspector’s significant and substantial finding, and to reduce the number of persons to “one person.”

KENT 2011-1498

It is **ORDERED** that Citation No. 8363460 be **MODIFIED** to reduce the level of negligence to “moderate.” It is **ORDERED** that Citation No. 8353925 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding,

KENT 2012-20

It is **ORDERED** that Citation No. 8347842 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding. It is **ORDERED** that Citation No. 8406122 be **MODIFIED** to reduce the number of persons affected to “one person.”

KENT 2012-23

It is **ORDERED** that Citation No. 8342546 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely,” and to reduce the injury that could reasonably be expected to occur to “lost work days.” It is **ORDERED** that Citation No. 8342557 be **MODIFIED** to reduce the likelihood of injury to “unlikely,” and to remove the inspector’s significant and substantial finding.

KENT 2012-414

It is **ORDERED** that Citation No. 8368064 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely.”

KENT 2012-725

The Secretary has vacated Citation No. 8368218. It is **ORDERED** that Citation Nos. 8368065, 8368213 and 8368054 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to “moderate,” and to reduce the likelihood of injury to “reasonably likely.” It is **ORDERED** that Citation No. 8368219 be **MODIFIED** to reduce the level of negligence to “high,” and to reduce the likelihood of injury to “reasonably likely.” It is **ORDERED** that Citation No. 8368220 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to “high,” and to reduce the likelihood of injury to “reasonably likely.”

KENT 2012-841

It is **ORDERED** that Citation No. 8406504 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the likelihood of injury to “unlikely.” It is **ORDERED** that Citation No. 8353920 be **MODIFIED** to change the type of action to a section 104(a) citation, and to reduce the injury that could reasonably be expected to occur to “lost workdays.” It is **ORDERED** that Citation No. 8353935 be **MODIFIED** to reduce the injury that could reasonably be expected to occur to “lost workdays.”

KENT 2012-846

It is **ORDERED** that Citation No. 8368063 be **MODIFIED** to change the type of action to a section 104(a) citation, to reduce the level of negligence to “moderate,” and to reduce the likelihood of injury to “reasonably likely.” It is **ORDERED** that Citation Nos. 8368051 and 8368217 be **MODIFIED** to reduce the likelihood of injury to “reasonably likely.”

KENT 2010-1213

It is **ORDERED** that Order No. 8364001 be **MODIFIED** to reduce the injury or illness that could reasonably be expected to occur to “permanently disabling” and to reduce the level of negligence to “moderate.”

PAYMENT

It is further **ORDERED** that the operator pay a total penalty of **\$1,197,465.00** in ten installments. The first payment in the amount of \$119,746.50 will be due on September 24, 2013. Nine subsequent payments of \$119,746.50 shall be due on the following dates:

October 24, 2013, November 24, 2013, December 24, 2013, January 24, 2014, February 24, 2014, March 24, 2014, April 24, 2014, May 26, 2014 and June 24, 2014.³

The parties have agreed that failure to make any of the scheduled payments within ten days of the due date will result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor, or other agency acting on its behalf, in collecting the amount due. Upon receipt of full payment, the above-captioned cases are **DISMISSED**.

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

Distribution:

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/ca; /dm

³ The payment schedule has been adjusted to accommodate the clerical corrections made to the decision. Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-7240
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August 20, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2012-278
Petitioner	:	A.C. No. 36-05018-286371
	:	
v.	:	
	:	
CUMBERLAND COAL RESOURCES, LP,	:	Mine: Cumberland Mine
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Susan M. Jordan, Esq., & Douglas R. Sciotto, CLR, U.S. Department of Labor, Office of the Solicitor, Philadelphia PA for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). Cumberland Coal Resources, LP (“Cumberland” or “Respondent”) engages in coal mining activities at the Cumberland Mine that subjects it to the jurisdiction of the Act as a “coal or other mine” as defined by section 3(h) of the Act, 30 U.S.C. §802(h). Further, Respondent meets the definition of an “operator” as defined by section 3(d) of the Act, 30 U.S.C. §802(d). Hence, this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judge (ALJ) pursuant to sections 105 and 113 of the Act, 30 U.S.C. §§805, 813. A hearing was held in Pittsburgh, PA on January 15, 2013, where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post-Hearing Briefs.

Two citations were at issue in this proceeding. Both of those citations were issued under 30 C.F.R. §75.400. The Court upholds Citation Nos. 7022912 and 7071904 and imposes civil penalties of \$176.00 and \$392.00, respectively.

STIPULATIONS

The Secretary and Respondent agreed that the following stipulations should be included in the record:

1. Cumberland was an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. §803(d), at the mine at which the citations at issue in this proceeding was issued
2. Operations of Cumberland Mine 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 designed Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. True copies of the citations at issue in this proceeding were served on Cumberland as required by the Act.
5. Cumberland demonstrated good faith in the abatement of the citations.
6. Payment of the proposed penalty will not affect Cumberland’s ability to continue in business.
7. The appropriateness of the penalties, if any are assessed, to the size of Cumberland’s business should be based on the fact that in 2011, Cumberland Mine mined approximately 6.2 Million tons of coal, and that in 2011, Cumberland’s controller mined approximately 128 million tons of coal.
8. Cumberland mine had a total of 279 violations that have been paid or finally adjudicated issued in the 15-month period prior to the issuance of the citations in this case. Cumberland had 1,116 inspection days during that same period.

CITATION NO. 7022912

i. Contents of the Citation

On February 22, 2012 at 10:15 a.m., Inspector Carl F. Kubincanek (“Kubincanek”) issued to Respondent Citation No. 7022912. Simmons found:

An accumulation of combustible material was pushed into the wedge cut of the face of #3 entry of the 61 Headgate section (MMU 034). The accumulation went from rib to rib, 4 to 5 feet in depth and approximately 10 feet in length. Methane in the amount of 0.45% was found in the wedge cut and a light film of rockdust was applied to the accumulation. The outby area in the #3 entry was cleaned and rockdusted

Government's Exhibit 1.¹ Kubincanek noted that the gravity of this violation was "Unlikely," "Lost Workdays/Restricted Duty," and that it would affect two persons. *Id.* He further marked that Respondent exhibited "Moderate" negligence with respect to this violation. *Id.*

On February 23, 2012 at 11:00 a.m., Kubincanek issued a termination of the citation noting, "[t]he face was cleaned and the loading crew is now mining this entry." *Id.*

ii. Legal Standards

Citation No. 7022912 was issued under Section 104(a) of the Mine Act. That provision provides the following:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 814(a).

This citation deals with an alleged violation of 30 C.F.R. §75.400 (titled "Accumulation of combustible materials.") That section provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. §75.400

iii. Secretary's Evidence

a. Testimony of Carl F. Kubincanek

Kubincanek testified as to his relevant coal mining experience including 30-35 years of experience with continuous miners. (Tr. 19-23). He also testified regarding his 20 years of experience and training as a coal mine inspector. (Tr. 19-23). He has mine examiner's papers and assistant mine foreman's papers in Pennsylvania. (Tr. 20-21). Before 2011, Kubincanek

¹ Hereinafter Government's Exhibits will be referred to as "GX" then the number.

inspected Cumberland Mine on occasion. (Tr. 22). After the mine was added to his group, he conducted three EO1 inspections and other special inspections. (Tr. 22). He would spend four to six days there every three months. (Tr. 22).

He reviewed the citation he issued to Respondent on February 22, 2012 at 10:15 a.m. (GX-1) and his notes from that day (GX-2). (Tr. 23-24). He also reviewed a map of the 61 headgate that showed conditions at the mine that day (GX-3). (Tr. 24). He issued the citation because, while checking the faces before the EO1 inspection, he found an accumulation of combustible material in the No. 3 Entry wedge cut.² (Tr. 25-26). This was a violation of Section 75.400, which prohibits accumulations of combustible material in an active area. (Tr. 26-27, 40-41). The area was ventilated. (Tr. 26-27). He marked the accumulation on the map with a circled "A." (Tr. 28).

The accumulation was approximately 16 feet wide (rib to rib), 10 feet long, and 4-5 feet high (though varied) where visible. (Tr. 29, 31). These are estimates because Kubincanek could not measure beyond the supports. (Tr. 31). The accumulation was mostly combustible, though it included rock, clay and other things. (Tr. 29). He knew this based on the appearance and texture. (Tr. 30). The accumulation was damp to dry and he did not see water. (Tr. 30). On cross examination, he conceded that he did not touch the accumulation. (Tr. 56). Further, continuous miners spray water when cutting. (Tr. 56). There are at least 40-50 sprays with 80-100 PSI. (Tr. 56). The water gets on the mine floor and mixes with whatever is being scooped up. (Tr. 56-57). Finally, material that is piled dries out slower than spread out material. (Tr. 63-64). However, this occurred in winter when mines are drier. (Tr. 61-62). Also, it would have dried out in the day between when the miner moved out and when it returned. (Tr. 62).

He could not travel past the last roof bolt so he stopped about 12-14 feet from the face and looked. (Tr. 27, 29, 48-49). In full-face mining, bolting occurs at the same time as mining, every four feet. (Tr. 49). Kubincanek was not sure if it was rib bolted in the cited area but it was not center bolted. (Tr. 49). There was a sign at the last bolts saying "Danger Roof" indicating not to go beyond. (Tr. 49). There was also a barrier device hung across the area to prevent people from accidentally entering. (Tr. 50). All of the material was in by the barrier. (Tr. 50).

There was a minimal film of rock dust on the top making the accumulations gray rather than black. (Tr. 30-31). Kubincanek believed that rock dust had migrated to that area during the previous shift when other areas were rock dusted and were not dusted deliberately. (Tr. 32). He

² Wedge cuts are unique to full-face mining. (Tr. 46). The purpose of a wedge cut is to limit the amount of roof that is hanging and it serves as a warning not enter the area. (Tr. 40). It also allows the miner to cut the area and use fresh bolts when it returns to the area. (Tr. 40). Finally, methane is lighter than air so cutting a wedge makes the air migrate up and out of the cut and improves ventilation. (Tr. 40). The MSHA Tech Support Office created a drawing to show what a wedge cut looked like (GX-4). (Tr. 28, 38). Kubincanek circled an accumulation on the drawing and marked it with a circled "B" to show where the accumulation in the instant citation was located. (Tr. 28-29). The wedge cut tapered from the entry height of 8 feet to a height of 2 feet over a 14-foot stretch. (Tr. 32-33).

did not take rock dust samples because he could not enter the wedge cut. (Tr. 57). However, the entry had been properly rock-dusted up to within 40 feet of the face. (Tr. 50).

The accumulations were more than just the amount left under the miner, a small amount of which is acceptable.³ (Tr. 26-27, 33). The entry was clean, so Kubincanek decided the coal had been pushed forward from the entry into the wedge and left there. (Tr. 34). The No. 3 Entry, after the belt, is a runway where scoops and shuttles travel. (Tr. 34). The mine has a history of sloughage (coal falling from the rib) and if that material stays on the bottom it will be crushed into dust if not cleaned with a scoop. (Tr. 34-35). Sloughage can stay in place as long as it is heavily rock-dusted. (Tr. 59). He could tell from the appearance that there had been sloughage and that it had been cleaned. (Tr. 59). The material pushed into the wedge could have come from the ribs, spillage from shuttle cars, or come from underneath the miner. (Tr. 35, 57, 59). Kubincanek reached this conclusion based on his experience. (Tr. 35). Respondent should have put the material on the feeder to the belt line with the scoop or loader instead of in the wedge. (Tr. 35-36). The miner was in a different entry at this time. (Tr. 36).

On cross examination, Kubincanek conceded that a scoop is used for other things on a section, like transporting supplies. (Tr. 55). If someone uses a scoop to move material to the feeder, the feeder is narrower than the scoop and there might be a spill. (Tr. 55-56). A shuttle car would put material on the feeder without spillage. (Tr. 56).

The accumulations did not block examination of the face because Kubincanek had a probe pole. (Tr. 38-39, 52). He also took a valid gas check within 12-inches of the roof and got 0.45% methane, which indicated something was wrong. (Tr. 39, 52). The Respondent's books said the pre-shift and on-shift found liberation of methane at 0.3%. (Tr. 39, 52-53). That was less than what Kubincanek found. (Tr. 53). He saw the detector, but it was not his reading so he did not record it. (Tr. 53). He conducted the gas check to make sure it was venting and it was doing so. (Tr. 39-40). He was concerned because the material in the wedge would condense the area, prevent ventilation, and cause accumulation of gases. (Tr. 41-42). When the miner returned and cut into trapped methane, an ignition could occur from the bits or cable (if not permissible). (Tr. 42).

However, on cross-examination Kubincanek conceded that a continuous miner is a permissible piece of equipment, designed to prevent explosion. (Tr. 53). Continuous miners have methane monitors that shut the machine down if it finds more than 1.8% methane. (Tr. 53-54). The miner cuts coal from the face and liberates methane. (Tr. 54). It starts at 100% then is reduced by ventilations. (Tr. 54). When the miner arrives to load out the material, it is essentially doing its typical job of cutting material at the face and loading it out. (Tr. 54).

³ When a full-face miner is mining, it dumps a pile of coal behind the miner. (Tr. 47). That pile can fill a shuttle car, 8 to 10 tons, or more. (Tr. 47-48). Shuttle cars are about 14 feet wide and 30 feet long and the material will be at least 3 to 4 feet high. (Tr. 48). The pile that forms behind a miner is not rock-dusted. (Tr. 48). MSHA will not cite an operator for having a pile of accumulation behind the miner before loading it out. (Tr. 48).

Based on when the miners said the area was cleaned, Kubincanek determined that the accumulation existed from the midnight shift before the day shift. (Tr. 37, 60-61). The material could have been there longer; they have no way of knowing for sure. (Tr. 61). The miner had moved to Entry No. 2 to cut over to No. 1. (Tr. 55, 61). He marked the area he thought they were going to cut on the 22nd with an X on GX-3. (Tr. 55). After that it would go back to No. 3, but this could take two or three shifts (a day) based on the rate of mining. (Tr. 37, 55, 61). The material would have been loaded out when the miner returned to the entry. (Tr. 51).

On cross examination Kubincanek conceded that he also inspected the No. 1 and No. 2 entry and there were no other problems. (Tr. 50-51). The sections looked good. (Tr. 51). Having a system is important to effective clean-up. (Tr. 51).

Kubincanek found an incident was unlikely and non-S&S because he did not have an ignition source. (Tr. 42-43). Also, the ventilation was still good, though that could have changed if more material was added. (Tr. 43). By the time the miner returned it might have been S&S or more likely, but he evaluated the condition based on the facts that the time. (Tr. 43). He found that two persons would be affected because, in the event of an ignition, the two integral persons most inby would be most affected. (Tr. 45).

Kubincanek found Respondent exhibited moderate negligence because the foreman deliberately pushed material from the No. 3 Entry into the face. (Tr. 43). Also, because the material was present on the midnight shift, the foreman had seen it at the face and the daytime foreman would have seen it also. (Tr. 43-44). Further, in 2011 when Kubincanek's group took over the Mine, there was a pre-conference meeting wherein his supervisor, Robert W. Newhouse ("Newhouse"), Inspector Joseph Vargo ("Vargo"), and other members of MSHA sat down with Respondent to discuss past and future enforcement. (Tr. 44). Kubincanek chaired the meeting and Newhouse stated that Respondent was not permitted to push combustible material into the wedge as it was against policy. (Tr. 44-45).

Newhouse is the person who set the policy at the pre-conference. (Tr. 58). Kubincanek does not know if that is difference from other groups. (Tr. 58). He agreed with Newhouse. (Tr. 62). Newhouse was with Kubincanek on the day of the citation and is the person who evaluates him. (Tr. 58-59). If Kubincanek did not follow the policy, it would come up in his evaluation. (Tr. 59). He did not recall observing this condition at the mine in the past. (Tr. 45). Most mines clean up as they go, as Kubincanek did when he was in the industry. (Tr. 45-46). After that conference, Kubincanek did not observe material pushed to the face until a year later. (Tr. 62-63). If he had, he would have cited them. (Tr. 63).

Kubincanek told Respondent how he wanted them to abate the condition. (Tr. 46). He left the mine and returned the next day. (Tr. 46). Kubincanek does not know when they returned, but when he was there on the 23rd, the miner was there. (Tr. 46, 51-52). They were about 8 feet past the spot where the accumulations has been located at 11:00 a.m. on the 23rd. (Tr. 46, 52). Before they re-started, they had to probe it and check for methane. (Tr. 52-53). He spoke with their representatives and Respondent had properly scooped the material. (Tr. 47).

b. Testimony of Robert W. Newhouse

Newhouse testified as to his relevant coal mining experience including experience with continuous miners. (Tr. 68-69). He also testified regarding his 30-plus years of experience and training as a coal mine inspector and supervisor with MSHA. (Tr. 65-68). He supervises between 6 and 9 inspectors plus support personnel and, along with another supervisor, is in charge of inspecting more than 40 mines. (Tr. 66-67). As part of his duties, he must travel to mines at least 36 times a year. (Tr. 67). At times, Cumberland Mine has been under his supervision. (Tr. 69). Starting in 2011, his group inspected the mine and still does. (Tr. 69-70).

Newhouse recalled being at the mine on February 22, 2012. (Tr. 71-72). He was there to evaluate a trainee (Randy Bombach), to evaluate Kubincanek's performance (as required), and inspect the mine. (Tr. 72). Mike Konosky ("Konosky") from the company also went with them. (Tr. 72).

Newhouse is familiar with the citation Kubincanek issued at 10:15 a.m. that day for a violation of 75.400. (Tr. 72-73). It was issued for coal pushed into the wedge cut with the scoop. (Tr. 73, 85). The accumulations were rib to rib (16 feet) and around 4 to 5 feet high at the center, less on the sides. (Tr. 74-75). He could not see if it was full in the back but it was 10-12 feet long, as deep as the wedge. (Tr. 75). There was a light film of rock dust caused by dust being moved by the air, nothing purposeful. (Tr. 75-76). The accumulation was mostly coal. (Tr. 76). It was black or dark gray and appeared dry. (Tr. 76). The accumulation was coal and therefore combustible. (Tr. 76). A scoop can be used to cut into the bottom. (Tr. 85). The bottom may be coal or it may be other material. (Tr. 85).

As the miner moves up, the load machine behind it advances up to the back of the miner. (Tr. 90). The negligible amount of coal left afterwards is acceptable if heavier dust is added. (Tr. 90-91). This material would not be pushed anywhere, it would be left scattered, covered with rock dust, and removed later. (Tr. 88). The accumulation under the miner would only be a couple of inches deep 20 feet long, and 16 feet wide (about the size of the miners). (Tr. 91).

Newhouse believed the coal was pushed into the wedge cut when the No. 3 Entry was cleaned. (Tr. 76-77). The area cleaned started where "63" is shown on the map (GX-3) and was about 175 to 200 feet from the cross cut. (Tr. 77). They put the rock dust on it after they scooped it. (Tr. 77). He does not recall confirming this was Respondent. (Tr. 77-78).

The accumulations existed for about a shift, because the No. 3 Entry looked freshly cleaned. (Tr. 78). Cumberland works three production shifts. (Tr. 78). The citation was issued on the day shift and the accumulation occurred the previous midnight shift. (Tr. 78). Respondent was preparing to cut an angle chute to connect No. 2 entry to No. 1, so it would have taken three shifts for them to return to No. 3 entry. (Tr. 78-79). He does not know if they mined the No. 2 entry, but they were going to mine roughly where the X was located on the map. (Tr. 79). He does not know if the other two entries had been driven that far. (Tr. 80).

It looked like they were using a system to keep the area clean and that they had just scooped the No. 3 Entry the previous shift. (Tr. 89). Newhouse did not recall writing citations at the No. 1 or No. 2 feeder and did not think they had. (Tr. 89). It takes significant maintenance to keep the feeder clean. (Tr. 89). He did not recall those areas being unclean. (Tr. 89-90).

Newhouse and Kubincanek both measured 0.45% methane as observed at the last strap in the No. 3 Entry. (Tr. 73-74, 85). Newhouse did not see the probe register 0.3%. (Tr. 85). The coal in the ribs and face can have methane in it can be liberated even before the coal is broken. (Tr. 85-86). Mining can create additional liberation. (Tr. 86). It is possible for broken coal to liberate more methane than unbroken coal, but not always.⁴ (Tr. 86).

Newhouse reviewed the citation and agreed that it was a violation of §75.400 because there was an accumulation of combustible material. (Tr. 80). He agreed with the gravity designation, with some reservations. (Tr. 80). The potential hazard of this condition would be that when the miner returned, the material in the wedge would interfere with ventilation. (Tr. 81). The wedge is designed to provide ventilation, but putting material inside could prevent the movement of air and trap the methane. (Tr. 81). When the miner returned and cut, it could hit rock and cause sparks. (Tr. 81-82). This increases the likelihood of methane ignition. (Tr. 82).

On cross examination, Newhouse conceded that the continuous miner is a permissible machine. (Tr. 86). When mining with a continuous miner the curtain is taken down and ventilation tubing and a fan is used to increase ventilation. (Tr. 86-87). Before cutting coal, the miners probe for methane to the extent possible. (Tr. 87). They must also check the methane at the last row of bolts twice a shift. (Tr. 87). They must pre-shift and on-shift. (Tr. 87).

Newhouse agreed with the negligence determination. (Tr. 82). He was present for the pre-inspection conference in early 2011. (Tr. 82-83). Mine Manager Jack Tackemas, Mine Superintendent Robbie Robinsons, Safety Director Bob Bohatch, Safety Inspector Konosky, production coordinators, the department heads, and the United Mine Worker's Safety Committee were all present. (Tr. 83). In that meeting he told them about the prohibition against pushing material into a wedge cut. (Tr. 83). He did not know what their practice was before and did not want to surprise them. (Tr. 83-84). He brought it up because he had seen the issue at Emerald Mine, which is owned by the same company. (Tr. 84). Before that meeting, a different field office supervisor was responsible for inspection at the mine. (Tr. 87). Newhouse does not know if there is a difference of opinion about whether material can be pushed to the face during cleanup. (Tr. 87-88). It is MSHA's policy, even though it is not written down. (Tr. 88).

⁴ Under Section 103(i) a mine must be inspected on a five-day spot when it liberates more than a million cubic feet of methane for a 24 hour period. (Tr. 70). This mine liberates anywhere from 7 to 12 million. (Tr. 70).

iv. Respondent's Evidence

a. *Testimony of Mathia Mark Mooney*

Mooney discussed his four and a half years of mining experience including his time in the foreman trainee program. (Tr. 93-95). He also discussed his university training both in mining and management. (Tr. 94-95). He is an assistant foreman. (Tr. 95). At the time of the citation, Mooney was a section foreman and had been for about a month. (Tr. 111).

Mooney was supervising a continuous miner section in February 2012. (Tr. 95). When starting to mine, Mooney would go to the miner and do the parameter checks. (Tr. 96). He also checked the miner and the faces for gas before turning on equipment. (Tr. 96, 112). At the No. 3 Entry the face was considered the last row of bolts. (Tr. 96-97, 112). Methane is checked in the upper quarter. (Tr. 113). Mooney does not probe the wedge. (Tr. 113). If the probe was placed at the bottom, it would not give an accurate reading because methane rises. (Tr. 113-114)

If everything is good, they start. (Tr. 96). At the time they were using an Alpine miner, which allows simultaneous cutting and bolting. (Tr. 97). When they cut, the coal piles behind the miner where a loader gathers it and loads it into the shuttle cars. (Tr. 97). Generally, the coal is only piled for a few minutes before being loaded out. (Tr. 114). The two shuttle cars transport coal to the feeder and dump it on the belt. (Tr. 98). The amount of coal behind the miner varies but they try to keep it minimal for safety reasons. (Tr. 98). They will use a loader to clean the rib during mining and to clean spillage from the shuttle cars. (Tr. 98-99).

The amount they mine before changing to another entry varies based on the cycle. (Tr. 98). On a gate road like the No. 3 Entry, 180 feet is average. (Tr. 98). When the miner finishes a cut, they do a wedge cut and pull the miner out.⁵ (Tr. 99). They will then clean the spillage that accumulates on the sides, load it, and then push it to the face. (Tr. 99). They then dust with the loading machine and take the miner to the next location. (Tr. 99). Finally, they scoop the entry as needed. (Tr. 99-100). This is done, even though they have been cleaning the whole time, because the shuttle cars will create ruts in the bottom. (Tr. 100-101). It also cleans up a little coal spillage. (Tr. 101). If there is significant material it is taken to the face and if it is a small amount it is left where it fell until the miner returns. (Tr. 101).

While they are cleaning, the mine fan is still in place to ventilate the area. (Tr. 100). This is easier than hanging canvas, because if the canvas is used it must be moved when the scoop is in the area and this can cause methane accumulation.⁶ (Tr. 100-102).

⁵ Wedge cuts are designed to allow them to install the last roof bolts with the miner. (Tr. 106).

⁶ The fan has fiberglass tubes that run in the upper corner of the entry and ventilates gas from the face. (Tr. 101-102). Canvas extends from the floor to the roof and goes near the middle of the entry, so the scoop cannot move past it. (Tr. 102). This fan is in addition to any other fans used to ventilate the mine. (Tr. 102).

Mooney was on the day shift when Kubincanek issued the citation and saw the material in the No. 3 Entry. (Tr. 102). It was in the area between the last row of bolts and the face where he could not enter. (Tr. 103-104). The material was rock-mud that had been drug up by the shuttle car. (Tr. 104). Mooney reviewed the illustration of a wedge cut (GX-4) but did not believe it was as substantial as in the drawing.⁷ (Tr. 103). It was not five feet tall; it was less than three bucket loads.⁸ (Tr. 103, 115). His men abated the condition and it was only a quarter to half of a shuttle car of material and only took 35-45 minutes. (Tr. 103, 115). Even if the wedge is full it cannot fit a substantial amount of material. (Tr. 106).

There was a rib bolter on either side of the miner and they used them on all three entries. (Tr. 109). At the time of the citation, the rib in Entry No. 3 was rib bolted and “Tensared.” (Tr. 109). Tensar is a plastic mesh with a board on it for additional support. (Tr. 110).

The rock-dusting in the area was very good and it was done deliberately. (Tr. 104, 119). The area was fling dusted and dusted from the loading machine. (Tr. 104-105). The loader has a duster on it, a box with an auger attached to it that will project dust out of a hose. (Tr. 108-109). A fling duster attaches to the bucket scoop that discharges a large amount of dust. (Tr. 109). The fan also distributes dust and rock dust can be spread by hand. (Tr. 109). Outby the last row of bolts, the No. 3 Entry, ribs, and floor were dusted. (Tr. 105-106). The material at the face (the circled 65 on GX-3) had as much rock dust as the surrounding area. (Tr. 105). The rock dust could have traveled in the air currents from areas outby. (Tr. 119).

Methane liberated from the wedge cut is removed with ventilation. (Tr. 107). The cited wedge cut had adequate ventilation. (Tr. 107). The methane was within the legal limits at the last bolts. (Tr. 118). He believes that the reading was 0.3, but he only does not recall he just saw it in the on-shift and pre-shift. (Tr. 118). That amount indicates that there was methane present but nothing out of the ordinary for the area. (Tr. 118). Mooney did not believe it was unsafe to have material in the wedge cut. (Tr. 107, 110). Pushing the material up is part of the clean-up process. (Tr. 110). The material was going to be loaded out when the miner moved to the next location. (Tr. 107). Usually they like to load it out before they start cutting again, but it depends on the operator. (Tr. 107-108). There is no hazard in loading it out with a continuous miner. (Tr. 108). It would have been moved out at 9:00-10:00 that evening. (Tr. 108).

The cleanup plan states that material must be moved when it starts to impede examination. (Tr. 119-120). It would impede ventilation if he could not take a proper gas check at the last row of bolts because material extended out past the bolts. (Tr. 120). If it does not extend past the last row of bolts they do not clean it; there is no set amount that must be cleaned. (Tr. 120-121). Even if material was at the roof in the wedge cut, it would be okay if he got a good methane reading. (Tr. 121). It would not be easy to get material roofed out in the wedge

⁷ The picture of the wedge cut (GX-4) is a representation of what a wedge cut looks like but Mooney believed an actual cut was at a sharper angle, like the angle of stairs. (Tr. 106).

⁸ He did not know how much the buckets could hold, but he would guess three or four tons of coal (rock and mud are heavier than coal). (Tr. 115-116).

cut. (Tr. 121). There could be a pocket at the toe of the wedge cut he did not know about. (Tr. 122).

There are alternatives to the practice of pushing material into the wedge including scooping it over to the next entry where the miner could pick it up. (Tr. 122). That would take the coal out faster. (Tr. 122). It is also possible to scoop out the face area and bring it to the feeder. (Tr. 122). However, Respondent does not like this because the scoop is larger than the feeder and this can create spillage. (Tr. 123-126). Further, the scoop bucket sides are 18 inches while shuttle cars are three and a half to four feet deep. (Tr. 126). Also, a shuttle car dumps on the feeder with a conveyor chain onto the middle of the feeder. (Tr. 126). The scoop cannot dump because of its height and just has to ram, causing spillage. (Tr. 126). When they cleaned No. 3, they scooped it and took the scoop to the feeder and dumped it on. (Tr. 125). Then they had to clean the feeder. (Tr. 125). Pushing into the wedge is also faster. (Tr. 124).

The No. 3 Entry was mined before the citation, but Mooney does not remember the time of day it was finished. (Tr. 116-117). After they mined No. 3, they mined up No. 1, up No. 2 and were located in Entry No. 2 and preparing to mine an airway from 2 to 1 (at X on GX-3) when the citation was issued. (Tr. 116-117, 127). To go to No. 1, the miner could go through the No. 65 crosscut or the foreman might take it up and over to avoid tramming backward with the cables. (Tr. 116). After the airway between 1 and 2, the miner would return to No. 3. (Tr. 118).

The scoop is battery powered but the loader, shuttle car, and miner are cable powered. (Tr. 124-125). When moving across sections, Mooney has to be aware of where the cables are because they are expensive. (Tr. 125).

b. Testimony of Jason David Grasha

Jason David Grasha discussed his four and a half years of mining experience, including experience on continuous miner sections. (Tr. 127-130). He is a certified mine examiner, has foreman papers, is an EMT, is on the mine rescue team, and has blasting certification. (Tr. 128).

Grasha worked on the midnight shift prior to the shift where the citation was issued and was familiar with the material in the wedge. (Tr. 130, 139). It was scooped there after the miner holed through 2 to 3. (Tr. 130). The material was in by the last row of bolts and was not a significant amount. (Tr. 130). The material was mostly the rock cracked from the floor when the miner turned from the No. 3 to the No. 2 Entry and the insignificant amount of coal that drops through the conveyor system and from the intersection. (Tr. 131, 139-140). It was not the material from the cleanup of outby areas of the No. 3 entry. (Tr. 140). That was not the practice, only material from the last crosscut to the face was pushed in. (Tr. 140). When he worked at Enlow Fork, material left behind from the cut would be pushed into the face and loaded in the next cycle. (Tr. 129-130). No one objected to this practice. (Tr. 130).

The accumulation purposefully rock dusted by hand, usually two bags of dust. (Tr. 130-132, 140). He did not believe they brought in a duster. (Tr. 141). The material was covered in rock dust, it was more than a light film; it was white and inert. (Tr. 141).

During shifts, Grasha conducts examinations of the faces, the returns, the electrical equipment, and conducts gas checks at the proper location. (Tr. 132). He reviewed R-2, which contained an on-shift examination from February 22, 2013 of the 61 headgate section which he signed. (Tr. 132-133). At the No. 3 Entry gas checks are taken at the last channel (a strap between roof bolts) in the entry, 12 inches from the face, roof, and ribs.⁹ (Tr. 133, 142). The on-shift states that Entry No. 3 measured 0.5% methane after the cleanup. (Tr. 141-142). He knew it was after clean-up because it was the beginning of his shift and the materials were already in the wedge cut. (Tr. 142). He also conducts pre-shifts at that location. (Tr. 132, 134). They are conducted three hours before the oncoming shift. (Tr. 134). Grasha reviewed R-3 which contained a pre-shift for February 22, 2012 that he signed.¹⁰ (Tr. 134-135). The methane reading at the No. 3 Entry was 0.3%. (Tr. 135).

All of the examinations show readings at the last channel strap not probes into the wedge. (Tr. 142). Probes are used when someone is actually mining. (Tr. 143). When cuts are started, the tests are at the last channel. (Tr. 143). The probe allows methane readings to be done farther than from standing. (Tr. 144). It is around 20 feet. (Tr. 144-145).

It is a little easier to clean with a scoop than a miner because of the cables and the greater size of the bucket than the pan under the head of the miner. (Tr. 136). The pan is the full width of the miner. (Tr. 136). The scoop provides a better clean because it is not the width of the whole entry so the ribs can be cleaned individually, plus the miner drops material. (Tr. 137).

c. Testimony of Michael Anthony Konosky, Sr.

Konosky, discussed his 35 years of mining experience with Respondent, including 22 years as a safety representative. (Tr. 145-146). He has assistant mine foreman and EMT certifications. (Tr. 146).

Konosky accompanied the inspection party and saw the material at the face. (Tr. 146). The material had been placed there when the crew scooped the entry after mining. (Tr. 146). The accumulation was more than just the materials left under the miner. (Tr. 148). It included materials scooped out by the area from Entry No. 3. (Tr. 149). Coal is combustible and the material contained coal. (Tr. 149). He does not know how much of the material was coal and how much was rock, it was mixed. (Tr. 151). It was harder to tell because of the rock dust. (Tr. 151). From where the entry started it was about 30 feet and it was all dusted. (Tr. 151-152). He does not recall the inspectors finding any other problems with the clean-up. (Tr. 147).

The material had “somewhat” been rock dusted, but not deliberately. (Tr. 147, 149). It was sufficient and more than a film. (Tr. 147, 149). He is not sure if it was inert. (Tr. 149).

⁹ At the last channel there is a physical barrier to impeded travel across the entire width of the entry about waist high that holds two signs that say “Unsupported Top.” (Tr. 143).

¹⁰ It is normal practice to look at the pre-shift examination, in fact Grasha countersigned the previous pre-shift indicating that he seen the conditions and hazards. (Tr. 135-136). The other miner signed it when he came out. (Tr. 136).

Konosky had no problem with the material where it was; that is where it belonged and how clean-up was always done. (Tr. 147). Newhouse was not happy about it, but other inspectors and field supervisors did not enforce §75.400 the same way. (Tr. 147-148). He believes this was the first citation Respondent received for this action. (Tr. 150). No inspectors objected to the material in the wedge before this was issued, despite the fact that all of the inspectors before this had seen material in the wedge. (Tr. 150). In fact, some agreed with the practice. (Tr. 148). However, Konosky was aware Newhouse disagreed with this practice and may have learned that at the pre-inspection meeting. (Tr. 151).

v. Contentions of the Parties

The Secretary contends that Citation No. 7022912 was validly issued, that the violation was unlikely to result in lost-workdays/restricted duty, that two miners were affected, that Respondent was moderately negligent, and that the proposed civil penalty was appropriate. The Secretary argues that the citation is valid because there was an accumulation of combustible material in an active working section of the mine and that accumulation was not rendered inert with rock dust. (*Secretary's Post-Hearing Brief* at 4-7). The Secretary argues that, with respect to gravity, that an event was unlikely because there was no ignition source and the area was still being vented, however if an event were to occur it would result in lost-workday/restricted duty injuries to two miners. *Id.* at 8. Further, the Secretary contends Respondent's actions were moderately negligent because Respondent had deliberately pushed material to the face, the accumulations had been examined twice and were obvious, and management had been told this condition was a violation during a pre-inspection conference. *Id.* at 8-9. Finally, the Secretary argues that the penalty was appropriate. *Id.* at 9-10.

Respondent contends that Citation No. 7022912 was not validly issued. Respondent argues that the citation was not valid because the area cited was not an active working and because a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not believe the condition posed a danger. (*Respondent's Post-Hearing Brief* at 9-15). Respondent argued that a reasonably prudent person would not believe the condition posed a danger because the coal was being staged for removal in a manner that demonstrated control by the operator and management had been praised for this activity in the past both by MSHA and the Commonwealth of Pennsylvania. (*Id.* at 11-15) Finally, Respondent argues that the Secretary is not entitled to deference for his interpretation of the standard. (*Id.* at 13-14)

vi. Findings and Conclusions

a. Validity

It is undisputed that an accumulation of material was pushed into the wedge cut at the face of the No. 3 Entry at Cumberland Mine and that a citation was issued for this condition on February 22, 2012. (Tr. 23-26, 34, 43, 90-91, 99, 102, 130, 139, 146). The only issues in dispute with respect to the validity of Citation No. 7022912 are whether this was an accumulation of combustible material under §75.400 and whether the cited condition occurred in an "active working section." For the reasons laid out below, I find that the Secretary has met the

an “active working section.” For the reasons laid out below, I find that the Secretary has met the burden of proof with respect to those issues.

A violation of §75.400 occurs where an accumulation of combustible material exists. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979). While some spilling of coal and other material is inevitable in the mining processing, the standard seeks to prevent the accumulation of combustible material that could cause or propagate a fire. *Utah Power & Light*, 12 FMSHRC 965, 986 (May 1990) *aff’d* 951 F.2d 292 (10th Cir. 1991) *quoting Old Ben II*, 2 FMSHRC 2806, 2808 (Oct. 1980). Furthermore, even that type of spillage is only acceptable if it is cleaned up “with reasonable promptness, with all convenient speed.” 951 F.2d at 295 n. 11. Material is “combustible” when it is capable of undergoing combustion, burning, or catching fire when subject to fire. *Eastern Associated*, 12 FMSHRC 239, 244 (Feb. 1990) (ALJ) (*citing Webster’s Third New International Dictionary*).

In this case, the Secretary provided credible evidence that an accumulation of material was placed in the wedge cut that measure approximately 16 feet wide (rib to rib), 10 feet long, and 4-5 feet high (though varied) where visible. (Tr. 29, 31). Clearly, this amount is more than mere spillage. This was not a small, accidental accumulation; it was a purposefully-created consolidation of loose material from the area around the face. In addition, the Secretary presented evidence that the material had existed since the midnight shift before the day shift where the citation was issued. (Tr. 37, 60-61). Therefore, the spillage had been sitting for some time, so that even if it were spillage, it was not being cleaned up with reasonable promptness. Instead, it was left in place for some time.

With respect to whether the accumulation was combustible, the Secretary presented credible evidence that this material was mostly coal, though it included rock, clay and other things. (Tr. 29). Respondent concedes in its post-hearing brief that this material included coal that was staged for removal from the mine. *Respondent’s Post-Hearing Brief* at 11. Coal is, without question, a combustible material. The Secretary also established that the accumulation was not rock dusted. Witnesses both for the Secretary and Respondent testified that the accumulation was not intentionally covered with rock dust.¹¹ (Tr. 32, 75-76, 147, 149).

Respondent presented several arguments attempting to show that this was not an impermissible combustible accumulation. However, none of those arguments were compelling. For example, Respondent cites 30 C.F.R. §75.402 for the proposition that material within 40 feet of the face, including the material here, did not need to be rock dusted. *Respondent’s Post-Hearing Brief* at 14. While it is true that coal operators are only required to rock dust areas that are within 40 feet of the face, that does not mean that accumulations of combustible material are permissible in that area. The evidence presented that dealt with rock dusting was not presented by the Secretary to prove that Respondent violated 30 C.F.R. §75.402. It was used to show, persuasively, that the accumulation was not rendered inert. It is entirely possible for an area to be in violation of 30 C.F.R. §75.400 while complying with 30 C.F.R. §75.402. Here, the

¹¹ Only one of Respondent’s witnesses, Konosky, conceded that the material had not been dusted. However, Respondent’s other witnesses provided contradictory evidence regarding how much rock dust existed and how that dust had been spread. (Tr. 104, 119, 141). Therefore, I find the Secretary’s explanation as far more credible.

accumulation consisted of coal and was not rendered inert with rock dust; therefore it was an accumulation of combustible material.

Respondent also argued that this accumulation was not an illegal accumulation under §75.400 because operators are allowed some accumulations when the coal is prepared for removal from the mine. *Respondent's Post-Hearing Brief* at 14. It notes that the Secretary does not issue citations for coal dumped behind the miner, coal dumped to be loaded out by the shuttle car, or coal when on the conveyor belt. *Id.* However, Respondent cites no authority for the proposition that accumulations are permissible when they are being prepared for removal from the mine. In fact, Emerald Coal Resources, LP, Respondent's sister company, unsuccessfully made the same argument in a case before Judge Andrews. *See Emerald Coal Resources, LP*, 33 FMSHRC 489, 494 (Feb. 2011)(ALJ) (arguing that "the material pushed up to the face was part of the active normal cleanup process, and therefore, not an 'accumulation.'")¹²

I agree with Judge Andrews' analysis in that case that, "how the mass came to be is not relevant to the determination of whether an accumulation exists." *Id.* There is no language in the standard that provides exceptions to the prohibition on accumulations of combustible material and I will not create one. There was an accumulation of combustible material at the No. 3 Entry face and it does not matter why it was there.¹³ While it is uncontested that operators are permitted to allow coal to be dumped behind the miner, near the shuttle car, or on the conveyor belt, those are not accumulations because it is presumed those incidental instances of coal spillage will be cleaned with reasonable promptness, all convenient speed. *See* 951 F.2d at 295 n. 11. That is different than this situation, where coal was permitted to sit in a large pile for an indefinite period of time.

As a result, I find that the Secretary has clearly established that an accumulation of combustible material was located at the face of the No. 3 Entry.

The Secretary also provided credible evidence to show this face was an active working section of the mine. The regulations define an active working section as "[a]ny place in a coal mine where miners are normally required to work or travel." 30 C.F.R. §75.2. The Secretary

¹² In a related point, Respondent argued that the Secretary's interpretation of the standard in this case constituted only Newhouse's personal aversion to accumulations of coal at the face and that it was not entitled to deference. However, as I believe that Respondent has created the "waiting for clean-up exception" to the standard out of whole cloth, I do not believe that this is an issue of the Secretary's interpretation. There is only one possible interpretation: accumulations of combustible material are not permissible.

¹³ Respondent argues that *Emerald Coal Resources, LP* is distinguishable from this case because the accumulation here is smaller and was completely in by the last row of bolts while the accumulation in that case was large and stretched out by the face. *Respondent's Post-Hearing Brief* at 11. However, I do not believe that the size of the accumulation alters the way it is treated by the standard. All accumulations of combustible material are a violation of the Act, not just larger ones. Further, as will be described further below, the location of the material relative to the face in this particular matter is irrelevant.

asserted that the entry had been recently mined and would have been mined again in the next day or so. (*Secretary's Post-Hearing Brief* at 6). That assertion is supported by evidence in the record. (Tr. 37, 55, 61, 78-79). Further, the Secretary noted that the entry was examined before and during each shift. (*Id. citing Respondent's Exhibits 1-6*) (Tr. 37, 60-61). I find that the Secretary provided adequate evidence to show that miners normally worked in the No. 3 Entry, therefore making this an active working section.

Respondent disagreed with the Secretary's position that this was an "active working section" and cited to *Jim Walter Resources*, for the proposition that areas inby a barrier are "inactive" sections and that, therefore, §75.400 would not apply. 16 FMSHRC 1411, 1512 (July 1994)(ALJ). Respondent claims that in the instant case, the area inby the last row of bolts was blocked with signs and therefore was an inactive area.

Beyond the fact that the Judge's decision in that case has no precedential value, Respondent's reading of the decision can only be described as tortured. First, in that decision Judge Melick determined that an accumulation of combustible material was a violation of §75.400. *Id.* at 1511-1512. Only after deciding that issue did the Judge also state the following:

It is undisputed that accumulations existed as cited on January 31, 1994, both inby and outby a check curtain... According to issuing Ventilation Specialist Thomas Meredith of the Mine Safety and Health Administration (MSHA) this check curtain separated the active outby area from the inactive inby area. At that time, the inactive inby area was admittedly not an area where miners typically worked or normally traveled. Under the circumstances, the inactive inby area cited in the order was not within the "active workings" and the accumulations located therein were therefore not in violation of the cited standard.

Id. Because the Judge had already determined that a violation occurred, this differing treatment of areas inby and outby the check curtain were not part of the holding regarding validity and only dealt with the size of the accumulation for the purposes of the S&S analysis. As the Secretary has not alleged S&S here, this statement by the judge is totally irrelevant.

However, even if the Judge's statement in *Jim Walter Resources* were a holding, it would not lead to the result sought by Respondent. As noted above, according to the MSHA official in that case, the curtain separated the active outby area from the inactive inby area. In this case, the Secretary does not concede that the area inby the last row of bolts is inactive. (*see Secretary's Post-Hearing Brief* at 6). Further, the evidence does not support a finding that this area was inactive. As noted by the Secretary, mining had recently been completed in the area, it was subject to examinations, and the miner was going to return and continue mining in, at most, a couple of days. (Tr. 37, 55, 60-61). The factual discussion in *Jim Walter Resource* are quite bare, but nothing indicates that the inactive area in that case was a spot that had just been mined and was about to be mined again. Instead, a curtain separated areas where miners traveled from where they did not. This is clearly different that the situation here, where the area was blocked to indicate that there were no roof bolts and Respondent had admittedly staged the area for further mining.

Respondent's argument suggests two equally untenable understandings of the term "inactive." First, Respondent's position is that any area where miners are not presently engaged in production, even if mining has ceased only for a few days or perhaps even during lunch, is an inactive area. Alternatively, it suggests that placing up a temporary barricade or a sign that reads, "inactive" transforms a spot into an inactive area regardless of the production planned for that area as part of the cut cycle in the near future. There is no statutory or logical reason for either of these interpretations. The No. 3 Entry was an active working section because miners were regularly required to work and travel in that area.

As there was an accumulation of combustible material in an active working section of the mine, I find that there was a violation of §75.400 and that the citation issued by the Inspector was valid.

b. *Gravity*

The Secretary presented credible evidence that an ignition was unlikely as there was no ignition source and the air was not blocked in its entirety, meaning that methane was being vented. (Tr. 42-43). Respondent presented evidence that the continuous miner was designed with methane exposure in mind and that it was equipped to prevent ignition. (Tr. 53-54-86). However, the Secretary has already conceded that an ignition is unlikely. I believe that it is possible that methane could concentrate in the coal accumulation (Cumberland Mine is a gassy mine on a 5-day spot) and that with the introduction of an ignition source, it could ignite. This scenario is unlikely, but possible. If it were to occur, the evidence shows that it could reasonably result in serious burns or smoke inhalation injuries to two people. (Tr. 45).

c. *Negligence*

Under Commission precedent and promulgated standards, negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Finally, an operator exhibits reckless disregard where it acts without the slightest degree of care. 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

It is uncontested that Respondent deliberately created an accumulation by pushing coal into the face. (Tr. 23-26, 34, 43, 90-91, 99, 102, 130, 139, 146). Further, the evidence establishes that this accumulation was examined 2 times and was obvious to anyone looking at the face. (Tr. 43-44). Further, and perhaps most importantly, Respondent had been told that

pushing material into the face was impermissible at the pre-inspection conference. (Tr. 44-45, 58, 62, 82-84, 87-88). Therefore, Respondent knew or should have known that the accumulation existed and that it was a violation of the cited standard. However, Respondent's negligence was slightly mitigated by the fact that it generally kept the other areas of the mine clean, making the accumulations in the face an anomaly. (Tr. 34). Therefore, I find that Respondent exhibited moderate negligence.

d. *Penalty*

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$176.00 for Citation No. 7022912. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 7022912:

- a. The operator's history of previous violations – The parties stipulated that Respondent had been cited 279 times in the last 15 months and over the course of 1,116 inspection days.
- b. The appropriateness of the penalty compared to the size of the Operator's business – The parties stipulated that Cumberland Mine produces 6.2 millions tons of coal and Respondent produces 128 millions tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives Cumberland Mine 15 "mine size points" out of a possible 15 and Respondent 10 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previous shown, the operator exhibited moderate negligence.
- d. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation is unlikely to cause injury, but if it did it could result in lost workdays or restricted duty injuries to two persons.
- f. The demonstrated good-faith of the person charged in attempted to achieve rapid compliance after notification of a violation – The parties have stipulated to good-faith abatement.

Considering all of the factors listed above, Respondent is ordered to pay \$176.00 with respect to this citation.

CITATION NO. 7071904

i. Contents of the Citation

On March 7, 2011 at 9:00 a.m., Inspector Vargo issued to Respondent Citation No. 7071904. Vargo found:

Loose coal was permitted to accumulate in the #1 face of the 89 South Mains Left operating section, MMU 0-31. The length of the accumulation was 12 feet from the last permanent roof support to the furthest penetration of the face, rib to rib and up to 2 feet high on the right rib and up to 5 feet on the left rib. This obstructed the face from being ventilated.

(GX-5). Vargo noted that the gravity of this violation was “Unlikely,” “Lost Workdays/Restricted Duty,” and would affect seven persons. *Id.* He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. *Id.*

On March 7, 2012 at 10:25 a.m., Vargo issued a termination of the citation noting, “The accumulation was removed form the affected area.” *Id.*

ii. Legal Standards

As with Citation No. 7022912, Citation No. 7071904 was issued under Section 104(a) of the Act for a violation of 30 C.F.R. §75.400.

iii. Secretary’s Evidence

a. Testimony of Joseph Andrew Vargo

Vargo discussed his 30 years of mining experience, including his work on a full-face continuous miner section (Tr. 152-156). He also discussed his training and experience as an MHSA inspector. (Tr. 155-156). He is certified as a miner, a machine runner, shot firer, and mine examiner. (Tr. 154). Before March 2012, Vargo had conducted about three quarterly inspections at Cumberland Mine. (Tr. 156). He was there 4-6 days. (Tr. 156-157).

Vargo reviewed a 104(a) citation he issued at 9:00 on March 7, 2013 at the Mine (GX-5). (Tr. 157). Vargo also reviewed his notes for that same day (GX-6). (Tr. 158). When he issued the citation he was with Newhouse, Ron Hixson (the assistant district manager), a trainee, and Konosky. (Tr. 157, 175). Vargo observed the condition described in the citation. (Tr. 158).

Vargo reviewed a map of the 89 South Main section (GX-7). (Tr. 158-159). He marked the map on the 89 South Mains left section, No. 1 Entry inby the 51 crosccut at the face where the accumulation was located with an arrow and a circled “C.” (Tr. 159-161). Entry No. 1 is the furthest entry to the left and the entries increase in number to the right. (Tr. 159-160).

Vargo observed the material beyond the last permanent roof support in the No. 1 Entry wedge face. (Tr. 161). There was a barrier there to prevent movement past the support. (Tr. 174). He did not need to be shown the accumulation. (Tr. 162). He told Konosky he would issue a citation for an accumulation of combustible material. (Tr. 161-162). Vargo believed all the material (not just what was visible) was 80% coal and 20% rock, which he learned by poking it with his walking stick. (Tr. 162, 174). The stick went through the material and it was soft, fine, black, and dry coal. (Tr. 162-163). There were no puddles and no rock dust (although there was rock dust up to the bolts). (Tr. 163, 175). There were no other clean-up issues. (Tr. 175).

The accumulation was about five feet high at the left rib and two feet at the right. (Tr. 163). It was rib to rib (16 feet wide) and 12 feet long as measured with tape. (Tr. 163-164). At that location the roof was about 8 feet tall; in the wedge it tapered to 2 feet. (Tr. 164).

The material was pushed into the wedge from outby crosscut 51, although some could have been pushed from the No. 1 Entry and also from the corner. (Tr. 164). It was black so he believed it came from rib sloughage and from where the miner hit the ribs. (Tr. 164-165). Systematic, regular clean-up of the section is good. (Tr. 179). Respondent clean-up process was to clean with the miner and loader while still mining, then scoop the entry, and finally load it into the miner to get it out of the mine. (Tr. 180). However, pushing material into the face is not cleaning. (Tr. 179-180). It takes the material out of the Entry but it is not acceptable because it is combustible. (Tr. 180).

Vargo believed the accumulation had existed for at least four days because of the mining sequence (Entry 4 to 3, to 2, then the air connections, and then Entry 1) and because that section would be the first place idled if Respondent had man-power shortages. (Tr. 165). At the time the miner was in the No. 4 Entry. (Tr. 166).

They should have put the accumulations in front of the miner or taken to the feeder to be removed. (Tr. 165). Vargo had never seen material pushed to the face before; when he worked in the mines it was common practice to scoop the entries and take it to the feeder. (Tr. 165-166). He does not believe that material would spill transferring from the scoop to the feeder if the operator is careful. (Tr. 182-183). However, accumulations have been cited at feeders and even shuttle cars designed to dump on feeders can spill. (Tr. 182-183). It is also possible to drop some accumulation while moving it in a scoop because it is not normally used to transport coal from the face to the feeder, which is what shuttle cars are designed to do. (Tr. 183-184).

If they chose to place the coal in front of the miner after scooping the entry, Respondent would have to back the miner out to get the correct positioning, which takes a little more time and planning. (Tr. 180-181). The miner would need to move back enough for the bucket to push the material in front of the miner. (Tr. 181). However, it would also be acceptable for the scoop to take the material from that entry to the next place the miner would go. (Tr. 181). The miner would still have to pull back, not because of cleaning, but to pull the cables, so it would not interrupt mining. (Tr. 182). They would synchronize the clean-up with the move. (Tr. 182).

Vargo reviewed an illustration of a wedge cut (GX-8). (Tr. 166). The wedge cut starts at the last permanent strap and tapers in by 12 to 14 feet down to 2 feet high. (Tr. 166-167). This

protects the limited amount of roof exposed to the mine atmosphere and ventilates the wedge cut. (Tr. 167-168). That day, the last bolt was 8 feet high and the wedge was 12 feet deep. (Tr. 167). Vargo then drew what the accumulations looked like on the day of the citation. (Tr. 167). The left to right tapering is not shown in Vargo's drawing because it is a side view. (Tr. 173-174).

The accumulation did not block the examination of the face; Vargo got to the last roof support. (Tr. 168). He took a gas check a foot from the roof and rib and had 0.1% methane, so it was obstructing some ventilation, but some of the air was migrating to the wedge. (Tr. 168). On cross examination he conceded that he did not check the methane with a probe from the miner. (Tr. 175-176). It is possible that methane was migrating up and out of the cut to the two rows of bolts. (Tr. 176). The material in the wedge was loose, not compacted so any gas could migrate up through the material. (Tr. 176). The methane would then go to the highest spot, not just in the wedge but in the roof. (Tr. 176-177).

Respondent violated §75.400 because there was an accumulation of combustible material at the No. 1 face. (Tr. 169). Vargo feared methane would get trapped in the wedge and then ignite when the miner started. (Tr. 169). However, he conceded there was no ignition source. (Tr. 177). Further, he admitted that when the miner loads out, it sprays a substantial amount of water on the bits and the pan. (Tr. 177). He could not say for sure if the water would prevent sparks. (Tr. 177). He also did not check the bits to see if they were dull and therefore more likely to spark. (Tr. 177-178). The mine has methane at the face when it is mined. (Tr. 177).

Vargo marked the gravity as unlikely and non-S&S because there was no immediate ignition source but there was 0.1% methane and limited air going to the face. (Tr. 169-170). He marked seven person affected because when the miner returned there would be two integral bolters, the miner operator, the utility man/tuber, loading machine, shuttle car operator, loader machine operation, and maybe a foreman or mechanic. (Tr. 173).

Vargo marked the citation as moderately negligent for three reasons: the material was deliberately placed in the wedge cut, an exam had been done on the previous shift and likely on the on-shift, and the issue was raised in a pre-inspection conference by Newhouse. (Tr. 170). Vargo was present at that conference and took notes. (Tr. 170). Vargo reviewed those notes (GX-9) and noticed that on page 5 that they discussed that excessive coal would not be permitted in the wedge cuts. (Tr. 170-171). Specifically, the notes indicate Newhouse said, "Excessive coal will not be permitted to accumulate in wedge cuts of previously mined faces." (Tr. 178). On cross examination he conceded that "excessive" is a broad term. (Tr. 178-179). However, he felt there was not a specific amount that would be permitted and that only the coal under the miner would be allowed. (Tr. 179). His notes include an attendance sheet on page 6. (Tr. 171).

Vargo was present when the condition was abated. (Tr. 171-172) Respondent scooped four or five buckets out of the wedge cut and put them on the feeder. (Tr. 171). The weight of the material in the bucket would average about two or three tons. (Tr. 172).

b. Testimony of Robert W. Newhouse

Newhouse was with Vargo on March 7, 2012 to do a normal evaluation of his inspection procedures, evaluate conditions in the mine, to train an inspector, and to be evaluated by his immediate supervisor Hixson, the District 2 Assistant District Manager. (Tr. 185-186). He witnessed Vargo when verbally issue the citation and observed the cited conditions. (Tr. 186-187). The accumulation consisted of coal pushed into the No. 1 face. (Tr. 187). It was rib to rib (16 feet wide) and five feet tall on the left side. (Tr. 187). He could not see the face inby. (Tr. 187). There as no rock dust and the coal was dry coal and therefore combustible. (Tr. 187-188).

Newhouse believed that the roadways were cleaned outby across all of the faces, probably at 51 crosscut and were pushed into the No. 1 Entry. (Tr. 188). He believed the accumulation existed for multiple shifts because he did not see any evidence of recent activity in the area. (Tr. 188). The miner had just started in the Entry No. 4 and he did not know where it had been last. (Tr. 188-189). In the normal mining process, the material would stay in that location for four or five days and this particular section is more sporadic than normal. (Tr. 189).

Newhouse agreed that this was a violation of §75.400 because it was an accumulation of dry coal put in an active area purposefully. (Tr. 189-190). Hixson did not object to the citation, his only comment was that Vargo did a good job. (Tr. 190-191).

The potential hazards of material in the wedge cut include the miner returning to the area and releasing the trapped methane and increasing the possibility of a face ignition. (Tr. 191).

When Vargo verbally issued the citation, Section Foreman Brennan Gallick (“Gallick”) and Newhouse discussed abatement. (Tr. 195). Gallick said he would station two people at the No. 2 entry between 50 and 49 to lift up the curtain and let the scoop in to get the material and then reverse the process and take it out to the feeder. (Tr. 195). Newhouse asked Gallick why the material was present and Gallick said he did not know and that it was his first day on that section. (Tr. 196). Newhouse was in the mine for the abatement, but he did not count how many scoops it took. (Tr. 196). There were multiple scoops. (Tr. 196).

It is possible to clean the material by putting it behind the miner for the load machine. (Tr. 201). That is less work than putting it in front of the miner. (Tr. 201). Loaders do not have water sprays or methane detectors like miners do. (Tr. 201-202). A miner constantly loads coal that could be liberating methane and Cumberland Mine usually liberates methane. (Tr. 202).

Newhouse reviewed Vargo’s notes of the January, 2011 meeting (GX- 9) and noted that the sign-in sheet accurately reflects those in attendance.¹⁴ (Tr. 191-192). At the meeting, Newhouse discussed the hazards of pushing material into the wedge, including trapping methane and obstructing ventilation. (Tr. 192). The wedge needs to be ventilated like any other area because it gives off methane. (Tr. 192). Danny Maher asked what amount of material would be excessive. (Tr. 192). Newhouse told him it was not a specific amount but instead the condition

¹⁴ Newhouse did not take notes at the January 11 meeting nor did he take notes during any of his other conversations on this point. (Tr. 200).

of the material, whether it is heavily rock dusted, and whether it blocked ventilation. (Tr. 193). He gave the example of the amount under the miner, if left in place and rock dusted, as fine because it does not block ventilation. (Tr. 193).

Following that meeting he held numerous discussions with management and the union regarding this practice during post-inspection conferences and pre-inspection conferences. (Tr. 193-194). Newhouse discussed the clean-up of §75.400 conditions and the reasons for citations at these meetings. (Tr. 194). Following the citation issued by Kubincanek in February, he discussed accumulations with Konosky and explained that the citation was exactly the situation they had discussed in the pre-inspection conference. (Tr. 194).

Internally, Newhouse spoke with the district manager, both assistant district managers, and the CLR group regarding the issue of pushing material into the wedge cut and the interpretation of §75.400 before the issuance of any citations at Cumberland. (Tr. 196-197). He raised these concerns because he and other inspectors saw accumulations. (Tr. 197-198). Further, Emerald raised issues with respect to this practice before either citation at issue here. (Tr. 197-198). That is why they had the meeting, to avoid blindsiding operators. (Tr. 198).

Other mines under Newhouse's supervision use wedge cuts, including Emerald, Bailey, and Enlow Fork and he does not believe they push material into wedge. (Tr. 198-199). Newhouse knows this information from personal observation and from discussions with mine management. (Tr. 199). In fact, the superintendent of Enlow Fork, Brett McLean, said he did not know why anyone would. (Tr. 199-200). Newhouse does not recall when he spoke with Mr. McLean, but it was the same day he took Chinese officials on a mine tour. (Tr. 200-201).

Newhouse does not recall if there were any citations for material pushed to the face before February 2012. (Tr. 202). That was the first citation as far as he knew. (Tr. 203). He does not believe they have been pushing the material to the face for a long time and does not recall Konosky saying they had been doing it forever. (Tr. 202).

iv. Respondent's Evidence

a. Testimony of Brennan Paul Gallick

Brennan Paul Gallick described his mining experience, including his union experience while receiving a bachelor's degree at Pitt-Johnstown. (Tr. 204-205). He is certified as a mine examiner, assistant foreman, EMT, in mine rescue, blaster, and shot-firer. (Tr. 205).

On March 7, 2012 Gallick was in the 89 mains section left side to do the on-shift and get the crew started. (Tr. 205). He was not going to be there the whole day; he was going to be relieved at 10:00 a.m. (Tr. 206). At the time, 89 mains was running on every shift. (Tr. 206). When he arrived on the section there was an MSHA trainee there with four inspectors. (Tr. 206-207). After safety speeches, Gallick did his on-shift which included methane and oxygen readings, checking for hazards, checking electrical equipment, taking return readings, checking dust parameters, and checking tubing at the face. (Tr. 207). The entire inspection team went with him, going from the No. 4 entry over to No. 1 Entry and then back to the return entry. (Tr.

207). He took a gas test in each entry at the intake and return curtain, if possible. (Tr. 207-208). No. 1 had a curtain instead of a tube because they were no longer mining. (Tr. 208).

There was material at the face of No. 1 entry that was scooped in by the last channel. (Tr. 211). It was put there to control it and keep the area clean. (Tr. 211). That clean-up would not have been the shift before the cited shift, they were mining 4 at the time and they did not go right from 1 to 4. (Tr. 221-222). To know for certain when it occurred, he would have to look at the production records. (Tr. 222). Material is supposed to stay in the wedge until the miner pulls back. (Tr. 211). It is not an accumulation, it is controlled. (Tr. 211). It is not a hazard when it is sitting at the face or when the miner loads it out. (Tr. 211). The miner is designed to handle pockets of methane in solid coal, so even if methane were trapped there, as it is in solid coal, it would not be a problem. (Tr. 212).

As for when it was going to be removed, after mining Entry No. 4, the cycle is finished and they move back to Entry No. 1. (Tr. 233). On that day they had holed 4 and were coming back to No.1 within 2 hours. (Tr. 233). It would not have taken four or five days. (Tr. 233).

It was Gallick's understanding that after they cleaned up behind the miner and got the entry clean the miner would move and anything left could be pushed to the face as long as it was not out by the channel. (Tr. 228-229). They were not supposed to push material from out by, just from the entry. (Tr. 229). That is not just the material under the miner, but nothing out by the last open crosscut. (Tr. 229-230). If material were out by the last channel it would hinder examination and gas checks. (Tr. 230-231). It is not the amount that is a problem; it is whether it is outside the wedge cut. (Tr. 231). It does not matter if it is "roofed out" the ventilation still goes to the face and gets the methane out. (Tr. 231).

Gallick could not see the end of the wedge from the last bolt. (Tr. 214). The accumulation described by the Secretary's witnesses was generally accurate but did not think the high side got up to 5 feet and that it might have only been 8 feet deep. (Tr. 223-224). It went rib to rib. (Tr. 224). The material in the wedge was page rock from the bottom. (Tr. 215-216, 230). In Entry No. 1, the rock breaks on the sides, so they push that to the wedge to make it smoother. (Tr. 230). The coal from under the miner was the only coal in the wedge. (Tr. 216). Also, the miner is also 16 feet wide and sometime bangs the rib and knocks coal down. (Tr. 232).

The inspection team brought up their concerns about the material in the No. 1 Entry at 8:49 and then again in the return at 8:52. (Tr. 212). He remembers the time because it was when they took the gas check with the trainee. (Tr. 212). Sometime around 8:52 Newhouse told him that there was too much in the wedge and that it needed to be dealt with. (Tr. 212-213). Gallick thought that if the material was not past the last permanent support then it was okay. (Tr. 213).

No. 1 Entry was the return entry. (Tr. 208). Respondent uses the auxiliary fans as the primary duster in a return. (Tr. 208). Those fans can hold anywhere from five to seven 50-pound rock dust bags and blows dust 24 hours a day. (Tr. 208-209). Mining does not occur unless the fan is on. (Tr. 209). The fan can blow two or three pallets of dust a day so anything behind the fan is white. (Tr. 209). The dust goes into the ventilating current. (Tr. 209). At the cited wedge, Gallick believed that the fans had caused the material to be very white and inert

(above 80% noncombustible). (Tr. 222-223). The fan was not spreading rock dust that day and he is not sure where it was. (Tr. 220-221). The No. 1 Entry was dusted. (Tr. 213).

Gallick does not recall the methane reading in the No. 1 entry but it was anywhere from 0.1 to 0.3, which is normal. (Tr. 209-210). Gallick reviewed his on-shift book, which he signed, and looked on the last page which showed the methane reading of 0.1% methane (RX-6). (Tr. 210). It also showed on-shift records filled out by foremen on prior shifts. (Tr. 210). No one probed for methane. (Tr. 214). When material is pressed into the face, methane will rise out of the material because it is lighter than air and will find a way out. (Tr. 231).

He did not bring the scoop to the feeder because it would cause a mess to transport it the distance and cause more trouble than it solved. (Tr. 215). It is common during mining for spillage around the feeder, though they try to prevent it. (Tr. 224). Part of the clean-up plan is to clean spillage at the feeder. (Tr. 224).

Since Gallick started at Cumberland this has been the clean-up method. (Tr. 219). He saw other inspectors observe material at the face without issuing citations. (Tr. 219). Newhouse had not been there at those times. (Tr. 219). Gallick does not recall which inspectors did not issue citations. (Tr. 227). He does not recall what date that occurred but it was during the midnight inspection blitz by MSHA in the 59 headgate before 2012. (Tr. 227-228). There were also other times. (Tr. 228). MSHA inspectors are at Cumberland Monday through Friday and sometimes on Saturday. (Tr. 234). Until March 7, 2012, Gallick had never seen an inspector write a citation for material pushed into the face. (Tr. 235).

Further, as part of the Running Right Program, Gallick traveled to 13 mines in several states and those mines had continuous miners. (Tr. 234). He talked to people at those mines about pushing material into the face and they said MSHA wanted the material there. (Tr. 234). They said it was company policy based on regulation and they would get written up if it was not in the face. (Tr. 234). However, the other mines that Gallick looked at were place-change continuous mining, not full-face mining, and do not result in wedge cuts. (Tr. 235-236).

Gallick told Newhouse that he did not agree with the citation and that the material was not affecting ventilation current at the face. (Tr. 219-220). The benefit of the clean-up plan is that it takes the sloughage that they are trained to remove and puts in one controlled area where no one is walking. (Tr. 241). Also, no equipment is operating over it and crushing it. (Tr. 214). That is where it should be. (Tr. 214).

Gallick did not recall telling Newhouse that he did not know how the material got to be in the wedge. (Tr. 215). Gallick was filling in as foreman on that section but had spent the better part of nine months there. (Tr. 224-225). His normal duty was working for the Running Right Department. (Tr. 225). He was not sure the last time he had worked on there but he had been there probably two days earlier in his role in the Continuous Improvement Program. (Tr. 225-226). He had "necked in" a section of this area. (Tr. 226).

Gallick directed the abatement efforts. (Tr. 216). They rolled the curtain up and eliminated the current to the face to get to the wedge causing methane to rise above 1%. (Tr.

216-217). This rise was not from the accumulation, it was because the mine liberates 12 million cubic meters of methane in a 24-hour period. (Tr. 217). They filled four buckets about a third to a half full (the first was full). (Tr. 217-218). They put the curtain up and down as the scoop moved in and out. (Tr. 218). On the fourth trip, the methane was becoming a problem and they were making a mess so they just dug the rest out from the wedge and spread it around the last four channels. (Tr. 218-219). They did not rock dust that material and picked it the next time they went through. (Tr. 226-227). The material would not have filled a shuttle car. (Tr. 219).

b. Testimony of Coalbe Nelson

Coalbe Nelson described his six years of mining experience, including working at three mines with full-face continuous miners. (Tr. 236-238). In March 2012, Nelson was the section foreman for the 89 mains on the afternoon shift and had been for a year. (Tr. 244-245).

On March 7, 2013, He was on the 89 south mains at some point when it was cited for material at the face of No. 1 Entry. (Tr. 239). It was his regular section at the time and he saw the material. (Tr. 239). The material got there because, according to the map work, Nelson's crew had scooped it. (Tr. 239).

Nelson did not know when his crew had scooped the entry. (Tr. 239). He reviewed a document that included a "Bolting Summary" that he had filled out on his shift (RX-4A).¹⁵ (Tr. 239-240). That document lists the things that Nelson accomplished on his shift. (Tr. 240). Nelson reviewed the entries he filled in on March 6, 2012 and it shows that he scooped the faces that day during the afternoon shift on March 6. (Tr. 240-241, 246). That was part of the normal clean-up. (Tr. 241). However, according to sheet, they scooped the cut through the rest of the faces to the left (3, 2, and 1) after they finished mining Entry No. 3. (Tr. 241, 249). That would mean they pushed material into the wedge cuts on all three. (Tr. 247). Everything was not pushed into the No. 1 face, material was pushed into each face. (Tr. 250). Material in the crosscut between 1 and 2 would have gone to the No. 1 face, but nothing from farther up the No. 1 Entry would have been pushed in. (Tr. 250). When they holed through No. 3 they would not have had a lot of canvas to deal with and they took advantage and scooped. (Tr. 247).

On the initial cleanup, any material that the miner or loader did not get would have been pushed to the face. (Tr. 251). That has been the practice ever since Nelson worked there. (Tr. 251). The written policy does not specifically say to do that, but it is best practice to push into the face. (Tr. 251).

On March 7, 2013 they were mining No. 4 and when they were done they would go back to No. 1. (Tr. 242, 247). Nelson does not recall when No. 1, No. 2, or No. 3 were last mined. (Tr. 247-248). They would have mined 1, 2, and 3 before getting to 4. (Tr. 247). The best case for mining 1, 2, 3, and 4 would be less than a week. (Tr. 248). So the cleaning on March 6 was a second pass, adding to maybe a little bit that was already in the face. (Tr. 249). Nelson had seen that material scooped in. (Tr. 253-254). After the miner left the No. 1 Entry, the area was

¹⁵ GX-4A where the sticker is located is for the day shift, so Nelson would have taken over after that shift. (Tr. 244).

cleaned, but then the center bolter went in and then they would rib bolt, occasionally pulling material down from the rib. (Tr. 248-249).

The material was mostly rock. (Tr. 242). That material came from inby the crosscut and from the cut from 2 to 1 so there may have been some coal, but it was mostly rock. (Tr. 242). He does not believe it affected ventilation. (Tr. 243). The material would not affect the ability to take gas tests at the last row of bolts. (Tr. 243).

Prior to this citation, Nelson's understood that they would push anything to the face that was not cleaned up by the loader or miner. (Tr. 243). He had never discussed this with an inspector, it was never an issue. (Tr. 243). There had been inspectors on the section when material was pushed to the face. (Tr. 243). Further, three mines he worked at previously (Federal No. 2, Mettiki, and Enlow Fork) had full-face miners. (Tr. 237). Sometimes at those mines he would clean the miner sections. (Tr. 238). At Enlow Fork they would push the material into the face after mining, but the other two mines had different processes. (Tr. 238). On cross examination, he conceded that when he saw material at the face at Enlow Fork, that process was in preparation for Nelson and his crew to lay rail, not in the mining cycle or clean up process. (Tr. 245). They would sometimes take excess rib sloughage and put it at the closest face, but usually they would back drag the material to get a smooth surface. (Tr. 245-246). They would not usually scoop, but if they had to scoop they would take it to the face. (Tr. 246).

He would not move material with a loader because a bucket full of spillage traveling across the section will result in spillage and even more spillage will occur at the feeder. (Tr. 252). Even if the bucket is not overloaded, this can occur. (Tr. 252). Nelson does not know where the feeder was on March 7 but believed it would be in No. 4 because that was the belt entry. (Tr. 252-253).

Nelson did not see the abatement. (Tr. 243-244). He was not there when the citation was issued, he only returned to the area after the inspectors had left. (Tr. 254).

c. Testimony of Michael Anthony Konosky, Sr.

Konosky was with the inspectors on March 7, 2012 and saw the condition cited. (Tr. 255). The cited material was well rock-dusted and inby the last row of bolts. (Tr. 255). The rock dust here was spread by the auxiliary fan purposefully and well. (Tr. 259).

To abate the condition, Respondent brought a scoop in and they rolled back the canvas. (Tr. 255-256). There were four or five buckets but they were not full. (Tr. 256). They left the canvas down while the scoop was moving the material but he does not know if they took the material to the feeder or miner. (Tr. 256). When the curtain was down they had 0.4% methane but when they rolled it up it over 15 until they dropped the curtain and it went down again. (Tr. 256). That methane was not coming from the material inby, it was being ventilated properly. (Tr. 256). Konosky told Newhouse that this method of interrupting the ventilation was more dangerous than doing it on clean up. (Tr. 256-257). On cross examination Konosky conceded that it was Respondent's choice to abate in this manner, no one from MSHA told them they had to roll up the curtains. (Tr. 259-260). However, Vargo helped them do it. (Tr. 260). They

could have moved the curtains to the left so that it would not have to be raised and lowered while still maintaining air flow, but they might not have gotten all the material out. (Tr. 260).

There is a statement in the inspector's notes about his closeouts and they indicate that Konosky agreed with all of the findings. (Tr. 257). It is true that everything MSHA cited was in the citation, but he did not agree that the citation should be issued. (Tr. 257). He does not remember if No. 2 and 3 were no longer wedge cuts, they were on different cycles. (Tr. 259).

Konosky was a continuous miner operator at Cumberland before he became management. (Tr. 257-258). When he operated miners they were place change miners and he scooped material to the face. (Tr. 258). Before Newhouse did so in 2012, nobody cited him. (Tr. 258).

d. Testimony of Robert Allen Bohach

Robert Allen Bohach ("Bohach") is the safety manager for Respondent's parent company and he discussed his mining experience including his early experience as a union miner. (Tr. 261-262, 267-268). He has a degree in mining engineering from Penn State and a master's in safety management from West Virginia University. (Tr. 262).

Bohach is familiar with the cleanup plan at the mine. (Tr. 263). The reason they scooped material to the face was that it was part of the production cycle to remove the material from the mine. (Tr. 263). Before Newhouse began citing, that method was not only acceptable, it was promoted. (Tr. 263). It was promoted by the agencies (MSHA, the state Department of Environmental Protection) and by the management team. (Tr. 263-264). They would promote it because it cleans the active roadways and prevents pulverization and float coal dust. (Tr. 264).

While Bohach worked at Cumberland, they used continuous miners, including full-face miners and wedge cuts. (Tr. 262). He is not aware of any citations for scooping material into the wedge cuts. (Tr. 265). He is not aware of any ignitions of methane in material in the wedge cut when it was being removed by the miner at Cumberland or any other mine. (Tr. 265). Any methane in that area will rise up. (Tr. 265-266). However, Bohach was familiar with a case at Emerald where a 40 foot overdrive was full of material from the face back 40 feet. (Tr. 269).

Bohach does not consider material at the face to be an accumulation because it is part of the production cycle and part of the process of removing the coal. (Tr. 264). There is also no issue with the coal being removed by the continuous miner because that is what it is for, it has the proper ventilation, water sprays, and is permissible. (Tr. 264-265).

There is no hazard with pushing material to the face as long as it does not interfere with examinations. (Tr. 266). They do this because it is more efficient, it is safer, coal does not need to be hauled around the section, and cleans active roadways of sloughage, and prevents float coal dust. (Tr. 266). Moving material with the scoop to the feeder would cause spillage on the way and at the feeder. (Tr. 266-267). It is possible to dump it in front of the miner, but pushing it up to the face while the tubes are still in place is more efficient and effective. (Tr. 267).

Respondent has not requested a modification for the practice of pushing material to the face because it believes to be safe because they did not believe it was a violation. (Tr. 270). They have asked for manager's conference on this issue with MSHA on the citations but have not gotten one. (Tr. 270). Bohach is familiar with the modification petition and they often take a few years. (Tr. 271). In fact a CO monitoring modification took six years and a longwall high voltage modification took five or six years for approval. (Tr. 271). They currently have a horizontal gas line petition that has been pending for at least three years. (Tr. 271).

v. Contentions of the Parties

The Secretary contends that Citation No. 7071904 was validly issued, that the violation was unlikely to result in lost-workdays/restrict duty, that seven miners were affected, that Respondent was moderately negligent, and that the proposed civil penalty was appropriate. The Secretary argues that the citation is valid because there was an accumulation of combustible material in an active working section of the mine and that accumulation was not rendered inert with rock dust. (*Secretary's Post-Hearing Brief* at 14-15). The Secretary argues that, with respect to gravity, an event was unlikely because there was no ignition source and the area was still being vented, however if an event were to occur it would result in lost-workday/restricted duty injuries to seven miners. *Id.* at 15. Further, the Secretary contends Respondent's actions were moderately negligent because Respondent had deliberately pushed material to the face, the accumulations had been examined as many as three times and were obvious, and management had been told this condition was a violation during a pre-inspection conference. *Id.* at 16. Finally, the Secretary argues that the penalty was appropriate. *Id.*

Respondent contends that Citation No. 7071904 was not validly issued. Respondent argues that the citation was not valid because the area cited was not an active working and because a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not believe the condition posed a danger. (*Respondent's Post-Hearing Brief* at 9-15). Respondent argued that a reasonably prudent person would not believe the condition posed a danger because the coal was being staged for removal in a manner that demonstrated control by the operator and management had been praised for this activity in the past both by MSHA and the Commonwealth of Pennsylvania. (*Id.* at 11-15) Finally, Respondent argues that the Secretary is not entitled to deference for his interpretation of the standard. (*Id.* at 13-14)

vi. Findings and Conclusions

a. Validity

As with Citation No. 7033912, it is undisputed that an accumulation of material was pushed into the wedge cut at the face of the No. 1 Entry at Cumberland Mine and that a citation was issued for this condition on March 7, 2012. (Tr. 159-161, 187, 211, 239, 263). Once again, the only issues raised with respect to the validity of Citation No. 7071904 are whether this was an accumulation of combustible material under §75.400 and whether the cited condition occurred in an "active working section." The facts are substantially similar to the relevant facts in Citation No. 7033912 and Respondent's arguments were identical. I incorporate by reference the

legal point contained in the discussion of that citation. For the same reasons as set forth above in the discussion on Citation No. 7033912 I find that this was an accumulation of combustible material and that the face area of Entry No. 1 was an active working section.¹⁶ As a result, I find that the condition in cited was a violation of §75.400 and that Citation No. 7071904 was validly issued.

b. *Gravity*

The Secretary presented credible evidence that an ignition was unlikely as there was no ignition source and the air was not blocked in its entirety, meaning that methane was being vented. (Tr. 168-170, 176-177). With respect to this citation, Respondent presented arguments identical to those described above with respect to Citation No. 7033912. For the reasons discussed there, I find that an ignition from this condition was possible but unlikely and that, if it were to occur, the evidence suggests that it could reasonably result in serious burns or smoke inhalation injuries to seven people. (Tr. 173, 191).

c. *Negligence*

The relevant facts are substantially similar to the ones described with respect to Citation No. 7033913, except for the fact that Respondent had additional notice of MSHA's enforcement posture following the issuance of that citation. Further, the legal arguments and points were identical to that discussion. Therefore, for the same reasons as set forth above, I find that Respondent exhibited moderate negligence.

d. *Penalty*

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$392.00 for Citation No. 7071904. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 7071904:

- g. The operator's history of previous violations – The parties stipulated that Respondent had been cited 279 times in the last 15 months and over the course of 1,116 inspection days.
- h. The appropriateness of the penalty compared to the size of the Operator's business – As with the other citation, the parties stipulated that Cumberland Mine produces 6.2 tons of coal and Respondent produces 128 million tons coal in all its operations.
- i. Whether the Operator was negligent – as previous shown, the operator

¹⁶ Unlike Citation No. 7033912, None of Respondent's witnesses testified that the area was not rock dusted. However, I credit the testimony of Vargo and Newhouse that this material was combustible.

exhibited moderate negligence.

- j. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- k. The gravity of the violation – as previously shown, this violation is unlikely to cause injury, but if it did it could result in lost workdays or restricted duty injuries to two persons.
- l. The demonstrated good-faith of the person charged in attempted to achieve rapid compliance after notification of a violation – The parties have stipulated to good-faith abatement.

Considering all of the factors listed above, Respondent is ordered to pay \$392.00 with respect to this citation.

ORDER

Respondent, Cumberland Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$568.00 within 30 days of the date of this decision.¹⁷

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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¹⁷ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004

August 22, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-872
Petitioner,	:	A.C. No. 15-18393-178634
v.	:	
	:	
ICG KNOTT COUNTY LLC,	:	
Respondent.	:	Mine: Clean Energy Mine

DECISION

Appearances: Brian C. Winfrey, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;
John M. Williams Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. In dispute are one section 104(d)(1) citation and one section 104(d)(1) order issued to Respondent, ICG Knott County LLC (“ICG”). The Mine Safety and Health Administration (“MSHA”) issued both this citation and order at ICG’s Clean Energy Mine. To prevail, the Secretary must prove the cited violations “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This standard requires the Secretary to demonstrate that “the existence of a fact is more probable than its non-existence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

I. STATEMENT OF THE CASE

Both of these alleged violations involve ICG’s ventilation plan at the Clean Energy Mine. Citation No. 8219731 charges ICG with a violation of 30 C.F.R. § 75.370(a)(1) for failing to comply with an approved ventilation plan. Order No. 8219732 charges ICG with a violation of 30 C.F.R. § 75.370(e) for failing to train miners on the unapproved provisions and changes to the existing ventilation plan. The Secretary designated each violation as significant and substantial

("S&S")¹ and as a result of ICG's unwarrantable failure to comply with a mandatory health or safety standard.² The Secretary proposes a penalty of \$59,527.00 for Citation No. 8219731 and \$12,563.00 for Order No. 8219732, for a total civil penalty of \$72,090.00.

Chief Administrative Law Judge Robert J. Lesnick issued an Order of Assignment, which assigned Docket No. KENT 2009-872 to me, and attached a copy of my Prehearing Order. Given the unprecedented number of penalty petitions before the Commission and the high penalty involved in this case, I granted several extensions of time to comply with my Prehearing Order deadlines. After rescheduling the hearing due to a death in the family of a key witness for the Secretary, I held a hearing in Pikeville, Kentucky.³ At the hearing, Respondent stated that ICG's Clean Energy Mine had previously stopped producing coal and the mine had since closed. (Tr. 126:20–25.)

The Secretary presented testimony from MSHA Inspector Carl Little. (Tr. 18:12–16.) ICG called four witnesses: Roger Cantrell, ICG's Safety Director; Clark Meade, Former ICG Mine Foreman and Superintendent; Ronald Gayheart, ICG section foreman; and Alger McIntyre, ICG section foreman. (Tr. 125:8–126:9, 157:6–7, 161:23–162:6, 208:10–23, 212:21–213:1, 228:8–10, 230:22–231:4.) The Secretary and ICG submitted post-hearing briefs, and ICG filed a reply brief.

II. ISSUES

The Secretary argues that the conditions were properly cited as violations and that the allegations underlying the citation and order are valid. (Sec'y Br. at 15.) ICG denies both violations, alleging ambiguity in the ventilation plan's map and arguing that Respondent did not

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

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine 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."

³ In this decision, the hearing transcript, the Secretary's exhibits, and ICG's exhibits are abbreviated as "Tr.," "Ex. G-#," and "Ex. R-#," respectively.

revise its ventilation plan, and asks that I vacate the citation and order at issue.⁴ (Resp't Br. at 22, 25.)

Accordingly, the following issues are before me: (1) whether the November 3 ventilation plan's map is ambiguous; (2) whether the Secretary's mandatory health or safety standard at 30 C.F.R. § 75.370(e) requiring training under the ventilation plan is ambiguous; (3) whether the cited conditions were violations of the Secretary's mandatory health or safety standards regarding ventilation plan provisions; (4) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including whether they are S&S; (5) whether the record supports the Secretary's assertions regarding ICG's negligence, including the unwarrantable failure determination, in committing the alleged violations; and (6) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation No. 8219731 is **AFFIRMED** as written, and Order No. 8219732 is **VACATED**.

III. BACKGROUND AND FINDINGS OF FACT

A. ICG's Operation at its Clean Energy Mine

At the time Inspector Little issued Citation No. 8219731 and Order No. 8219732 on January 23, 2009, ICG operated an underground coal mine known as the Clean Energy Mine. (Tr. 7:5–8.) ICG continued operations at the mine until it was “mined out” in late 2009. (Tr. 31:18–20, 126:20–25.) Maps of the Clean Energy Mine show it to be a room-and-pillar-type mine with long main entryways that serve as intake and neutral air lines, escapeways, and return

⁴ Respondent points to the “missing witness” rule and requests that I draw an adverse inference from the Secretary's failure to call MSHA Ventilation Specialist Jerry Bellamy, the Pikeville District Office specialist involved in approving ICG's ventilation plan. (Resp't Br. at 14–15; Tr. 30:24–31:13, 133:8–19.) The decision whether to make such an adverse inference is within the Judge's discretion as a factfinder. *See Bogosian v. Woloohogian Realty Corp.*, 323 F.3d 55, 67 (1st Cir. 2003) (observing that the “missing witness” rule permits, rather than compels, the factfinder to draw an adverse inference from the absence of a witness [] particularly where the factfinder concludes that the party who requested the adverse inference failed to subpoena a witness otherwise available to testify.”) (citations omitted); *Virginia Slate Co.*, 23 FMSHRC 482, 485 (May 2001). Here, although the Secretary included Bellamy as a potential witness in its initial Prehearing Report (Sec'y Request for Hearing and Prehearing Statement at 3), the Secretary's Amended Prehearing Report gave ICG notice that he no longer anticipated calling Bellamy to testify. (Sec'y Amended Prehearing Report at 4.) Under Commission Procedural Rule 60, Respondent could have procured Bellamy's testimony had ICG felt it was crucial to its case. *See* 30 C.F.R. § 2700.60 (allowing parties broad discretion to seek subpoenas). I therefore decline to draw an adverse inference against the Secretary for not calling Bellamy as a witness.

air passageways. (Ex. G-5.) Off these entryways a series of rooms, or panels, have been cut as a result of mining coal. (*Id.*) Prior to November 2008, ICG had mined the first right panel off of the main entryway, leaving behind a series of pillars.⁵ (*Id.*)

Bleeder systems ventilate previously mined areas, or gobs,⁶ in a way that pushes mining-related gasses and dust into a return air course and out to the surface. (Tr. 97:7-10, 136:6-9, 139:1-8.) A bleeder system usually includes rows of blocks—or pillars—which maintain the roof to support travelways, stoppings, and ventilation controls in the area around the outer edges of the gob. (Tr. 135:5-18.)

The Clean Energy Mine operated on three shifts: day, evening, and third shift. (Tr. 44:24-25, 221:15-21.) Ten miners each worked on the day shift and evening shift, while five miners worked on the third shift. (Tr. 77:2-17.) ICG produced coal on the day and evening shifts, but the third shift was for maintenance. (Tr. 109:16-24, 163:22-25.)

On November 3, 2008, two months prior to the issuance of Inspector Little's violations, MSHA inspectors cited ICG for failing to comply with its February 15, 2008, ventilation plan because ICG used a technique called retreat mining to remove "approximately 385 blocks [or pillars] of coal" without "an approved bleeder system." (Ex. G-9 at 1.) That same day, an MSHA inspector also cited ICG for failing "to properly instruct the management employees at this mine" in the provisions of ICG's February 15, 2008, ventilation plan. (Ex. G-8 at 1.) To abate these violations, ICG immediately submitted a revised ventilation plan on November 3, 2008, that included a bleeder system and instructed mine management and employees concerning those revisions. (Ex. G-8; Ex. G-9; Tr. 85:15-21.) MSHA immediately approved the revised ventilation plan for the Clean Energy Mine that same day. (Ex. G-9 at 3; Tr. 54:24-56:18; Ex. G-6.) This November 3 plan, especially its accompanying map, are a source of dispute between the parties in this proceeding.

⁵ For ease of description, I refer to this panel as the "first right panel" or "first right section" throughout this decision. The first right panel is nearly rectangular in shape. (Ex. G-5.) Viewed from above, the long base of the rectangular first right panel (in essence, the southern part of the panel) and the northern part of the rectangle run parallel to the main entryways. (*Id.*) At the time of violation, the approved ventilation plan did not include this section in active mining. The panel was to include a system of stopping lines, curtains, and bleeder blocks designed to force air around the short western side of the rectangle, and up and over the long topside of the rectangle, and out the short, eastern side of the rectangle. (*Id.*; Tr. 51:15-52:2.) This allows air ventilating through the panel to flow into a return air course and out of the mine rather than back into the active sections of the mine. (Ex. G-5.)

⁶ A "gob" is common term for "goaf," which is "[t]hat part of a mine from which the coal has been worked away and the space more or less filled up with caved rock." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 239 (2d ed. 1997).

The November 3 plan incorporated a map that Safety Director Cantrell and Ventilation Specialist Bellamy drew up in abating ICG's November 3 citations.⁷ (Ex. G-5; Tr. 55:7-14, 132:18-133:19.) According to the November 3 Plan approval letter, any "proposed changes . . . shall be submitted to and approved by the District Manager prior to implementation." (Ex. G-6 at 1.) ICG operated under this plan until January 23, 2009, when Little issued the two violations that are the subject of this proceeding. (Tr. 58:6-10.) ICG did not submit to MSHA any proposed ventilation plans after approval of the plan on November 3, 2008, and before the issuance of Citation No. 8219731 and Order No. 8219732 on January 23, 2009. (Tr. 58:8-11, 151:23-152:4.)

B. Inspector Little's December 2008 Conversation with Meade

Between October 1 and December 31, 2008, Inspector Little conducted the Clean Energy Mine's E01 inspection. (Tr. 24:22-25:5.) Little inspected Clean Energy at "random times through the week" and had visited the mine "several times" prior to January 23, 2009. (Tr. 25:3-20.) While at Clean Energy in mid-December 2008, Little spoke with Superintendent Meade about retreat mining in the first right panel. (Tr. 25:21-26:13.) Retreat mining is a process whereby an operator removes coal pillars that are being used to maintain the mine roof and bleeder system. (Tr. 73:18-20, 135:5-18.) Little claims he told Meade that "as far as [Little] knew, if [ICG] had a plan approved to retreat mine in that area, there was no reason [ICG] could not perform retreat mining in that area." (Tr. 26:13-16.) According to Little's testimony, he also told Meade during this mid-December conversation that ICG must submit a plan before mining the area. (Tr. 73:18-20, 81:10-25.) Meade denies Little told him that ICG needed to submit a new ventilation map to engage in retreat mining of the first right section. (Tr. 184:18-21.)

C. Inspector Little's January 2009 Inspection

Inspector Little again visited the Clean Energy Mine on January 22, 2009. (Tr. 27:21-28:1, 108:21-109:2.) During this visit, Little asked Superintendent Meade where ICG was currently mining. (Tr. 28:16-17.) Meade told Little that ICG was mining the first right panel. (Tr. 28:18-19, 31:16-20.) Little also asked Meade if ICG had "a plan approved to

⁷ Hereinafter, I refer to these as the "November 3 Plan" and "November 3 Plan Map," respectively. I note, however, that neither the Secretary nor Respondent introduced a copy of the November 3 Plan itself. Instead, the Secretary introduced only the November 3 Plan approval cover letter and the November 3 Plan Map. (Tr. 55:1-10, 56:6-9, 85:1-12, 148:16-19; Ex. G-6 at 1-2; Ex. G-5.) The cover letter references the approval of the supplemental maps but does not provide other written details about the approved ventilation plan. (Ex. G-6.) A copy of the November 3 Plan itself may have proved useful. Nevertheless, I must make findings based on the approval letter, November 3 Plan Map, witness testimony, and the inferences I am able to draw from that evidence.

perform retreat mining” and Meade answered that “as far as he knew [ICG] had a plan approved to retreat mine in that area.”⁸ (Tr. 28:12–29:2, 31:21–24.)

When Little arrived at MSHA’s Whitesburg field office on January 23, 2009, he asked his supervisor, Vernus Sturgill, if he had seen any submitted plans allowing ICG to retreat mine in the first right panel. (Tr. 29:25–30:6.) Sturgill had not, and he directed Little to contact MSHA’s ventilation department to determine whether it had approved anything to permit ICG to mine in that area.⁹ (Tr. 30:12–19.) MSHA Ventilation Specialist Bellamy confirmed ICG had not submitted any new plans to allow retreat mining in the first right panel. (Tr. 30:21–31:6.) Little and Sturgill then traveled to ICG’s Clean Energy Mine. (Tr. 31:9–13, 31:25–32:3.)

Little and Sturgill arrived at the mine at 8:50 a.m. (Ex. G–2 at 1; Tr. 32:12–14.) While still on the surface, Meade confirmed that ICG was retreat mining in the first right panel.¹⁰ (Tr. 32:16–21, 33:3–20, 165:4–7, 165:20–22.) Inspectors Little and Sturgill orally issued Citation

⁸ When asked about this January 22, 2009, encounter, Meade acknowledged he had seen Little during an inspection at the Clean Energy Mine “sometime before the violation” but was unable to determine specifically which day it was. (Tr. 185:1–6.) Given Little’s specific and credible testimony in contrast to Meade’s uncertainty regarding the date of the conversation and his failure to dispute its contents, I find the conversation occurred as Little described.

⁹ To get a plan approved, an operator submits a map detailing the areas it intends to mine to the District office and the District’s ventilation department. (Tr. 58:12–15.) “Vent[ilation] specialists” review the submitted plan and determine whether any changes—such as specified minimums of air at regulators or locations of stoppings—need to be made. (Tr. 58:16–19.) After a ventilation supervisor initially approves the plan, it is sent to the District Manager and Assistant District Manager for approval. (Tr. 58:20–24.) Once the District Manager signs off on the plan, it is approved and copies are provided to the operator, the field office, and the inspector assigned to the mine. (Tr. 58:25–59:5.)

¹⁰ Both the Secretary and ICG entered into evidence maps depicting the first right panel on the day of the violation. (Ex. G–7; Ex. R–2.) Hereinafter, I refer to these maps as the “Retreat Mining Maps.”

No. 8219731 to ICG at 8:55 a.m for a violation of 30 C.F.R. § 75.370(a)(1).¹¹ (Ex. G-3 at 1; Tr. 33:3-20, 165:20-22.) Likewise, Little and Sturgill orally issued Order No. 8219732 to ICG at 9:10 a.m. for violating 30 C.F.R. § 75.370(e).¹² (Ex. G-4 at 1; Tr. 33:20-23, 34:7-10.) Although the violations were issued orally at the times indicated, Little did not make gravity determinations or write the condition or practice text for either alleged violation until after he had visited the first right panel. (Tr. 36:23-25, 93:20-95:5, 115:13-116:12.)

After Little and Sturgill orally issued both the citation and order, Meade directed ICG personnel to shut off the mine's belt and have the miners come to the surface. (Tr. 34:19-35:4, 165:20-24, 233:2-5.) The mining crew arrived at the surface within ten to fifteen minutes. (Tr. 35:7.) Little and Sturgill did not speak with any of the miners regarding the conditions on the first right panel (or section). (Tr. 102:22-103:20.) Little also checked the preshift examination books while still on the surface but did not record any air readings. (Ex. R-7; Tr. 101:15-17.) Little and Sturgill then traveled underground with ICG's Meade and McIntyre to the first right section through the mine's neutral air entries. (Tr. 44:9-45:10, 166:17-167:12, 233:14-16.) Once Little, Sturgill, Meade and McIntyre arrived at the first right p, they walked toward a permanent stopping line. (Tr. 45:21-24, 169:2-13, 233:21-25.) Little observed "the backup curtains that are actually required to be installed by [ICG's] ventilation plan to force air into the bleeder were torn down." (Tr. 45:25-46:4.) Moreover, the "curtains were not secured against the ribs, as required." (Tr. 46:5-6.)

As the inspection party traveled through the first right panel, Meade walked with Sturgill and Little walked with McIntyre. (Tr. 169:19-21.) During his inspection, Little did not identify

¹¹ Section 75.370(a)(1) provides:

The operator shall develop and follow a 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. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 [including the design of the bleeder system and the location of regulators, stoppings, and bleeder connectors, *see* 30 C.F.R. § 75.371(x), (bb)] will be subject to approval by the district manager.

30 C.F.R § 75.370(a)(1).

¹² Section 75.370(e) provides: "Before implementing an approved ventilation plan or revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions." 30 C.F.R. § 75.370(e).

any dust or methane problems. (Tr. 104:7–105:5.) The group entered the bleeder return entry through an open mandoor on the east side of the first right panel.¹³ (Tr. 46:8, 169:19–170:1, 233:24–234:2.) Once through the east mandoor, Little and Sturgill traveled toward the panel’s mouth and each took an air reading at “the outby [east] end of the bleeder entry, where it dumps back into the main return.” (Tr. 46:9–21, 171:11–18.)

The inspection party then traveled the “entire [perimeter] of the panel” and “observed brattices, and the conditions around the [perimeter] of the panel” as they followed the bleeder line around from the east side of the panel to the northern part of the panel. (Ex. G–5; Ex. R–2; Tr. 47:9–13, 51:15–52:2, 171:24–25, 234:3–5.) While on the northern end of the panel, Little observed a “six-by-eight[-inch] hole in the corner of the brattice line” but “no other means” to “direct air from [the] first right panel directly into the return.” (Tr. 47:15–19.) Little did not take an air reading at the hole in the brattice line, as the hole was “not sufficient to ventilate an active working section.” (Tr. 47:22–25.) Little found no other suitably large opening in which to take air readings on the northern side of the panel.¹⁴ (Tr. 52:13–52:17; 99:8–17, 121:5–18.)

While on the northern side of the first right panel, the inspection party also encountered two closed mandoor.¹⁵ (Tr. 48:19–22, 50:7–51:14, 234:3–5.) ICG’s witnesses testified that at least one of these mandoor was supposed to be “tied” open using wire to allow air to ventilate the section. (Tr. 50:7–51:14, 139:24–25, 172:16–173:16, 183:6–9.) At the conclusion of his inspection, Little wrote Citation No. 8219731 for a violation of 30 C.F.R. § 75.370(a)(1) as follows:

The approved Ventilation, Methane and Dust Control Plan is not being complied [with] on the 002 MMU. The 002 section has mined 26 pillars of coal which were indicated on the plan approved 11-03-2008 to be left as bleeder blocks. This is the second violation of the same practice since 11-3-2008. The operator’s approved Ventilation Plan has been cited 10 times since 10-2007. An inspection of the perimeter of the permanent stoppings

¹³ Throughout this decision, I refer to this mandoor as the “east mandoor,” reflecting its position in the first right panel as viewed from overhead. *See supra* note 5. The shorter “east” side of the rectangular panel is the part of the bleeder system where air ventilating the panel flows back into the main return air course.

¹⁴ According to Little, an air reading for the six-by-eight-inch hole was not relevant to his inspection because “the approved ventilation plan was what was cited,” and the size and location of the hole “would have no bearing on where [ICG was] presently mining.” (Tr. 48:3–9.) On the other hand, Little believed that a regulator, which is simply a very large opening in a permanent stopping to allow air to travel through it, would have had a bearing on the approved ventilation plans. (Tr. 48:11–16.)

¹⁵ For ease of description, I will refer to these doors as the “north mandoor.”

constructed to divert intake air and to create a return air course to ventilate the gob area of the 1st right panel off the mains has no means for the gob air to be directly coursed into the return. No regulator of any kind is installed. The 002 section [had] no lapse in production between the first and second shifts. Production of coal was stopped immediately and miners withdrawn to the surface.

(Ex. G-3 at 1.) Based on his examination, Little determined this violation was S&S. (*Id.*) According to Little, he marked the citation as S&S because—other than tying or propping open the closed north mandos—there was no way to ventilate dust and methane accumulations from the first right section into the bleeder system. (Tr. 75:2-10, 76:3-6, 79:23-25, 80:5-15; 104:1-3.) He found it would affect the twenty miners on this section during the active mining shifts in this portion of the mine. (Ex. G-3 at 1; Tr. 76:24-77:9.) Little later amended the citation to characterize it as an unwarrantable failure.¹⁶ (Ex. G-3 at 2; Tr. 80:16-81:11.)

Upon completing his inspection, Little also wrote Order No. 8219732 for ICG's alleged violation of section 75.370(e) for failing to train miners on a new ventilation plan. The condition or practice cited for the order reads:

The operator has failed to submit and have a plan approved and train the miners on the provisions and ventilation changes necessary to ventilate the 1st right panel off the mains prior to beginning retreat mining on the panel. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-4 at 1.) Little also characterized the order as an S&S violation affecting twenty-five miners who worked during all shifts on that panel and resulting from ICG's unwarrantable failure. (*Id.* at 1; Tr. 77:10-17.) To abate the alleged violations, ICG submitted a new ventilation plan that was subsequently approved on January 28, 2009, and then trained its miners in this new plan's contents.¹⁷ (Ex. G-3 at 3; Ex. G-4 at 2-3; Ex. G-10.)

At the hearing, ICG introduced both on-shift and pre-shift records from the morning of January 23 (Ex. R-6; Ex. R-7; Ex. R-8), as well as videotapes showing smoke tests ICG conducted in the first right panel three days after the issuance of the citation and order. (Ex.

¹⁶ On February 6, 2009, Sturgill again modified Citation No. 8219731 to reduce the level of negligence from "reckless disregard to high" because "after further investigation a determination of high negligence is better suited for this condition." (Ex. G-3 at 4.) Sturgill's modification provided no details regarding his "further investigation" and no explanation of why high negligence better suited this citation than reckless disregard.

¹⁷ Hereinafter, I refer to these as the "January 28 Plan" and "January 28 Plan Map."

R-5.) Although Little reviewed preshift reports before going underground, his review of those reports had no impact on his issuance of the citation and order. (Tr. 101:18-102:17.)

III. PRINCIPLES OF LAW

A. Section 75.370(a)(1)

Section 75.370(a)(1) requires operators to (1) develop and follow an approved ventilation plan; (2) that is designed to control methane and respirable dust and suitable to the mine's conditions and mining system; and (3) consists of the plan content prescribed in section 75.371 and a map as prescribed in section 75.372. 30 C.F.R. § 75.370(a)(1). Only portions of the map containing information required under section 75.371 are subject to the district manager's approval. *Id.* Section 75.371's plan content provisions include "a description of the bleeder system to be used, including its design," and "the location of ventilation devices such as regulators, stoppings, and bleeder connectors used to control movement through worked out areas." *Id.* § 371(x), (bb). An operator violates section 75.370(a)(1) when it does not conform its operations to items required in a ventilation plan map. *Solid Energy Mine Co.*, 19 FMSHRC 886, 888 (May 1997) (ALJ) (finding a violation where an operator failed to construct stoppings "required by the plan and shown on the ventilation plan map.").

B. 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).

Besides specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission 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 the opinion of an experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a *measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981). Moreover, the Commission has indicated "[t]he correct inquiry under the third element of *Mathies* is whether the hazard

identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission indicated 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)).

C. Unwarrantable Failure

In *Emery Mining*, the Commission described “unwarrantable failure” as “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.

D. Plan Interpretation

Plan interpretation weaves together two threads of Commission precedent. First, the Commission has indicated that, “plan provisions are enforceable as mandatory standards.” *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 254 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987)). Moreover, as with regulatory standards, unambiguous plan provisions must be enforced as written. *Id.* at 255 & n.11.

In a plan context, however, the Commission has specifically rejected deference to the Secretary’s reasonable interpretation of an ambiguous plan. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 589 n.8 (Aug. 2006). Where a plan provision is ambiguous, the Commission reiterated, “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.* at 589 (citations omitted). As Administrative Law Judge David Barbour observed, regulations requiring adherence to a plan “recognize [that] due process entitles an operator to fair notice of the Secretary’s interpretation of a plan’s provision.” *Mach Mining, LLC*, 29 FMSHRC 869, 882 (Oct. 2007) (ALJ).

These two lines of precedent, therefore, provide the framework for interpreting a provision in an adopted plan. First, I must determine whether the plan provision is unambiguous. If it is, those terms must be enforced as written. However, if the plan provision is ambiguous, the Secretary’s reasonable interpretation is not entitled to the deference a reasonable regulatory interpretation would receive. Instead, I must determine whether the Secretary’s credible evidence as to the history and purpose of the provision, as well as evidence of consistent enforcement, establish the intent of the parties and dispel the provision’s ambiguity.

E. Regulatory Interpretation

Interpreting the Secretary’s regulations that implement the Mine Act is a two-step process. First, unambiguous regulatory provisions “must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results.” *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). The meaning of regulations are “ascertain[ed] . . . not in isolation, but rather in the context in which those regulations occur.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary’s reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8219731 - Ventilation Plan Violation

1. Additional Findings of Fact

a. Inspector Little and Superintendent Meade’s December 2008 Conversation

Inspector Little and Superintendent Meade provided contradictory testimony regarding their mid-December conversation. Little claims he told Meade that ICG would need to submit revised plans before beginning retreat mining in the first right panel, but Meade denies he received such instructions. Little admitted that he made no notes regarding his mid-December conversation with Meade. (Ex. G-2; Tr. 108:5-9.) More importantly, Little made no mention of this conversation in the condition or practice section of his citation, even though it was one of the bases for his unwarrantable failure determination. (Ex. G-3; Ex. G-4; Tr. 108:10-20.)

Although Little did mention other detailed facts underlying his citation and made notes during the course of his inspection, this factor was not recorded. (Ex. G-2.) Given Meade's credible testimony to the contrary, Little's inability to produce any notes from the conversation, and Little's failure to include this assertion in his citation, I find that Little and Meade's mid-December conversation did not include a discussion about plan requirements.

b. Position of Mandoors During Inspector Little's January 23 Inspection

Superintendent Meade testified that he and Inspector Sturgill approached the east mandoor before Inspector Little and section foreman McIntyre, who were trailing behind him. (Tr. 169:19-21.) According to Meade, the mandoor had been propped open using a cinder block and head board to create a "T." (Tr. 170:3-15.) Meade testified that he went through the mandoor and held it open for Sturgill, but Sturgill waited for Little. (Tr. 169:21-170:1, 170:25-171:2.) At that point, Meade shut the door behind him and waited in the return for Sturgill, Little, and McIntyre. (Tr. 171:3-5.) Meade's testimony that the east mandoor was open when he and Sturgill approached it during the inspection seems self-serving, but the Secretary presented no contrary evidence suggesting the east mandoor was closed when the inspection party approached it. Little also agreed he was probably the last person through the door because he takes inspection notes as he goes. (Tr. 50:1-2.) As a result, Little "couldn't say that [the east mandoor] was open or closed when approached by the party." (Tr. 50:4-5.) Finally, because mandoors are meant to be closed when not in use (Tr. 49:8-10), it makes sense that Meade would close the door behind him. Accordingly, I find the east mandoor was propped open when Meade approached it during the January 23 inspection, and Meade closed it behind him while he waited for Sturgill, Little, and McIntyre.

Later, while on the north side of the panel, Little found both north mandoors to be closed, including the door that was supposed to be tied open. (Tr. 50:7-52:9, 80:8-10.) According to Little, Meade explained to him at the time that one of the north mandoors should have been tied open, but Little did not know when the mandoor had been closed or if anyone in ICG management was aware it had been closed. (Tr. 123:21-124:11.) Section foreman Gayheart testified that the doors in the northern side of the bleeder entry had been open during his evening shift on January 22, 2012. (Tr. 215:12-216:10, 218:16-219:14, 224:6-11.) However, Gayheart admitted he did not travel all the way to the north mandoor that had been tied open, and he had no knowledge of what occurred between 12:30 a.m., when his shift ended, and 8:30 a.m. on January 23. (Tr. 222:10-13, 224:18-19.) In addition, Meade stated that an unidentified miner purposely relieved himself in the bleeder entry's return air course, closing the tied-open mandoor behind him when he finished. (Tr. 173:14-174:17, 206:11-207:2.) Given the use of return air to ventilate air out of the mine, Meade's uncontroverted testimony regarding the unknown miner and the mandoor is convincing. Based on the evidence before me, I find that a miner closed the tied-open north mandoor at some point between 12:30 a.m. and 8:30 a.m. on January 23.

c. ICG's Use of Mandoors to Control Airflow

The approved November 3 Map also indicates that air was to flow in the direction of the northern and eastern parts of the panel and out to the bleeder system. (Ex. G-5.) Yet when ICG engaged in retreat mining of this panel, Little indicated that no regulator had been installed; instead, ICG tried to use mandoors. (Tr. 48:11-49:25.) At the hearing, ICG suggested that mandoors on the first right section functioned as regulators.¹⁸ (Tr. 96:4-97:3, 99:3-7, 139:15-25, 152:25-153:9, 214:23-215:1.) Respondent's intention in propping and tying open the east mandoor and one of the north mandoors was, therefore, to ventilate air off of the working section. The facts before me, however, demonstrate that ICG was not permitted to use mandoors as regulators under its November 3 Plan and that the mandoors themselves, which are designed to maintain separation between air courses, did not operate as regulators.

First, ICG's mandoors serve a different purpose than regulators. Regulators are openings in a stopping used to control air flow for proper ventilation. (Tr. 48:15-17, 96:4-7, 120:12-16, 146:7-10, 242:25-243:16.) Conversely, mandoors allow miners access between areas with separate air flows but mandoors remain closed after miners pass through. (Tr. 49:8-19.) Inspector Little explicitly stated several times that the type of mandoors ICG used are not permissible regulators. (Tr. 49:8-19, 54:12-14, 95:15-96:3.) Little also drew a sharp and very important distinction between *sliding* doors that might be used as a regulator and the mandoors ICG used in this case: though sliding doors will not be inadvertently closed, the mandoors ICG used are to be kept closed. (Tr. 119:23-120:5.) That ICG needed to employ on-the-fly, makeshift adjustments to force open the mandoors demonstrates that ICG's mandoors were *not* equivalent to regulators. Regulators are fixed *openings*. Mandoors open for egress but remain closed otherwise. *See supra* note 18.

The miners' conduct at ICG also indicates that its mandoors did not *function* as regulators. Both Meade and an unidentified miner closed the very mandoors that ICG said were to be propped and tied open. *Cf. Consolidation Coal Co.*, 11 FMSHRC 1105, 1109-1111 (June 1989) (ALJ) (discussing a ventilation plan where a door in a stopping was likely to remain open). Meade's own action of closing the east mandoor is particularly instructive. As a

¹⁸ In its post-hearing brief, ICG argues that mandoors qualify as regulators because they "meet [the] definition" of 30 C.F.R. § 75.333(e)(1)(ii). (Resp't Br. at 15.) Section 75.333(e)(1)(ii) requires that regulators be "constructed of noncombustible materials" like "concrete, concrete block, brick, cinder block, tile, or steel." However, just as a dinner spoon does not become a surgical scalpel simply because it is made of the same material, a mandoor does not become a regulator simply because it is constructed of the material listed in section 75.333(e)(1)(iii). Each has a distinct purpose or use, and they are not interchangeable. Notably, a different paragraph of the same regulation indicates that "personnel doors [i.e., mandoors] shall be constructed of non-combustible material and shall be of sufficient strength to serve their intended purpose of maintaining separation between air courses When not in use, personnel doors shall be closed." 30 C.F.R. § 75.333(c)(3).

supervisory employee in the midst of an inspection—and knowing ICG had been issued a citation for not following its November 3 Plan— Meade would have had a strong incentive to leave the mandoor open to show a ventilated first right section if ICG were actually permitted to use mandoor as regulators. Despite that incentive, Meade either absentmindedly or purposely closed the mandoor. Given the context, his closure of the east mandoor suggests that the November 3 Plan did not permit mandoor to be propped or tied open as a proxy for a regulator. It also indicates that ICG’s mandoor were to remain closed when not in use.

The unidentified miner’s closure of the tied-up north mandoor also supports a finding that ICG’s mandoor were routinely kept closed. ICG personnel had been trained in the November 3 Plan in order to abate earlier violations. Yet even section foreman McIntyre admitted he was not aware that the north mandoor was being used as a regulator. (Tr. 234:8–10, 243:9–12.) If ICG’s section foreman did not know that the north mandoor would be tied open to try to ventilate the section, it is reasonable to expect other ICG miners would be similarly unaware. That a trained miner, therefore, would close a tied-open mandoor indicates the mandoor was supposed to be closed under the Secretary’s regulations and November 3 Plan. Moreover, it further demonstrates that propped-open or tied-open mandoor would have been closed in the normal course of continued mining operations.

Finally, Safety Director Cantrell admitted that in abating Citation No. 8219731, MSHA refused to approve a plan map that allowed mandoor to operate as regulators. (Tr. 145:12–22, 147:23–148:13.) As a result, the January 28 Plan Map specifically includes a regulator rather than a mandoor. (Ex. G–10; Tr. 145:12–22, 147:23–148:13.) MSHA’s refusal to accept a mandoor—a piece of equipment that is designed to be kept closed to maintain separate air courses—as a regulator supports a finding that the November 3 Plan prohibited ICG from tying or propping them open to ventilate pillar removal activities on the first right section.

Based on these facts and circumstances, I therefore find that the November 3 Plan did not permit ICG to use these mandoor to ventilate the section. I also find that miners trained in the November 3 Plan would have closed any open mandoor in the course of continued mining operations. Moreover, as Cantrell and McIntyre each admitted, a closed mandoor would not serve as a regulator. (Tr. 153:9–13, 243:17–244:7.) Accordingly, I find these mandoor did not function as regulators or ventilate the section because they were either closed at the time of the inspection, being improperly tied or propped open, or would have been closed by miners during future mining operations.

2. Respondent’s Evidence

a. ICG’s January 23, 2009, Morning Shift Records

At the end of the overnight maintenance shift, ICG maintenance shift section foreman Arthur Tackett completed a Preshift Mine Examiner’s Report for the first right section (or panel). (Ex. R–7; Tr. 163:17–21, 238:18–239:2.) Preshift reports alert mine operators to hazardous conditions and the amount of air on the examined section. (Tr. 238:21–25.) The

January 23, 2009, preshift reports showed no hazardous conditions observed between 5:00 a.m. and 6:15 a.m. (Ex. R-7; Tr. 239:4-7.) A little more than an hour later, section foreman McIntyre completed an onshift report showing no hazardous conditions observed or reported, no methane in working places between 7:30 a.m. and 8:00 a.m., and no methane in the return air course at 7:20 a.m. (Ex. R-8; 239:22-240:17.) McIntyre also took air readings at the last open crosscut across the face and at the continuous mining machine when he first arrived on the section and just before beginning to mine. (Ex. R-6; Tr. 236:2-237:18.)

Perfunctorily, ICG's on-shift and pre-shift records from the morning of January 23 (Ex. R-6; Ex. R-7; Ex. R-8) might suggest that enough air was flowing through the section and that methane had not accumulated in the first right section. Yet despite Superintendent Meade and section foreman Gayheart's admissions that ICG had been mining the first right section for two to three days, Respondent did not present similar reports for any previous shifts during which it undertook active mining in the section.¹⁹ (Tr. 193:16-19, 214:19-22.) Moreover, it is possible and likely that any previously present methane would have dissipated during the overnight maintenance shift that immediately preceded mining operations—either through a small opening in the brattice line or a then-open mandoor. Regardless, ICG's records provide little insight regarding the ventilation of the section in previous shifts when active mining occurred, or how well-ventilated the panel would have been in *future* shifts. Accordingly, I afford little weight to ICG's on-shift and pre-shift records from the morning of January 23 beyond suggesting that methane had not accumulated in the section during the two hours between the beginning of the morning shift and the issuance of the citation and order in this case.

b. ICG's Video of Smoke Tests

Three days after MSHA issued both the citation and order in this case, ICG performed and videotaped its own smoke tests in the first right panel. (Ex. R-5; Tr. 194:4-13.) Chemical smoke tests may be used to determine the direction and quantity of airflow. (Tr. 105:14-15.) To perform a smoke test, the tester breaks the end off of a test tube and aspirates its contents to create smoke. (Tr. 105:10-13, 186:3-6.) The direction the smoke travels in five-, ten-, or twenty-second intervals may be used to determine air direction and velocity. (Tr. 105:17-106:4,

¹⁹ Gayheart did testify that on the day pillaring (or retreat mining) began, the air passing through one of the open manddoors was strong enough to shake his jacket, that ICG had "sufficient air" on the section, and there was no methane on the section. (Tr. 215:8-216:14.) During his exchange with Respondent's counsel, however, Gayheart admitted he was not sure of other details, including the block number location of the continuous miner where he allegedly took his air reading, how many days ICG had mined the first right panel, the method in which the manddoors were held open, and the location and direction of mining activities in the section. (Tr. 214:19-215:6, 215:8-17, 216:2-5, 218:1-18.) He also did not give any specifics regarding the amount of air he measured on his anemometer beyond saying it was "sufficient." (Tr. 216:6-14.) Based on his admitted difficulty in remembering such details, I give his testimony little weight as to the amount of air flow on the active mining section.

186:3–6.) According to Inspector Little, chemical smoke tests are “very rarely used to measure an air reading” but might be used where air “has a very low velocity or the movement of an anemometer is not possible.” (Tr. 106:5–8.) ICG claims it videotaped its smoke tests with both the east and north manddoors open and then with the manddoors closed in an effort to show that air flowed in the proper direction under both scenarios. (Ex. R–5; Tr. 189:1–8, 190:16–19; Resp’t Br. at 17.) Moreover, ICG represented at the hearing that no changes had been made to the ventilation of the first right panel. (Tr. 192:9–13, 194:17–19.)

Notwithstanding the poor quality and confusing nature of the video footage, ICG’s smoke tests are riddled with problems. ICG’s process for making its smoke test videos raises serious evidentiary concerns. First, Superintendent Meade admitted that no MSHA representatives were present during the smoke tests, and MSHA had no way to verify conditions had not changed in the three days that elapsed between the inspection and the smoke tests. (Tr. 194:19–195:8.) Second, Meade admitted that ICG made the smoke test video and took pictures using cameras that may not have been permitted in the return airway under MSHA regulations, and that he did not know what kind of cameras were used. (Ex. R–3; Ex. R–4; Ex. R–9; Tr. 195:9–196:3.) Third, Meade admitted he did not know if ICG sought permission from MSHA’s District Director to use the cameras in the return. (Tr. 196:4–11.) Granted, Meade stated that he had no knowledge of any changes to the ventilation system prior to the smoke test, that he specifically ordered miners not to go on the section, and that ICG was under a section 104(d) order preventing access to the area. (Tr. 192:9–13; 204:1–13.) Nevertheless, I note that miners who might inadvertently or openly violate permissible-equipment regulations might also inadvertently or openly violate a section 104(d) order, let alone Meade’s order not to go on the section. Further, the absence of MSHA officials at the videotaping and inability of MSHA to verify the ventilation conditions calls into question the veracity of the smoke test videos in their entirety. Accordingly, the results of ICG’s smoke tests are sufficiently questionable that I accord them no weight.

3. November 3 Map Interpretation

Inspector Little and ICG’s Cantrell also testified to their varying interpretations of the November 3 Plan Map. (Tr. 110:17–113:20, 122:16–123:4, 132:20–136:20.) Little testified the “Xes” on the November Plan Map reflected coal blocks, or pillars, that could not be mined. Specifically, he pointed to the map’s legend as indicating “Xes” that represent “Blocks To Be Left.” (Tr. 67:1–7, 111:8–19, 112:6–16, 122:16–25.)

Conversely, Cantrell testified that he and MSHA Ventilation Specialist Bellamy drew up the map in order to abate the earlier violations cited on November 3. (Tr. 131:22–133:12.) According to Cantrell, some “Xes” were placed on the blocks in order to “maintain the bleeder line,” while other “Xes” were placed on “blocks that were expected to be mined.” (Tr. 133:2–7.) Cantrell further testified it was the company’s understanding that the “Xes” were placed on the map to “maintain the bleeder line” and ICG was “not to take any blocks that would affect the bleeder line.” (Tr. 133:23–25.) In addition, Cantrell testified that not every block marked with an “X” was necessary for the bleeder system. (Tr. 134:25–135:18.) From Cantrell’s perspective,

ICG would be permitted to mine blocks marked with an “X” as long as mining them did not affect the bleeder line. Cantrell, who has thirty years of experience preparing ventilation maps, also stated that bleeder blocks are normally identified with a “B,” but in this case started out being marked as “X” and continued throughout the map’s development. (Tr. 136:10–20.) However, Superintendent Meade admitted: “The way we refer [to] Xes as far as [the] mine process [goes], these [are] blocks that we cannot get due to bad roof conditions, a bleeder line, et cetera. That’s what we put our Xes down for.” (Tr. 202:8–11.) He also indicated that if he saw an “X” on a map, he would not mine the block “[b]ecause . . . something’s wrong with it.” (Tr. 202:13–14.)

As I indicated above, the November 3 Plan Map contains several items listed in section 75.371—including the design of the bleeder system and the location of regulators, stoppings, and bleeder connectors. 30 C.F.R. § 75.371(x), (bb). These items are part of the ventilation plan subject to the District Manager’s approval. *Id.* §§ 75.370(a)(1), 75.372. Thus, the first step in interpreting a November 3 Plan Map provision is to determine whether the provision is unambiguous.

Despite Cantrell’s testimony to the contrary, the map’s provisions are ostensibly clear. As Inspector Little correctly identified, the legend in the bottom right hand corner lists “X” as indicating “Blocks To Be Left.” (Ex. G–5.) In addition, on the upper right hand side of the November 3 Plan Map is a small blue box. (*Id.*) Inside the box in blue type, the text reads: “Pillar Left To Maintain Bleeder Line,” followed by a black “X.” (*Id.*) I need not refer to the dictionary definition of each of these words to deduce the meaning of these provisions. The words used in both the legend and the small blue box support Little’s interpretation that every block of coal marked with an “X” could not be removed. Read plainly, “Blocks to Be Left,” implies that every box marked with an “X” must not be mined. Similarly, the “Left” in “Pillar Left To Maintain Bleeder Line” implies that a block marked with an “X” may not be removed.

Furthermore, Cantrell’s alternate reading does not hold water given the context in which the parties developed the November 3 Plan Map. *Cf. Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (“[W]e ascertain the meaning of regulations not in isolation, but rather in the context in which those regulations appear.”) (citations omitted). First, and most critically, MSHA and ICG developed the map *after* MSHA inspectors cited ICG for failing to comply with a previous ventilation plan where ICG engaged in retreat mining of 385 blocks of coal “without an approved bleeder system.” (Ex. G–9.) The November 3 Plan approval letter, in particular, highlights MSHA’s reluctance to grant ICG the latitude to adjust its ventilation plans on the fly, specifically requiring ICG to submit “[a]ny proposed changes to the plan” for MSHA approval “*prior* to implementation.” (Ex. G–6 (emphasis added).) Moreover, nothing in the record besides Cantrell’s self-serving testimony indicates that MSHA intended to empower ICG to make judgment calls about which pillars could be safely removed without affecting the bleeder system. In fact, given MSHA’s conspicuous concern with retreat mining and bleeder systems at the Clean Energy Mine, the exact opposite appears to be true: MSHA intended to keep ICG on a short leash.

Second, ICG's interpretation is incongruous with the standard methods of marking ventilation maps. As both Cantrell and Meade indicated, an "X" normally indicates a coal pillar that cannot be removed. Conversely, a "B" is used to mark bleeder blocks. The parties drew up, and MSHA approved, the November 3 Plan Map immediately after MSHA inspectors cited ICG for failing to comply with its ventilation plan by engaging in retreat mining of 385 pillars. MSHA would have had strong reasons to make the November 3 Plan Map unambiguous so ICG would not mine pillars MSHA thought necessary for proper ventilation. Given this background, I simply do not find credible Cantrell's testimony that he and Bellamy ignored ventilation plan conventions and used an "X" to mark bleeder blocks so that an "X" could be seen as meaning two different things. Indeed, Cantrell seems to have adopted Humpty Dumpty's memorable boast to Alice in *Through the Looking Glass*: "When I use a word . . . it means just what I choose it to mean—neither more nor less." Lewis Carroll, *Through the Looking Glass* 123 (1897). As Alice astutely responded, I must observe: "The question is . . . whether you *can* make words mean so many different things." *Id.* Here, I am not convinced by Cantrell's variable meanings. Rather, the "X" in the November 3 Plan Map meant the pillar was not to be removed, as Cantrell and Meade readily admitted is the industry convention.

Third, ICG's suggested interpretation is inconsistent with the text of the November 3 Plan Map. "Blocks to Be Left" does not imply any wiggle room in interpretation: those blocks will be left no matter what. It makes no sense to read the November 3 Plan Map, as ICG suggests, to have an "X" in one case mean the pillar may not be removed and in another case mean ICG has the discretion to remove the pillar. The only reading that makes sense is the plain one whereby a block marked with an "X" may not be removed.

Finally, MSHA's authority for plan review and oversight is one of the bulwarks of miner safety. I find it implausible that MSHA would have permitted ICG—or that ICG would have believed it could—pick and choose which pillars were necessary to maintain an effective bleeder system when one of section 75.370's main purposes is to establish a framework for ventilation plan submission, approval, and implementation. *See* discussion *infra* Part IV.B. It is not the approved substantive provisions alone that protect miners; the plan review process itself allows MSHA to contribute important oversight of the ventilation plan.

Consequently, I see no need to read ambiguity into the November 3 Plan Map's provisions simply because Cantrell's self-serving testimony might suggest an alternative, though tortured, interpretation. Based on my review of the November 3 Plan Map and the context surrounding its adoption, I determine its provisions are unambiguous and prohibit mining any block marked with an "X." Accordingly, I do not need to determine whether the Secretary's evidence regarding the history and purpose of the provision and its consistent enforcement establish the intent of the parties.

4. Violation

Inspector Little issued Citation No. 8219731 for ICG's failure to comply with the November 3 Plan, including the November 3 Plan Map. ICG argues it did not violate section

75.370(a)(1) because the Secretary “failed to prove that ICG . . . min[ed] blocks necessary to maintain the bleeder system in the Mine” and “failed to prove there were no regulators in the 1st right panel.” (Resp’t Br. at 16.)

Despite Respondent’s arguments, to establish a section 75.370(a)(1) violation the Secretary need not prove that ICG mined blocks necessary to maintain the bleeder system or that the first right panel had no regulators. As noted above, 30 C.F.R. § 75.370(a)(1) requires operators to develop and *follow* an approved ventilation plan designed to control methane and respirable dust that is suited to the mine’s conditions and mining system. A failure to follow the terms of an approved plan, therefore, establishes a violation of section 75.370(a)(1).

The text of the November 3 Plan approval letter is clear: “*Any* proposed changes to the plan *shall be submitted and approved* by the District Manager *prior* to implementation.” (Ex. G-6 (emphasis added.)) The section 75.370(a)(1) requirement to *follow* an approved ventilation plan, therefore, bound ICG to abide by the terms of the plan, including the November 3 Plan Map, or to submit any proposed plan changes to the District Manager for his or her approval.

Even a cursory comparison of the November 3 Plan Map and the Retreat Mining Maps makes clear that many pillars of coal marked with an “X” on the November 3 Plan Map had already been mined. (Ex. G-5; Ex. G-7; Ex. R-2.) This constituted a change. ICG’s Cantrell and Meade admitted under oath that the maps showed differences, even though Cantrell refused to call them “changes.” (Tr. 150:10-22, 151:4-21; 200:3-8.) Cantrell also admitted that he did not submit such “differences” to MSHA for approval until after receiving the January 23, 2009, citation. (Tr. 151:23-152:5.)

Given the November 3 Plan requirement that ICG submit any proposed *changes* to MSHA for approval, Cantrell’s attempt to characterize these mined pillars as mere “differences” rather than “changes” is understandable, yet unconvincing. ICG’s semantic alchemy notwithstanding, I do not parse those words nearly as fine as Cantrell. Where the design of the first right panel, as mined, differs from the design outlined in the November 3 Plan Map, a change has occurred. According to the November 3 Plan approval letter, ICG was required to submit these changes for the District Manager’s approval prior to implementing the changes. Failure to do so, therefore, constitutes a failure to follow an approved plan.

Moreover, I have found that the November 3 Plan Map unambiguously prohibited the removal of blocks marked with an “X,” which Respondent has indisputably done. The Secretary also presented uncontroverted evidence that backup curtains, which play a role in ventilation, had not been secured to coal ribs. In addition, Inspector Little’s comparison of the November 3 Plan Map and the government’s Retreat Mining Map identified the unauthorized construction and relocation of stopping lines. (Tr. 71:20-73:8; Ex. G-5; Ex. G-7.) Meade also admitted that the November 3 Plan Map and ICG’s Retreat Mining Map had differences in their stopping-line construction and brattices. (Ex. G-5; Ex. R-2; Tr. 199:25-200:1.) Little characterized these as “major changes” that required re-submission to MSHA. (Tr. 73:9-15.) Because these parts of the map are part of the approved plan, failure to follow its terms also constitutes a violation.

I have also found that the November 3 Plan did not permit ICG to use manddoors to ventilate the section. Yet that is precisely what Respondent tried to do when it propped open and tied open the east and north manddoors. In doing so, ICG cobbled together a new ventilation scheme for active mining to remove in the bleeder area and again failed to follow its approved November 3 Plan.

Based on the above, I therefore determine that ICG failed to follow its approved ventilation plan because (1) it did not comply with the November 3 Plan Map provisions but made changes such as relocating stopping lines and mining pillars marked with an “X”, (2) it failed to submit the ventilation plan changes it made before implementing them, and (3) it impermissibly used manddoors as regulators changing the air course. Each of these, individually, would be enough to show a failure to follow an approved ventilation plan. Consequently, I conclude ICG violated 30 C.F.R. § 75.370(a)(1).

5. Gravity and S&S Determination

ICG’s violation of section 75.370(a)(1) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* element requires that the violation contribute to a safety hazard.

In this case, Inspector Little’s credible testimony highlighted the dangers that respirable dust and methane accumulations would present if this gob air became trapped on the first right panel. (Tr. 74:21–76:23.) Moreover, Little credibly testified to the potential for methane liberation at the Clean Energy Mine and identified the continuous miner, power centers, belt drives, and personnel carriers as potential sources of ignition. (Tr. 75:14–76:6.)

In response, ICG first argues that Inspector Little’s failure to take air readings or discuss conditions with miners and his inability to testify to methane levels—as well as Respondent’s smoke tests, readings and inspections, and section foreman McIntyre’s testimony regarding conditions on the section—indicate the violation is not S&S. (Resp’t Br. at 17–18.) However, ICG’s arguments do not rebut Little’s credible opinion that the ventilation system, as it existed at the time of the violation, did not adequately ventilate the first right panel. When Little inspected the section, both the east and north manddoors were closed. He saw no means for air to escape from the section besides the small hole in the brattice line.

Little’s testimony is credible and convincing given his long history in the coal industry, professional certifications and training, and specific experience with bleeder systems and ventilation plans. He worked in coal mines for 32 continuous years before joining MSHA as an inspector in 2005. (Tr. 22:17–23.) Little served as a general laborer, belt man, section foremen, mine foreman, assistant superintendent, and superintendent. (Tr. 20:8–22:22.) He held state foreman certifications beginning in the late 1970s and became a certified electrician in the late 1990s. (Tr. 20:23–21:9, 22:24–23:4.) As a mine foreman, assistant superintendent, and superintendent, Little established bleeder systems, installed ventilation controls, performed weekly exams of the bleeder system, and had input on the development of ventilation plans for

retreat mining (Tr. 22:3–13), which specifically relate to the issues in this case. Accordingly, his opinion is based on the facts he observed and his experience entitles that opinion to significant weight. *Cf. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1279 (Dec. 1998) (relying on inspector’s opinions to conclude the substantial evidence supported the Judge’s S&S determination).

Next, ICG points to Little’s admissions that he would not have considered the violation S&S if he had been able to take an air reading in the return air course showing sufficient air flow from the first right section, if a regulator had existed, or if the mandoor had been open. (Tr. 53:5–54:4, 110:1–10, 118:19–119:12, 122:2–12.) However, Little explained his rationale: the doors were closed when Little approached them. As Little stated: “[P]eople can go by a [man]door—and knowing mandoor doors are supposed to be kept closed when not in use, they can close those mandoor doors. Defeating your ventilation.” (Tr. 120:3–6.) Indeed, the facts of this case illustrate Little’s explanation. Even though I have found the east mandoor was open when Superintendent Meade initially approached it, it is uncontroverted that Meade himself closed it behind him. Still another miner closed the north mandoor after relieving himself in the return air course. In light of this otherwise appropriate instinct for miners to close mandoor doors, ICG’s evidence noticeably does not explain how or why these mandoor doors would remain open in the future. Instead, ICG’s mandoor doors would be closed—as they are designed to be, and as the miners would have been trained to ensure under the November 3 Plan (Ex. G–8)—in the course of future mining operations.

Looking at ICG’s evidence, Respondent’s closed-door smoke test demonstrates, at best, that air *might* have flowed toward the bleeder system at the time of the violation. Likewise, ICG’s preshift and onshift reports at most suggest that methane was not present at the end of the maintenance shift (when no mining took place). Respondent’s air readings from the January 23 morning shift are similarly inconclusive. I have found that the east mandoor was open at the time the inspection began, *see* discussion *supra* Part IV.A.1.b, so it is not surprising that McIntyre recorded air movement at the time. ICG, however, did not demonstrate that these air readings would be consistent with past or future mining operations with the mandoor doors closed, as they are intended to be. I have afforded each of these exhibits little weight individually, and ICG’s proffered testimony regarding past conditions is not credible and inapposite. None of ICG’s evidence, on its own, dispositively rebuts Little’s determination regarding the gravity of this violation.

Even taken together, ICG’s evidence is still insufficient to rebut the inspector’s opinion that the conditions he found did not adequately ventilate the panel or demonstrate sufficient air would ventilate the panel as additional pillars were removed. Unlike Little’s opinion, ICG’s evidence tells little about *past* or *future* ventilation conditions during active mining on the first right section. Revealingly, ICG’s McIntyre admitted he would not mine with the north mandoor closed because “there wouldn’t be enough air at the [continuous] miner.” (Tr. 248:25–249:14.) Further, when asked what would happen if the tied-up north mandoor were closed, he responded: “[The air] would stay in the area where they were mining.” (Tr. 249:17–23.) Thus, with no fresh air to ventilate the section, the closed north mandoor would create a hazard. At the time of

the violation, Little was in the first right section with both the east and north manddoors closed. Thus, McIntyre’s testimony confirms Little’s prediction that air would be trapped on the first right section when these manddoors are closed.

In determining that compliance with the terms of a ventilation plan does not necessarily shield an operator from liability for other bleeder-related violations, one Commissioner observed: “Ventilation regulations and ventilation plan provisions were designed to recognize that mine ventilation is a dynamic process.” *Plateau Mining Corp.*, 28 FMSHRC 501, 511 (Aug. 2006) (separate opinion of Comm’r Young), *rev’d on other grounds*, 519 F.3d 1176, 1191–93 (10th Cir. 2008). That same dynamic nature informs the crux of the hazard in this case. Because the manddoors had been closed—trapping the air on the section—the violation therefore contributed to, or made more likely, the hazards Little identified. Thus, the first two elements of the *Mathies* test have been satisfied because the violation contributed to discrete hazards of methane explosion and accumulation of respirable dust under normal and continued mining conditions.

The Secretary has also established the third and fourth element of the *Mathies* test. Rather than proving insufficient ventilation as ICG suggests, the Secretary must prove the discrete safety hazard—here, a methane explosion and breathing respirable dust—are reasonably likely to contribute to an injury. *Cf. Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (“The test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury . . .”). The Secretary, therefore, does not need to prove ICG’s failure to follow its approved ventilation plan is reasonably likely to cause injury. Instead, he must prove the discrete safety hazards of respirable dust inhalation or a methane explosion are reasonably likely to contribute to reasonably serious injury.

Methane and respirable dust do not need to be present at the precise time a citation issued for these safety hazards to be reasonably likely to result in injury. *See United States Steel Mining Co.*, 7 FMSHRC 1125, 1129–31 (Aug. 1985) (approving Inspector’s designation of a violation as S&S in part because “a rapid buildup of methane could reasonably be expected” when coal is being cut and an ignition source was present); *Consolidation Coal Co.*, 15 FMSHRC 1895, 1917 (Sept. 1993) (ALJ) (“I do not believe a physical indicia of the presence of coal dust is necessary to uphold an S&S finding. Pneumoconiosis is a cumulative disease. . . . It is not possible to state that any one exposure is more ‘likely’ to bring on a disease than any other . . .”). The S&S analysis is not an idle snapshot; rather, it contemplates continued operations at the mine. It is well-known that coal mining can produce dust and methane, and given ongoing mining operations, dust and methane would be produced on the first right panel. Respirable dust and methane explosions are among the most serious dangers underground coal miners face. *See Pine Ridge Coal Co.*, 34 FMSHRC 291, 303–305 (Jan. 2012) (ALJ) (discussing the dangers of respirable dust); *cf. Consol of Kentucky, Inc.*, 30 FMSHRC 1, 2 n.2 (Jan. 2008) (ALJ) (discussing the impact of the Sago and Darby methane explosions). Correspondingly, these dangers are reasonably likely to cause serious or fatal injuries if they occur. I determine that the

third and fourth *Mathies* elements are established, and thus conclude that this violation was appropriately designated S&S.

6. Negligence and Unwarrantable Failure Determinations

The Secretary's regulations define negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Moreover, the regulations indicate high negligence is found where "the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* at Table X. That ICG knew or should have known of the violative condition or practice is unmistakable. MSHA and ICG developed the November 3 Plan and November 3 Map immediately after violations of a ventilation plan for retreat mining the first right section. (Ex. G-9.) The November 3 Plan approval letter specifically required ICG to submit *any* plan changes for approval. (Ex. G-6.) ICG had been cited for ventilation plan violations ten times in the 15 months immediately prior to the issuance of Citation No. 8219731. (Ex. G-1 at 15-18.) MSHA's specific and recurring steps to correct ICG's poor track record with ventilation compliance at the Clean Energy Mine—and the first right panel, in particular—demonstrate that ICG either knew or should have known of the violative condition or practice.

More critically, ICG altered—or ignored—its ventilation plan in several ways, but neither informed MSHA of these changes nor sought MSHA's prior approval to implement these changes. As I noted above, the November 3 Plan Map unambiguously precludes the removal of coal pillars marked with an "X," yet ICG indisputably removed some of those pillars. ICG plainly relocated brattice curtains and stopping lines, which ICG should have known changed their ventilation plan. ICG also impermissibly used mandoors to ventilate the section. Finally, ICG did not ensure that even its own faulty and unapproved plan was implemented correctly. Indeed, the improperly used mandoors did not remain open and line curtains were torn down. ICG's "gum and duct tape" approach to its use of mandoors and line curtains highlight precisely why the MSHA ventilation approval process exists. Although MSHA ultimately approved a plan incorporating some of ICG's general ventilation ideas, it only did so after guaranteeing proper ventilation controls such as installation of regulators. Thus, I conclude that ICG demonstrated a high degree of negligence.

ICG's behavior is also precisely the type of intentional misconduct that is a hallmark of unwarrantable failure. As I explained above, ICG altered or ignored the November 3 Plan requirements when it mined pillars marked with an "X," improperly and impermissibly propped and tied open mandoors, moved brattice and stopping lines, and allowed line curtains to be torn down. Compounding its error, Respondent ignored the express requirements of the November 3 Plan approval letter when it did not seek MSHA's approval for ICG's poorly implemented changes. Given the danger involved in mining without proper ventilation, ICG's poor

implementation of its on-the-fly changes to the plan also demonstrates a serious lack of reasonable care under the facts and circumstances of this case.²⁰

Furthermore, ICG's actions represent aggravated conduct constituting more than ordinary negligence. First, the pillar removal process lasted three days and, in removing 26 pillars, extended throughout the first right panel. Moreover, any operator should have recognized the degree of danger inherent in retreat mining this panel without sufficient ventilation. In fact, Cantrell himself admitted that ventilation would be defeated if the manddoors were closed. (Tr. 153:9–13.) Thus, the risk should have been obvious to Respondent's Safety Director. Despite ICG's intention that the propped-open and tied-open manddoors function as regulators, *see* discussion *supra* Part IV.A.1.c, I have found this use of manddoors impermissible under the November 3 Plan. Given his long experience in the mining industry and recognition that closed manddoors would defeat ICG's ventilation, Cantrell should have recognized how misguided it was to rely on this type of spur-of-the-moment, makeshift ventilation. Employing quick-and-dirty solutions with crossed fingers in order to mine more coal is no substitute for the standard of miner safety the Mine Act requires.

In addition, ICG's violation of the November 3 ventilation plan for removing coal pillars put Respondent on notice that greater efforts were necessary for compliance. Little's January 22 instruction to Meade similarly indicates ICG had knowledge that engaging in retreat mining of

²⁰ In its post-hearing brief, Respondent suggests the existence of manddoors (as regulators) and the volume and direction of air flow on the section mitigate ICG's negligence in this case. (Resp't Br. at 19.) ICG's argument is inapt. Citation No. 8219731 alleges a violation for failure to follow a ventilation plan. *See* discussion *supra* Part IV.A.4. ICG's proposed mitigating factors *might* have borne on the gravity of the violation, *see* discussion *supra* Part IV.A.5. But given my gravity findings, Respondent's arguments have little bearing on ICG's negligent failure to follow the November 3 Plan and Map.

the panel without approval was a violation and that greater efforts were necessary for compliance.²¹ ICG did promptly abate the violation in conformance with MSHA's instructions, but I have also concluded that ICG was highly negligent in its failure to follow its ventilation plan—particularly given its repeated history of ventilation plan violations. Though Inspector Sturgill modified Citation No. 8219731 from “reckless disregard” to “high negligence,” a citation need not be marked as “reckless disregard” to sustain an unwarrantable failure. In fact, the Commission “has previously recognized that a finding of high negligence suggests an unwarrantable failure.” *San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007) (citing *Eagle Energy, Inc.*, 23 FMSHRC 829, 839 (Aug. 2001)).

Based on all of the above, I therefore conclude that this violation constitutes an unwarrantable failure to adhere to a mandatory safety standard. Consequently, Citation No. 8219731 is **AFFIRMED** as written.

7. Civil Penalty

Under section 110(i) of the Mine Act, I 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 ICG's history of violations at the Clean Energy Mine that became final orders over a fifteen-month period preceding this violation. (Ex. G-1.) The report consists of 132 violations, 28 of which were assessed as S&S violations, and ten of which involve the same standard violated in Citation No. 8219731. (*Id.*) Nothing in the record

²¹ ICG claims the Secretary did not prove “that any agent of ICG was aware that the regulator was closed or any proof that there was not sufficient air on the section.” (Resp't Br. at 20.) According to ICG, this means it cannot be liable for high negligence and unwarrantable failure. Again, Respondent unreasonably narrows what the Secretary must prove to show high negligence and unwarrantable failure. The Secretary has charged ICG with failing to follow its approved ventilation plan, not with having closed mandooors or improper air volume.

Furthermore, section 3(e) of the Mine Act defines “agent” as “any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a mine.” 30 U.S.C. § 802(e). At the time of the violation, Meade was a general mine foreman, which involved “manag[ing] the outby section” such that “if something needed to be done . . . I made sure it was done.” (Tr. 163:3-16.) Accordingly, Meade was an ICG agent. His knowledge is imputable to the operator. *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-331 (Mar. 2009) (affirming Judge's determinations that supervisors were acting as agents for the mine operator and their conduct was imputable to the operator).

suggests that the proposed penalty of \$59,527.00 the Secretary seeks in these proceedings is inappropriate for the size of ICG's business, and the parties stipulated that the proposed penalties would not affect ICG's ability to remain in business. (Tr. 7:10–12.) Moreover, once MSHA issued this citation, nothing suggests that ICG failed to make a good faith effort to achieve rapid compliance with the safety standard. I have determined that ICG's violation was S&S and constituted an unwarrantable failure to adhere to a mandatory safety or health standard. ICG was highly negligent and this violation exposed 20 miners 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 \$59,527.00.

B. Order No. 8219732 - Ventilation Plan Training

Section 75.370(e) provides: “Before implementing an approved ventilation plan or a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions.” 30 C.F.R. § 75.370(e). Section 75.370(e), therefore, requires mine operators to instruct miners in a ventilation plan's provisions prior to implementing the approved plan or revision to a ventilation plan. In this case, however, ICG already had an approved plan (the November 3 Plan) and trained its miners in that approved plan's provisions. (Ex. G–8 at 2.) In its post-hearing brief, Respondent claims it did not “change” its ventilation plan and cannot be cited for failure to instruct its miners. (*See* Resp't Br. at 22–23.) I understand Respondent's reticence to admit to a change in its ventilation plan, but I have already determined that ICG did not comply with its November 3 Plan and, in fact, made changes it did not submit to MSHA. *See* discussion *supra* Part IV.A.4. In his post-hearing brief, the Secretary contends that these changes constitute an unapproved “plan” and that section 75.370(e) required ICG to train its miners in these unapproved changes prior to implementing them. (Sec'y Br. at 11.) Consequently, Order No. 8219732 turns on whether section 75.370(e) requires an operator to train its miners in unapproved plan changes—or revisions—prior to implementing those unapproved changes.²²

Under the Commission's two-part regulatory analysis, I must first determine whether the text of section 75.370(e) is unambiguous. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012). Section 75.370(e) envisions two scenarios under which an operator must train its miners in plan provisions prior to implementation—“approved” ventilation plans and “revision[s]” to ventilation plans. 30 C.F.R. § 75.370(e). One potential reading of this regulation would apply the “approved” modifier conjunctively—in other words, both “ventilation plan[s]” and “revision[s] to . . . ventilation plan[s]” must be “approved” before an operator has a duty to train affected persons in the plan's provisions. *See id.* On the other hand, a disjunctive reading is

²² Notably, the Secretary did not cite ICG for a failure to submit a plan under section 75.370(a)(2) or for implementing a proposed plan before approval under section 75.370(d). As the U.S. Court of Appeals for the Eighth Circuit recently indicated, vacating a violation is a proper result when MSHA errantly relied on a regulation. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 709–12 (8th Cir. 2013).

possible if “approved” modifies only “ventilation plan[s]” but not “revision[s] to . . . ventilation plan[s].” *See id.* From this perspective, an operator has a duty to train affected persons in the plan’s provisions prior to implementation where there is an “approved ventilation plan” or any “revision to a ventilation plan,” whether approved or unapproved.

As a matter of regulatory interpretation, these two plausible readings of section 75.370(e) seem to suggest that the text of the regulation is ambiguous. *Cf. Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (finding that where a meaning of a term in a regulation is “open to alternative interpretations . . . we conclude that it is in some respects ambiguous.”). However, the Commission has also made clear that a regulation’s meaning must be read “not in isolation, but rather in the context in which those regulations appear.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010). I must, therefore, examine the regulatory context within which the section 75.370(e) training requirement appears.

As a whole, section 75.370 creates a comprehensive process for ventilation plan proposal, approval, and implementation that involves MSHA, the mine operator, and the representatives of miners. Paragraphs (a) through (d) of section 75.370 outline the process for proposal, review, and approval of a ventilation plan and a revision to a ventilation plan. Conversely, paragraphs (e) and (f) detail a mine operator’s duties in implementing an approved ventilation plan or revision to a ventilation plan. Finally, paragraph (g) of section 75.370 specifies MSHA’s ongoing responsibilities for oversight of the ventilation plan.

Given this structure, the text of section 75.370(e) supports a clear, conjunctive application of the word “approved” to both a “ventilation plan” and a “revision to a ventilation plan.” First, the overall text of section 75.370 contemplates two distinct types of ventilation plan revisions: approved revisions and unapproved revisions. *Compare id.* § 75.370(f) (requiring that certain disclosures be made to representatives of miners upon plan approval) *with id.* § 75.370(a)(ii)–(iii) (requiring identical duties for unapproved revisions). Thus, the text of the regulation uses the “proposed” modifier to discuss unapproved plans and revisions. *See id.* § 75.370(a)–(d). In contrast, the text of the regulation omits that modifier when discussing an approved plan or revision. *See id.* § 75.370(f)–(g)). Hence, the Secretary knew how to distinguish between approved and unapproved ventilation plans and revisions in the text of the regulation. Yet the Secretary’s application of section 75.370(e) in this case surprisingly overlooks that important textual distinction. Nevertheless, the text of section 75.370(e) would have included the “proposed” modifier if paragraph (e) actually required training on unapproved revisions to a ventilation plan.

Further, the Secretary's interpretation in this case overlooks his own preamble for section 75.370, which support a conjunctive reading of paragraph (e).²³ First, according to the preamble, paragraph (d) of section 75.370 "clarifies that ventilation plans or revisions may not be implemented until approved." Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899 (May 15, 1992) (final rule). Consequently, an operator would only train its miners on approved plans or approved revisions prior to their implementation. Second, when MSHA later developed paragraph (f)'s disclosure requirements for approved plans, some commentators suggested these requirements were duplicative of other parts of the regulation. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,808 (Mar. 11, 1996) (final rule amending section 75.370). MSHA ultimately "crafted the final rule in light of the [current paragraph (e)] which requires that operators instruct persons affected by the mine ventilation plan or its revision prior to its implementation." *Id.* Recognizing that "[c]hanges to the plan occur during the approval process[.]" MSHA expected "that the plan or revision would be available to the person conducting the required training, and, therefore, would be provided to the representative of miners." *Id.* Thus, MSHA based its paragraph (f) provisions on the premise that mine operators should be able to provide copies of approved plans and revisions to miner representatives, because an operator cannot properly train its miners prior to implementation without a copy of an approved ventilation plan or revision to a ventilation plan. Accordingly, the preamble for present day paragraphs (d) and (f) support a conjunctive reading of "approved," whereby training requirements under paragraph (e) of section 75.370 only apply to approved ventilation plans and approved revisions to a ventilation plan.

Moreover, the preamble for section 75.370(e) itself similarly supports a conjunctive interpretation. Paragraph (e) was a new provision in the 1992 standards, *see* Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,910 (May 15, 1992) (final rule), and was developed under a regulatory scheme that prohibited the implementation of an unapproved plan or unapproved revision. *See id.* at 20,899. Conspicuously, the preamble to paragraph (e) omits any reference to proposed plans in the new training provision, requiring "that *before* implementation of a revision to an approved plan, all persons in the mine who are affected by the revision must be instructed in its provisions." *Id.* (emphasis added). The

²³ Section 75.370(e) originally appeared in the Secretary's regulations as section 75.370(d) as part of a "comprehensive revision of the existing standards." Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 34,683, 34,683 (Aug. 6, 1992) (delaying effective date of final rule); *see also* Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899–900, 20,924 (May 15, 1992) (final rule). In 1996, MSHA revised "the existing plan submission and approval process to provide for an increased role for the representatives of miners in the mine ventilation plan process." Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,806 (Mar. 11, 1996) (final rule amending section 75.370). One of the changes was to "redesignate[] existing paragraphs (b)(1) through (f) as (c)(1) through (g)." *Id.* As a result, section 75.370(c) and (d) became section 75.370(d) and (f), respectively. The regulatory history of section 75.370(c) and (d), therefore, frames my interpretation of present day section 75.370(d) and (e).

preamble for paragraph (e) also notes, “[c]omplete understanding of the requirements of the *approved plan* is essential for it to be effective.” *Id.* at 20,899–900 (emphasis added). Given the prohibition on implementing unapproved plans under paragraph (d), *see id.* at 20,899, the preamble to paragraph (e) of section 75.370 suggests training requirements apply only to *approved* plans and revisions.

Finally, the regulatory purpose of section 75.370 also supports a clear, conjunctive reading of “approved” in paragraph (e). Read as a whole, section 75.370 assigns duties to both operators and MSHA, as well as entitling miner representatives to certain disclosures, starting with the submission and review of proposed plans and revisions in paragraphs (a)–(d). Paragraphs (e) and (f) apply to approved plans. Thus, a disjunctive reading of paragraph (e) that would include “proposed revision” within “a revision to a ventilation plan” is incongruous with paragraph (d), which prohibits implementation of unapproved plans or revisions. *See* 30 C.F.R. § 75.370(d); Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,899 (May 15, 1992) (final rule). In fact, the specific apportioning of duties, responsibilities, and entitlements suggests a carefully-crafted administrative framework for the submission and approval of ventilation plans. As the Secretary stated in the preamble:

Mine ventilation plans are a long recognized means for addressing safety and health issues that are mine specific. Individually tailored plans, with a nucleus of commonly accepted practices, are an effective method for regulating such complex matters as mine ventilation Section 75.370 requires that each mine operator develop and follow a ventilation plan that is approved by MSHA and that is designed to control methane and respirable dust in the mine. Section 75.370 further requires that the plan be suitable to the conditions and mining system at the mine. In addition, § 75.370 provides the procedures for submittal, review and approval of the plan to assure that the plan for each mine will address the conditions in that mine.

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,806 (Mar. 11, 1996) (final rule amending section 75.370). The 1996 preamble also repeatedly describes section 75.370 as a “process.” *Id.* at 9,806–08. Tellingly, the 1996 preamble makes no mention of an operator’s duty to train miners on ventilation revisions that had merely been “proposed.” Such silence is not surprising. Requiring operators to train on “proposed” revisions would frustrate the entire purpose of the regulation, which establishes the requirements and procedure for submitting a plan, having it approved, and then implementing its terms.

Therefore, based on the regulation’s structure, text, history, and purpose, I determine that section 75.370(e) is unambiguous and does not require an operator to train its miners on

ventilation plan provisions until after the District Manager has approved the plan or revision.²⁴ The Secretary has not argued that the regulation intended a different result, or that the unambiguous meaning would lead to absurd results. As noted above, the Secretary's own witness, his post-hearing brief, and his exhibits admit that ICG trained its miners in the November 3 Plan. Furthermore, I conclude that section 75.370(e) unambiguously does not require training on the unapproved changes ICG made to its November 3 Plan. Accordingly, Order No. 8219732 is **VACATED**.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8219731 be **AFFIRMED** as written and that Order No. 8219732 be **VACATED**. ICG is **ORDERED** to **PAY** a civil penalty of \$59,527.00 within 40 days of the date of this decision.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/pjb

²⁴ Because I have found the text of section 75.370(e) unambiguous, I do not need to determine whether the Secretary's interpretation is reasonable or due any deference.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

721 19th STREET, SUITE 443

DENVER, CO 80202-2500

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August 26, 2013

SECRETARY OF LABOR,	:	CONTEST PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE-2012-359-RM
Petitioner,	:	Order No. 8792037; 3/22/2012
	:	
	:	Mine: Winn Materials, LLC
	:	Mine ID: 40-03094
	:	
	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. SE 2012-540-M
	:	A.C. No. 40-03094-291606
	:	
	:	
WINN MATERIALS, LLC,	:	
Respondent.	:	Mine: Winn Materials, LLC

DECISION

Appearances: Jennifer Booth Thomas, Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Petitioner
Justin M. Winter, Law Office of Adele L. Abrams, P.C., Beltsville, MD, for the Respondent

Before: Judge Simonton

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 Winn Materials, LLC, at its Winn Materials, LLC mine (the “mine”), hereinafter referred to as Respondent, pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Act” or “Mine Act”). On April 24, 2013, a hearing was held in Nashville, Tennessee. The parties’ post-hearing briefs are of record.

I. ISSUES FOR ADJUDICATION

Was Respondent's violation of 30 C.F.R. § 56.11001 the result of high negligence and an unwarrantable failure to comply with the cited regulation? While Respondent admits to the violation of the standard, Respondent asserts that the Secretary has not proven the necessary elements to show that this citation was appropriately designated as high negligence, or as an unwarrantable failure to comply pursuant to section 104(d)(2) of the Mine Act. Accordingly, Respondent also contests the penalty amount assessed by MSHA.

II. FINDINGS OF FACT

A. Stipulations

Pursuant to the parties' Joint Stipulations submitted at the hearing on April 24, 2013, the parties have stipulated to the following facts:

Respondent Winn Materials, LLC mines and produces limestone that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977 and is subject to the Federal Mine Safety and Health Act of 1977, and thus, to the jurisdiction of the Federal Mine Safety and Health Review Commission. Further, the Administrative Law Judge has the authority to hear this case and issue a decision. A reasonable penalty will not affect Winn Materials, LLC's ability to remain in business.

The violation at issue in this case was properly served by a duly authorized representative of the Secretary upon an agent of Winn Materials, LLC, on the date stated therein. Respondent admits to the violation of the standard at issue in this case but continues to contest the unwarrantable failure designation, negligence, and the assessed penalty. Order No. 8792037 was properly issued as an alleged violation pursuant to 104(d)(2) of the Act. The predicate alleged 104(d)(1) citation and alleged 104(d)(1) order(s) were issued to the mine in November of 2011 and remain in contest. Order No. 8792037 is properly issued as required by the Act in accordance with the 104(d) series of violations. The Respondent continues to contest all of the violations in the 104(d) series.

B. Factual Background and Testimony

On March 22, 2012, MSHA inspector Darren Conn arrived at the Winn Materials mine to conduct a routine inspection of the plant. Tr. 17. Prior to his work at the Mine Safety and Health Administration ("MSHA"), Conn had worked as a coal miner for four years, in addition to spending 10 years working for CSX Railroad where he eventually became the vice chair for the central region safety chapter. Tr. 15. In 2008, Conn left CSX to work for MSHA, where he received training at the National Mine Academy in Beckley, West Virginia. Tr. 16-17.

On the morning of the inspection, Conn traveled with mine personnel Jeremy Childress, Sean Cotham, and Dan Adams from the hopper to the primary crusher, to the screens and belts, all located in the area of the mine known as the primary plant. Tr. 18-19, 60-61. When Conn

came to the tail section of the #2 belt, he noticed a vast rock spill that was blocking access to the tail section of the belt. Tr. 19. As a result of this condition, Inspector Conn issued Order No. 8792037, which states:

Safe access was not provided to the tail section of the #2's belt at the primary area of the mine. Spillage was observed alongside the west side of the tail section ranging approximately two feet to five feet in height. The grease line for the west side bearing measured two feet above ground level after cleanup and was barely noticeably [sic] when the spillage was observed. The area measured ten feet wide on the north end and eleven feet wide on the south end after cleanup occurred. Miners access the area on a regular basis for maintenance purposes. The condition created a slip, trip, or fall hazard to miners. Management engaged in aggravated conduct constituting more than ordinary negligence in knowing the condition had existed for more than two shifts without correcting it. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exhibit 1. Inspector Conn took photographs of the condition he observed at that time, which show large accumulations of rock that prevent safe access to the grease line, which is located approximately two feet above ground level and was marked by the inspector on the photograph during his testimony. Gov't Exhibit 6; Tr. 21-22. Conn testified that it was important to provide safe access to the grease line because there is a bearing at that location that employees might need to service, grease, or oil. Tr. 22. Conn noted that this condition made it dangerous for a miner to work in the tail section grease line, and that the area had not been roped off or barricaded in any fashion. Tr. 32.

Conn also stated that at the time he observed the area he was not sure of the source of the spillage but was later made aware that there had been a hole in a scalping screen on a surge chute located approximately 15 feet above the #2 belt tail roller. Tr. 25; Gov't Exhibit 9. Conn testified that while the spill was near the tail roller of the #2 belt, both the skirting issue at the #2 belt and the hole in the scalping screen contributed to the accumulation of rocks. Tr. 25.

However, Conn did not feel that the majority of the accumulations that blocked access to the grease line came from the hole in the scalping screen. Tr. 51. In support of this theory, Conn testified that he could tell by looking at the shape of the fallen rocks that the rock accumulation had been there for some time, because the rocks were damp, packed in, and flat. Tr. 26. He felt that, had the violation only existed for a short period of time due to the sudden hole in the surge chute as the Respondent contended at trial, the rock accumulation would have appeared to be more cone-shaped. Tr. 26. Since the spillage was spread out, Conn deduced that it had been there a few days. Tr. 27. In addition, Conn testified that after the rock spill was cleaned up, he noticed a dark, dampened outline of the area where the rocks had been, which indicated to Conn

that there had been water over the area and thus, that the rocks had been there for some time. Tr. 32-33; Gov't Exhibits 8, 10.

In addition, Conn determined that the operator had knowledge of the violation based on his further questioning of mine employees. Tr. 22-24. As recorded in his inspection notes, Conn asked foreman Jeremy Childress how long the excess spillage had existed at the #2's belt tail section, and Childress stated, "[a]t least a couple days." Gov't Exhibit 2; Tr. 23. Conn also looked at the workplace examinations that had been conducted over the four days prior to the inspection. Tr. 27; Gov't Exhibit 3. On the workplace examination notes for the primary area, housekeeping and skirting were marked as inadequate on March 19th and 20th. Tr. 29-30, Gov't Exhibit 3. However, when Childress was asked to explain his response during his testimony at the hearing, he stated that he had meant to acknowledge the problem specifically with the #2 belt, which had existed a couple of days before it was corrected. Tr. 77-78.

Childress also testified more generally as to his recollection of the relevant facts pertaining to the violation at issue. At the time of the inspection in March 2012, Childress was the quarry foreman, which meant he was responsible for daily planning, scheduling of employees, and examinations. Tr. 59. Childress had conducted workplace examinations of the primary plant on March 22 and the three days prior. Tr. 60-61. When asked to explain the workplace examination notes he had written for March 19 through 22, Childress provided a detailed explanation of what particular conditions he had referenced when marking areas of the plant as inadequate. He testified that the inadequate housekeeping indication on March 19, 2012 referred to the skirting issue on the #2 belt. Tr. 64. The inspection notes from March 20, 2012 also indicate that housekeeping is inadequate, which Childress testified was in reference to the skirting issue again, as well as housekeeping issues on the surge belt and 7x20 platform, both of which were located outside of the area depicted in the inspector's photographs of the violation. Tr. 66-67. With respect to the housekeeping inadequate marks on the examination notes for March 21, Childress testified that he was referring to the rubber on the scalping screen, handrails, and cleanup on the 7x20 platform, all of which are again areas that are not visible in the photograph of the cited area. Tr. 68; Resp. Exhibit 1 at 4.¹

Childress stated that when he conducted a workplace examination of the cited area between 5:45 and 6:15 A.M. on March 22, there was no material directly in front of the grease point. Tr. 70. His examination notes for that day indicate that housekeeping is inadequate, which Childress clarified meant that the stops on the surge belt needed to be replaced, the hole in the surge chute needed to be fixed, and the skirts on the crusher run shuttle belt needed repair. Tr. 70-71. Childress testified that he did not note accumulations, nor was the "housekeeping" note a reference to the type of accumulations in the violation, because, at the time he conducted workplace examinations of the cited area while there was a skirting issue on the #2 belt, he did not see a lot of material accumulated on the ground. Tr. 66-67. Specifically, he testified that the

¹ Respondent's exhibit 1 at page 4 contains a photograph of the cited area taken by Inspector Conn, a photograph which was also offered into evidence by the Secretary and marked as Government Exhibit 6.

area under the #2 conveyor had approximately a “five-gallon bucket of material underneath the conveyor itself.” Tr. 67.

During this workplace examination, Childress did find a hole in the surge chute that needed work. Tr. 70-71. However, he noted that the conveyors were not running at the time, so although he could see that there was a hole, there were not significant accumulations of material on the ground. Tr. 71-72. He also stated that this surge chute had liners that would often wear through and need replacement, and that he did not feel it was a serious enough issue not to energize the conveyors, since there was not much material and any material present would be small in size. Tr. 72.

After conducting the workplace examination on March 22, Childress returned to the primary plant area later that morning with Inspector Conn. Tr. 73. As they walked toward the area, they could see material falling, at which point Childress radioed the operator and had him shut everything down. Tr. 73. The men then walked over to observe the condition. *Id.* Childress estimated that material was moving through the area at a rate of roughly 1000 to 1200 tons per hour, and that there was, at most, approximately six to seven tons of material that had built up when they came to the area. Tr. 74.

After the accumulations were cleaned up, Inspector Conn noted that the skirting on the #2 belt appeared to be worn out. Tr. 24. Skirting, as Conn explained at hearing, is a 6-7 foot-long piece of rubber that goes up along the sides of a belt, to keep rock on the belt as it comes out of the chute. Tr. 24. After the violation was successfully abated, the men went back to the shop, at which point Conn informed the operator he would be issuing a 104(d) order for the accumulation, designated as the result of high negligence and an unwarrantable failure to comply. Tr. 76; Gov’t Exhibit 1.

Conn emphasized that Childress was the foreman at the time of the inspection, which meant that he was overseeing the plant area and responsible for conducting workplace examinations. Tr. 23. Accordingly, Conn considered him an agent of the mine. Tr. 23. Conn also spoke with Mr. Sean Cotham, Mr. Childress’s boss, about the skirting issue at the #2 belt, and testified that Cotham told him they knew of the problem with the skirt. Tr. 24. These responses, along with the workplace examination notes from the days prior to the inspection, led Conn to issue Order No. 8792037 as high negligence and an unwarrantable failure, since he felt the operator had known of the violation for a couple of days and had done nothing to correct it. Tr. 24, 30-31; Gov’t Ex. 2 at 6; Gov’t Ex. 3. However, the testimony of Jeremy Childress indicates that his response to Conn’s questioning was intended to tell him how long the skirting issue in particular had lasted, and both men acknowledged that the skirting issue could not have caused the subject violation on its own. Tr. 62-65, 24.

Childress also testified that there was no way the skirting issue on the #2 belt could have caused this accumulation because of the size of the accumulated material, since the rocks that typically go through the #2 belt are smaller. Tr. 74. He testified that the excessive spillage seen in the pictures was caused by a hole in the surge chute, though some smaller sources of spillage may have included holes in the surge belt and the #2 belt. Tr. 72-74.

After considering the conflicting testimony and the inconsistencies on the record, I find that foreman Jeremy Childress's testimony carries more weight and is a more complete recollection of the specific events on the day of the investigation. Inspector Conn testified to a theory of the events that asserted that the cited condition was caused by the rubber skirting issue on the #2 belt, but contradicted himself several times by also stating that the skirting issue could not have caused all the accumulations in the photograph of the violation submitted into evidence, and that he could not tell how much relative contribution to the accumulation was attributable to each source of spillage. Tr. 50-51. In contrast, Childress provided a detailed, step-by-step narrative of the day of the inspection, and provided logical explanations of mine personnel's responses to Childress's questioning, the workplace examination notes, and the physical shape of the rock accumulations.

III. APPLICABLE LAW AND ANALYSIS OF EVIDENCE

A. Undisputed Violation of 30 C.F.R. Section 56.11001

Citation No. 8792037 was written for a violation of 30 C.F.R. § 56.11001, which states, “[s]afe means of access shall be provided and maintained to all working places.”

The Joint Stipulations submitted at the hearing by the parties state that Respondent admits to violating 30 C.F.R. 56.11001. Joint Stip. at 2. In addition, mine foreman Jeremy Childress admitted at hearing that the accumulations pictured represented a hazard in terms of getting safely to the grease line. Tr. 82. Thus, the issues remaining for adjudication before me are whether the high negligence and unwarrantable failure designations are correct and whether the assessed penalty is appropriate.

B. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* at Table X. Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when [t]he operator knew or should have known of the violation, condition or practice and there are no mitigating circumstances. *Id.* Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

As noted above, Conn designated this order as “high negligence” because he felt that the operator had known of the violation and that there were no mitigating factors present. However, there were inconsistencies between his testimony at hearing and his prior deposition with respect to what he felt was the definition of “high negligence” under the Mine Act. Tr. 38-40; Resp. Exhibit 5 at 32. While Conn testified that he did not see any mitigating factors that affected his negligence designation, he did state that the lack of footprints or any indication that miners had actually traveled in that area was a mitigating factor for the purposes of the likelihood designation, which he had marked as unlikely. Tr. 41-43; *Id.* at 16, 21-22.

With respect to the operator’s knowledge of the violation, the Secretary focused on mine management’s responses to Inspector Conn’s questioning, the workplace examination notes, and the physical formation of the limestone accumulations to support her assertion that management had knowledge of the cited condition and that the condition had existed for several days. While the Secretary focused on Childress’s statement that the problem with spillage *on the #2 belt* had lasted a few days, it is clear from the wording of the question and from Childress’s further explanations at the hearing that Childress meant this statement in reference to the skirting issue on the #2 belt specifically, a problem Respondent had noted in workplace examinations and taken steps to correct. Tr. 77-78; Gov’t Exhibit 2 at 6. The testimony of both Mr. Childress and Inspector Conn confirm that while mine personnel had knowledge of the skirting issue on the #2 belt, the #2 belt could not have caused all the accumulations that created the cited condition. Tr. 47-48, 74-75.

Notably, Conn testified of the accumulations in the photograph of the violation that “it was clear to me that that did not happen from just a rubber skirt issue,” thus acknowledging the multiple sources of spillage that contributed to the violation. Tr. 24. In addition, he stated upon looking at the photograph of the total accumulations in the primary plant that the accumulations in the upper right-hand portion of the picture most likely came from the chute or the hole in the screen above. Tr. 52. In the photograph of the condition, the piles of rock in the upper right-hand part of the site most obviously block access to the grease line. Gov’t Exhibit 6. Thus, Conn’s testimony and admissions concerning the multiple sources of accumulation cast doubt on Respondent’s knowledge of, and ability to correct, this violation prior to the hole in the surge chute that occurred on March 22, 2013.

Further, the Secretary argued that, had the accumulation mostly come from the hole in the surge chute above, the rocks would have fallen straight down and formed a cone shape, as opposed to the spread-out mounds of limestone depicted in the photograph of the violation. Tr. 83; Gov’t Exhibit 6. However, Childress explained that the primary hole the rocks were escaping out of was located on the inside of one of the decks, so by the time the material fell to the area below it would have hit the tail pulley and reflected off of the sides, causing rocks to fall in all different directions and creating the spread out piles depicted in the pictures. Tr. 84. He also testified that, in contrast, material coming out of the #2 belt as a result of the skirting issue would have escaped between the belt and the guard, and would have hit the guard and fallen straight down. Tr. 65. The Secretary made no attempt to rebut this explanation, and Inspector Conn had not inspected the surge chute nor investigated the hole in the scalping screen at the time he wrote the citation. Tr. 48.

The Secretary also presented evidence that after rock accumulations were cleaned up, the ground below where the rock piles had been was damp, to show that the rocks must have been there for some time. However, the Secretary's reliance on the damp areas shown in the photograph of the cited area post-cleanup is unconvincing, since the photograph also reveals that the ground in areas never covered by rock accumulation also appears damp. Gov't Exhibit 10. When Childress was asked whether it had rained during the time of the inspection, he responded ambiguously with, "Huh-uh." Tr. 89. Respondent's brief refers to the weather records for Montgomery County, Tennessee on the date in question to support their statement that it had in fact rained three-tenths of an inch on March 22, 2012. Resp. Brief at 12 (citing <http://www1.ncdc.noaa.gov/pub/orders/IPS-408AA784-E7EE-48AD-8E8E-65504447EE44-wxc3.pdf>). To support this assertion, however, Respondent incorrectly references weather data for March 22, 2011, exactly one year prior to the inspection, which does not indicate any rain. *Id.* Despite this error, I take judicial notice of the fact that it had, as Respondent states in their brief, in fact rained three-tenths of an inch in Montgomery County, Tennessee, on March 22, 2012, as national weather records indicate.² However, this fact is still inconclusive since the inspection took place the morning of March 22 and there is nothing in the record to suggest it had rained prior to the inspection. Taken together, none of the evidence presented on this point was conclusive or persuasive.

The Secretary has not shown that mine management knew of the cited condition and had ignored it for days. Although the skirting issue on the #2 belt had existed for a couple of days, the Secretary failed to show that the skirting issue singlehandedly contributed enough accumulations of material to cause the violation. When asked to comment on the source of accumulations in various parts of the cited area, Conn testified that he could not tell how much material actually accumulated as a result of the skirt rubber issue alone, as opposed to the larger portion of material seen in the photograph of the violation. Tr. 49-50; Gov't Exhibit 6. It is the operator's knowledge of the violation itself (the lack of safe access to the grease line) that I must consider when determining their level of negligence, and not their knowledge of a skirting problem that could possibly have contributed an unknown amount to the overall violation. Childress, who had observed the area in question each day for the three days leading up to the date of the inspection, testified that at most, the area under the #2 conveyor had one five-gallon bucket's worth of material under it on the 19th and 20th. Tr. 67. I find that the skirting issue, which was corrected by the March 20, could not have by itself created such a large accumulation, and thus, that the operator did not know of the violation in the days prior to the inspection as the Secretary alleges.

² National Oceanic and Atmospheric Administration, National Climatic Data Center, available at: <http://www1.ncdc.noaa.gov/pub/orders/cdo/189437.pdf> (weather data collected at Clarksville Sewage Plant, Montgomery County, Tennessee, in March 2012). A court may take judicial notice on its own, at any stage of the proceeding, of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

In contrast, Childress's summary of his workplace examinations and corrective actions taken in the days leading up to the inspection show that the mine was aware of the skirting issue on the #2 belt, fixed it, and did not feel that there were accumulations significant enough to hinder safe access to the grease line in the primary plant section until the spill from the hole in the surge chute that occurred the morning of March 22, 2012. Inspector Conn's testimony confirms that the operator corrected the skirting issue, as he testified that the fact that skirting was marked "adequate" on the workplace examination notes for March 21 and 22 indicated to him that they had corrected the issue. Tr. 54. However, Inspector Conn testified that he did not view the fact that they had fixed the skirting as a mitigating factor when considering negligence. Tr. 55.

Upon examination of the factual circumstances in this case, I find that the operator's knowledge of the violation was less extensive than the Secretary asserts, and further, that there were mitigating factors that Conn failed to account for when writing the violation. The operator knew of the skirting issues on the #2 belt for two days, which contributed *some* accumulations to the violation, but there were mitigating circumstances in that Respondent noticed the issue, marked it in workplace examination notes, and corrected the problem with the skirting. With respect to the main source of limestone in the area, the operator was not aware of the hole in the surge chute until the morning of the inspection and was not aware of the amount of accumulations that would result until the conveyor was turned on later that morning. Upon noticing the violation, the operator immediately radioed to have the conveyors shut down and commenced cleanup, actions which quickly corrected the violation and ensured miners would be able to safely access the grease line safely as soon as possible. In addition, the workplace examination notes show that Respondent was conducting regular examinations and had in fact already taken corrective actions to address one potential source of the violation, the skirting issues on the #2 belt. Accordingly, I find that Respondent had taken steps to prevent and minimize this violation, a mitigating circumstance that makes the appropriate level of negligence for this violation "moderate" rather than "high."

C. Unwarrantable Failure

This citation was issued as an "unwarrantable failure," which has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). The Commission has stated that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Judges must consider each

of these factors in light of the evidence in order to reach a determination as to whether a citation is an unwarrantable failure.

As stated in my negligence analysis above, the Secretary did not adequately prove her assertion that the violation had lasted four days. I credit Childress's testimony that the majority of accumulation in the primary plant area occurred on the morning of March 22, 2013, as the inspection was occurring. Thus, the accumulation that actually caused the violative condition had only lasted, at most, an hour and a half. Tr. 70-71; Gov't Exhibit 1. However, the violation was extensive, as indicated by the photographs of the violation submitted into evidence as well as Childress's own testimony that rocks were flying out of the hole in the surge chute at a rate of roughly 1000-1200 tons per hour. Gov't Ex. 6, 7; Tr 74.

The Secretary did not present any evidence as to whether the operator had been placed on notice that greater efforts were necessary for compliance, and the operator's violation history does not indicate previous violations of this standard. Gov't Exhibit 11. In addition, testimony of both the foreman and the inspector indicate that the condition was abated as soon as the operator was made aware of the problem, and that Childress responded quickly by radioing the operator to shut everything down so the condition could be cleaned up. The Secretary has the burden of showing this violation rose to an unwarrantable failure, and did not present any evidence at hearing that the operator took longer than a normal time to abate the violation.

Both the testimony on the record and Conn's designation of this violation as unlikely to cause injury or illness indicate that it did not pose a high degree of danger. There was a lack of footprints in the area or of any other indicia that employees had tried to access the grease line during the time the violation existed, and the path to the grease line was cleaned up quickly after the operator noticed a problem.

With respect to the operator's knowledge of the violation, the negligence analysis above makes it clear that the violation this operator was cited for was not one that mine management had known of until the morning of the inspection. While Conn testified that one of the factors influencing his unwarrantable failure designation had been his reading of the workplace examination notes, I find that he misinterpreted the term "housekeeping" when he took it to refer to a broader spillage problem that could cause the violation, rather than to smaller issues with skirting that were remedied by the operator as they were discovered. After considering all of the above six factors, I find that several of the factors weigh in favor of the operator, such that I cannot find that the violation was a result of Respondent's unwarrantable failure to comply with the cited standard.

IV. PENALTY

Commission Administrative Law Judges (ALJs) have the authority to assess penalties under the Mine Act *de novo*, as stated in Section 110(i) of the Mine Act, which delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires Commission ALJs to consider the following six penalty criteria when assessing penalties:

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

30 U.S.C. §820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1155 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The operator's history of previous violations indicates that they have had no violations of this particular standard, and they were issued only seventeen 104(a) violations in the two year period between March 2010 and March 2012. Gov't Exhibit 11. In addition, Inspector Conn testified that he considered Respondent to be a generally safe operation. Tr. 36. The penalty is appropriate to the size of the business, and the parties have stipulated that a reasonable penalty will not affect Respondent's ability to stay in business. Joint Stip. at 1. As noted in my negligence analysis above, I consider the operator's negligence to be moderate, as opposed to high as the Secretary proposed. The gravity of the violation is not in dispute and has been established to be low. In addition, I find that this was not an unwarrantable failure to comply with the cited standard, and that Respondent rapidly abated the violation in good faith.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalty listed above for a total penalty of \$400.00 for the citation decided after hearing. Winn Materials, LLC, is hereby **ORDERED** to pay to the Secretary of Labor the sum of \$400.00 within 30 days from the date of this decision.³

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

³ 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

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

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August 29, 2013

THOMAS E. PEREZ, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ¹ Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. LAKE 2011-71
	:	A.C. No. 11-03141-233712
	:	
	:	Docket No. LAKE 2011-156
	:	A.C. No. 11-03141-236902
	:	
	:	Docket No. LAKE 2011-198
v.	:	A.C. No. 11-03141-238158
	:	
	:	Docket No. LAKE 2011-619
	:	A.C. No. 11-03141-250613
	:	
MACH MINING, LLC, Respondent	:	Mine: Mach #1
	:	

DECISION

Appearances: Sarah Weimer,² Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Christopher D. Pence, Esq., Betts Hardy & Rodgers, Charleston, West Virginia, for Respondent

Before: Judge Tureck

These cases are before me on four *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Mach Mining (“Respondent”), pursuant to section 105(d) of the Federal

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Thomas E. Perez was sworn in as the new Secretary on July 23, 2013.

² Counsel for the Secretary changed her surname from White to Weimer subsequent to the hearing.

Mine Safety and Health Act of 1977, 30 U.S.C. 815 (“Act”).³ The first, filed on March 7, 2011, was docketed as LAKE 2011-71. It alleges 11 violations of the Mine Act and assessed penalties totaling \$25,651. A settlement of all but one of these citations - No. 8423584 - was approved by me on October 19, 2012. The assessed penalty for this single violation is \$946. The second, filed on April 1, 2011, was docketed as LAKE 2011-156. It alleges 24 violations of the Mine Act and assessed a total of \$29,915 in penalties. The October 19, 2012 settlement encompassed all but five of these citations - Nos. 8362917, 8362918, 8362923, 8362941, and 8362942. These five citations had assessed penalties totaling \$4,970. The third, filed on April 20, 2011, was docketed as LAKE 2011-198. It alleges a single violation of the Mine Act and assessed a penalty of \$3200. The fourth, filed on May 31, 2011, was docketed as LAKE 2011-619. It alleges 19 violations of the Mine Act and assessed a total of \$25,162 in penalties. All but two of these citations - Nos. 8424580 and 8428128 - were included in the October 19, 2012 settlement. The remaining citations were assessed penalties totaling \$2,942.

The Secretary contends that each of these violations was significant and substantial and involved moderate negligence. Respondent contends that Safeguard No 8423514 and the accompanying Citation No. 8423560, and Citation Nos. 8428128, 8362917, 8362918 and 8362923 should be vacated, and the gravity and negligence regarding the remaining citations should be reduced.

The four dockets were consolidated for hearing and decision. A formal hearing was held in Carbondale, Illinois from June 19-21, 2012. At the hearing, Government Exhibits 1, 2, 4, 5, 8-13, 21-25, 27-30, and 36-38, and Respondent’s Exhibits 1-A, 1-B, 2, 4, 8-14, 16 and 18, were admitted into evidence.⁴ Both parties then filed post-hearing briefs and reply briefs, the last of which was received on November 20, 2012.

Findings of Fact and Conclusions of Law

Mach No. 1 Mine (“the Mine”) is an underground coal mine located near Johnston City, Illinois. It is operated by Mach Mining. It mines the coal using both a longwall and continuous miners, and operates on three shifts. TR 38-39. Anthony Webb is the President of Mach Mining and general manager of the mine. TR 611.

There are nine citations and a safeguard still in contention, issued by four different inspectors on nine separate dates. They will be discussed below.

³ This case initially concerned the following additional dockets, which were settled prior to the hearing: LAKE 2010-789; LAKE 2011-89; LAKE 2011-252; and LAKE 2011-423.

⁴ Citation to the record of this proceeding will be abbreviated as follows: GX– Government Exhibit; RX – Respondent Exhibit; TR - Hearing Transcript.

LAKE 2011-71

Citation 8423584

Keith Roberts worked in the coal mining business performing many different jobs from 1972 until September, 1999, when he became a coal mine inspector for MSHA. He worked for MSHA at the Vincennes, Indiana field office until June, 2006, when he transferred to the Benton, Illinois field office. He worked for MSHA until October 31, 2011, at which time he retired from MSHA and returned to the coal mining business in the private sector. He was a roof control specialist for MSHA, although he performed other inspection duties as well. TR 78-80.

On August 19, 2010, Roberts was at the Mach No. 1 Mine to take part in an EO1 inspection. On the inspection, he was accompanied by MSHA's Deputy Administrator, the District Manager, and the Field Office Supervisor, as well as Webb, the President of Respondent, and Johnny Robertson, Respondent's Mine Superintendent. TR 87. Roberts was not the regular inspector of the Mine at that time, although he had inspected the Mine previously as recently as June 22, 2010. TR 88, 91, 155.

The height of the Mine is from eight to ten feet. The roof of the Mine is composed of shale, a soft rock which has a greater tendency to break off and fall from the roof than harder rock such as limestone. TR 100. In order to prevent the shale falling from the roof from striking the miners, Respondent installed a wire mesh under the roof which catches the falling rock. Although the wire mesh covers most of the roof, there is a one to two foot space along the north rib line that the mesh does not cover. TR 103, 491. At two places during his inspection in the No. 1 and 2 entries, Roberts noticed slabs of shale approximately three feet long, two feet wide and one or two inches thick hanging over the edge of the wire mesh by the north rib line. GX 8; TR 110. He believed that subsequent rock falls onto the wire mesh could push these slabs over the edge of the mesh, where they could strike a miner who happened to be walking underneath; or another slab could fall from the roof and use a slab already on the mesh as an incline plane and fall off. TR 92-93. Roberts contended that the slabs he saw fell onto the mesh at least several hours prior to his inspection, but could have fallen as long ago as a few days. TR 117. He testified that the fallen rock was not damp, nor was it the color of freshly fallen rock. TR 117-18. He added that this condition should have been identified by the pre-shift and on-shift examiners. TR 113.

Thirty C.F.R. §75.202(a)⁵ states "[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." Roberts believed the overhanging rock he saw in the No.1 and 2 entries violated this section by posing a hazard to miners on foot. Accordingly, at 8:15 a.m. on August 19, 2010, he issued Citation No. 8423584. The citation notes the hazard posed by the overhanging rock; states that injury resulting in lost workdays or

⁵ All of the regulations cited in this decision are contained in Title 30 of the Code of Federal Regulations.

restricted duty was reasonably likely; that the violation was significant and substantial (“S&S”); and that Respondent’s negligence was moderate. A penalty of \$946 was assessed.

Respondent, while not contesting that there were overhanging slabs of rock on the wire mesh in the two places indicated in the citation, argues that this condition was not hazardous and therefore unlikely to cause an injury. Accordingly, it contends that any violation was not S&S. Further, Respondent contends that its negligence was low because the condition did not exist when the pre-shift examination was conducted earlier that morning. Finally, Respondent states that only a minimal penalty should be assessed.

Roberts testified that Respondent should be “given credit” for installing the wire mesh. TR 119. Respondent’s mine examiner, David Adams, testified that the wire mesh has cut injuries to miners by 98 to 99 percent. TR 489. Roberts also testified that the roof support in the Mine is very good. TR 228. Moreover, Roberts admitted that miners walking down the center of an entry would not be in danger from rocks falling off the edge of the mesh, and that miners normally walk down the center of the entry. TR 219-20, 627-28. Further, he agreed that since the cabs in most mobile face equipment are on the right side, when going inby the mesh would fully protect the operators since it goes up to the ribs on that side. Going outby, the operators are still protected by the canopies on the cabs. TR 110, 220.

Adams was working the midnight shift on August 19, 2010. He testified that he conducted the pre-shift examination for the morning shift at about 5:00 a.m. He did not observe the condition cited by Roberts; had he observed the overhanging rock discovered during Roberts’s inspection during his pre-shift examination, he would either have notified the foreman or taken the rock down himself. TR 494. Further, contrary to the testimony of Roberts (*e.g.*, TR 123), both John Dotson, a section foreman at the Mine, and Anthony Webb, Respondent’s President, testified that crosscut 20, where Roberts observed the overhanging rock, was outside the working section. TR 561-62, 627. If the overhanging rock was in the working section, miners were much more likely to be in the vicinity and the potential for injury would increase.

I do not know why Respondent conceded that it violated §75.202(a). It is clear that Respondent’s roof control plan did an excellent job protecting the miners from injury, and that is what §75.202(a) requires. But since Respondent did concede the violation, I find that a violation occurred. However, the evidence shows that an injury is unlikely and Respondent was not negligent. The evidence establishes that the wire mesh protected miners from injury unless they were walking directly against the north ribs, which would have occurred infrequently even in the working section. Further, the chance that a large overhanging rock would not be noticed by one of the mine examiners and taken down before the rock was dislodged from the mesh by other draw rock, or having other draw rock fall directly on the overhanging rock and slide off the mesh, appears small. To have a miner coincidentally walking at that exact spot as the rock falls from the mesh raises the odds astronomically. That is not to say it would have been impossible, just extremely unlikely. Further, I accept Adams’s testimony that when he conducted the pre-shift examination early that morning, there were no overhanging slabs of rock on the wire mesh;

and had there been, they would have been removed. Therefore, the citation must be modified to an injury being unlikely and no negligence.

Significant and Substantial

The Secretary further contends that Respondent's violation of §75.202(a) was significant and substantial ("S&S"). 30 U.S.C. §814(d)(i) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard . . . he shall include such finding in any citation given to the operator under this [Act].

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is S&S:

(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. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); *see also, Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

Clearly, the violation was not S&S, since there is no reasonable likelihood that an injury would occur due to the violation.

Penalty

Finally, the amount of the penalty to be assessed must be considered. Section 110(i) of the Mine Act lists the factors to be considered in assessing a penalty. These factors are:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

I find that a penalty of \$100 is all that should be assessed for this violation. Injury was highly unlikely; Respondent was not negligent; and the violation was not S&S.

LAKE 2011-156

Citation Nos. 8362917, 8362918 and 8362923

MSHA coal mine inspector Dannie Lewis issued Citations 8362917 and 8262918 on September 7, 2011, and Citation 8262923 on September 8, 2011, in the course of an EO1 inspection. Lewis's permanent duty station is MSHA's Barbourville, Kentucky, district office, although he works in other locations as needed. Lewis started at MSHA in 2002. Prior to his employment with MSHA he worked as an underground coal miner for almost 23 years. TR 274-76. Much of his coal mine work was as an electrician. TR 280-81. He was at the Mach No. 1 mine assisting the Benton, Illinois district office, which was short-staffed. He was not the lead AR on this inspection, and parts of the mine had already been inspected prior to his arrival in Illinois. TR 285.

The citations allege identical violations of §72.630(b) regarding three roof bolting machines. That section of the regulations states in pertinent part that “[d]ust collectors shall be maintained in permissible and operating condition.” The citations state that the dust collection system on the company # 2, #3 and #4 roof bolt machines “are not being maintained in permissible condition. When checked a considerable amount of drilled rock dust is observed behind the filter in the dust collection system” of each machine. GX 21, 22, 24. The citations state that injuries which could reasonably be expected to be lost workdays or restricted duty were reasonably likely to occur, affecting two people. Further, the violations were alleged to be S&S. A penalty of \$1,026 was assessed for each citation. Respondent contends that no violation of §72.630(b) occurred and each citation should be vacated.

Although the citations only allege that the dust collection systems on the roof bolt machines were not being maintained in permissible condition, the Secretary made no attempt to prove that the dust collection systems were not in permissible condition. Rather, the Secretary completely ignored the permissibility of the roof bolt machines, arguing instead that they were not being maintained in proper operating condition. Thus a key issue in regard to these citations is the meaning of the word “permissible”.

Lewis testified that maintaining the dust collection system in permissible condition means “that all the functions of the dust collection system will be frequently examined and maintained in good working order.” TR 291-92. But “permissible” is a term of art under the Mine Act and the regulations, and does not accord with Lewis's definition. Although Part 72 frequently refers to “permissible” equipment, it does not contain a definition of that word. However, Section 318 of the Mine Act contains two definitions of “permissible”, one covering equipment which is not electric face equipment and the other covering electric face equipment.

See §318(c), (i). They are long definitions which need not be quoted in their entirety. But as is relevant to these citations, permissible electronic face equipment must be

designed, constructed and installed, in accordance with the specifications of the Secretary, to assure that such equipment *will not cause a mine explosion or mine fire*, and other features of which are designed and constructed, in accordance with the specifications of the secretary, to prevent, to the greatest extent possible, *other accidents* in the use of such equipment.

§318.3(i) (emphasis added). This definition is codified in §75.2 of the regulations. Inspector Chad Lampley, who issued Citation No. 8428128, which will be discussed below, testified that “[p]ermissible is basically making electrical equipment and components of electrical equipment so that it [*sic*] can’t cause an explosion or reduces the chances that you are going to cause a mine explosion. Basically limiting ignition sources in a coal mine.” TR 421-22. Inspector Lewis conceded that roof bolt machines are face equipment. TR 374. He further conceded that the operation of the roof bolters which allegedly were in violation of §72.630(b) did not contribute to a fire or explosion hazard. TR 374-75.

The Secretary attempts to get around the limits of the citations by arguing that Part 72 does not define “permissible” and that, “in relation to dust collection systems” “permissible” in §72.630(b) is similar in meaning to “operating condition”. Sec’y Reply Br. at 8. It is unclear how counsel can make this argument with a straight face given the definitions of “permissible” in the Mine Act. According to the Secretary, both require the system to be in “good working order”. That clearly is not the case.

Of course, the Secretary could have avoided this problem simply by moving to amend the citations to allege that the dust collection systems were not being maintained in “operating condition.” Mine inspectors are not lawyers, and should not be held to the drafting standards to which lawyers are held. Moreover, citations are drafted quickly and on the spot. Accordingly, motions to amend citations to more accurately reflect the violations detected, when made in a timely fashion, should be liberally granted. But the Secretary has not moved to amend the citations, choosing instead to argue a position that he knows cannot be sustained.

Therefore, I hold that the Secretary has failed to prove violations of §72.630(b), and Citations 8362917, 8362918 and 8362923 must be vacated.

Even if the citations are read to include the failure to maintain the roof bolters in operating condition as the alleged violation, the Secretary’s proof is lacking. The Secretary’s evidence on this issue is that, when the filters in the dust collection systems of the three roof bolt machines in question were removed, there was a handful of dust behind each. TR 297. According to Lewis, there should not have been any dust behind the filters. The dust was getting through the filters instead of dropping down into the dust collection box, and some dust was being discharged into the mine air through the bolters’ exhaust systems. TR 294, 305. He

concluded from this that Respondent was not changing the bolters' filters often enough. TR 304. But Lewis did not check the inside (the clean side) of the filters to see if dust was getting through. TR 383, 412. It is the air going through the clean side of the filters that is discharged into the air. Moreover, he did not take any air readings or otherwise obtain evidence that the bolting machines were venting air that failed to comply with the Mine's ventilation plan. TR 376. He simply assumed that if there was some dust behind the filters then dust was being discharged into the air. TR 305. He testified that he had too much to do and did not want "to kill too much time" inspecting the dust collection systems. TR 412. *E.g.*, TR 298. Further, he did not see any dust on the mufflers, nor did he see any dust coming out of the machines. TR 378.

Webb testified that the dust the inspector saw when the filter was removed was generated by the act of removing the filter from the filter box. He added that if the bolter was emitting dust, it would have been visible in the air while the machine was running and it would be seen in the muffler as well. TR 635. Webb testified that he tested one of the bolting machines and found the dust collection system to be operating as it should. He stated that "the only time we could replicate what Mr. Lewis found was when we removed the dust filter" TR 636.

Accordingly, had the Secretary alleged that the dust collection systems on the roof bolt machines were not in operating condition, I would find that the Secretary failed to prove that violations of §72.630(b) occurred. The Secretary failed to prove that the dust collection systems on the bolting machines were not properly filtering the dust produced by the machines even if a handful of dust had escaped the filtration systems while the machines were operating. The inspector admitted that he failed to conduct a thorough inspection of the system. Moreover, Respondent's explanation for how the dust found by Lewis was generated is plausible. Therefore, even if I had not vacated Citations 8362917, 8362918 and 8362923 because the Secretary failed to prove that the roof bolt machines were not permissible, these citations must be vacated because there is no proof that their dust collection systems were operating improperly.

Citation No. 8362941

On September 15, 2010, as part of another EO1 inspection, Inspector Lewis issued this citation alleging a violation of §77.1607(d), which states that "[c]abs of mobile equipment shall be kept free of extraneous materials." GX 27. Lewis testified that one of Respondent's pick-up trucks which was used to haul men and equipment both underground and on the surface contained extraneous items including pipe wrenches, screwdrivers, strikers, 20 brass water sprays and a hammer. TR 343-44. The citation states that an injury causing lost workdays or restricted duty was reasonably likely; the violation was S&S; and negligence was moderate. A penalty of \$946 was assessed.

Respondent argues first that this truck, which it contends was used only by two midnight shift electricians, was not "loading and haulage equipment" which is subject to §77.1607, and therefore §77.1607(d) is inapplicable. This argument is specious. The definition of "haulage" cited by Respondent in its post-hearing brief includes "movement of men" Resp.'s brief at

38. Respondent does not disagree that the truck in question was used by two electricians to travel in the mine. Further, Robertson testified that the bed of the truck carries grease and oil tanks and maintenance equipment. TR 602-03. Accordingly, it is “haulage equipment” covered by §77.1607(d).

Second, other than arguing that the truck was not loading and haulage equipment, Respondent has not contested that a violation of §77.1607(d) occurred. But Respondent contends that “the presence of these items in the cab of the electricians’ truck, driven slowly in accordance with road conditions, would be highly unlikely to cause an accident or injury and the S&S designation should be vacated and the negligence level lowered.” Resp.’s brief at 36. Respondent does not dispute that all of the materials listed in the citation were loose in the cab of the pick-up truck. Rather, Respondent claims that these materials did not create a hazardous situation.

Lewis testified that these materials were on the bench seat, console, floor and dashboard of the truck. TR 346, 393. He stated that these materials could roll under the brake or gas pedals, or strike the driver in the event of an accident. Of particular concern would be the 20 water sprays in the cab,⁶ which Lewis testified, hyperbolically one hopes, “would have acted more or less as bullets that would beat the guy to death.” TR 343. Respondent, citing the testimony of Robertson, the Mine Superintendent, argues that even if an item would lodge under the brake pedal, it would not effect the truck’s braking ability because the brake pedal does not go all the way to the floor of the vehicle when stopping. Resp.’s brief at 38-39. But Robertson’s testimony does not support this contention. For although Robertson testified that the brake pedal in the truck *he drives* does not go all the way to the floor to stop it, he added that he has not driven the electrician’s truck and does not know whether it is true for it as well. TR 605.

As will be discussed below, Respondent has not contested that the roads in the mine can be very bumpy, requiring frequent grading. It seems likely that some of the loose materials in the cab could be jarred by an unanticipated bump or a collision even if the truck was moving relatively slowly. These materials could then strike the driver or lodge under one of the pedals. Had there not been materials on the dashboard, I would have found injury to be unlikely. But it seems inherently unsafe to keep tools and other material on the dashboard of a moving vehicle. Since the dashboard is close to head level, tools which are propelled from it are more likely to cause a serious injury than those located elsewhere in the cab. Accordingly, I find that injury was reasonably likely, as alleged in the citation. Further, such injuries could reasonably be expected to result in lost workdays or restricted duty; but it is not out of the question that a more serious injury such as a broken bone, or even lost teeth or a serious eye injury, could occur if a hammer, pipe wrench or water spray struck the driver in the face. Finally, Lewis stated that he is unaware whether any agent of the operator knew about the materials in the truck (TR 346, 397), and therefore I would categorize Respondent’s negligence as low.

⁶ Lewis testified that the water sprays were brass, torpedo-shaped and between a half and one inch in length.

Next, the Secretary contends that the violation was S&S. I have found an underlying violation of a safety standard, satisfying the first of the four parts of the *Mathies* test. Second, the violation contributed to the discrete safety hazard of the driver being struck by a tool or other item. Next, I have found that an injury is reasonably likely. Finally, I have found that there is a reasonable likelihood that the injury will be reasonably serious. Accordingly, the four tests have been met, and I conclude that the violation of §77.1607(d) is S&S.

Lastly, the amount of the penalty must be determined. The assessed penalty of \$946 was based in part on the violation resulting from moderate negligence, and I have found negligence to be low. The remaining elements of the citation were upheld. Considering the criteria set out in §110(i), I conclude that a reduction in the penalty to \$750 is appropriate.

Citation No. 8362942

This citation was issued by Inspector Lewis on September 16, 2010 alleging a violation of §77.505, which requires cable and insulated wires passing through metal frames to be properly fitted and substantially bushed with insulated bushings. The citation states:

The 3 AWG electrical cable entering the bottom of the metal disconnect box labeled Refuse belt 1A #1, is not substantially bushed. When checked this cable has fallen out of the bushing and the inner leads of this cable are visible on the outer portion of the bushing.

The citation further states that an injury which could reasonably be expected to be lost workdays or restricted duty is reasonably likely to result from the violation, with one person affected. Lewis indicated that the violation comprised moderate negligence and was S&S. Respondent admits that a “technical” violation of §77.505 occurred, but argues that the violation was not S&S and negligence was low. A penalty of \$946 was assessed for this violation.

Lewis testified that while walking a belt as part of the EO1 inspection on September 16, 2010, he came upon a small disconnect box which had the cable hanging out of the bottom with the inner leads exposed. He testified that the cable had been bushed, but the bushing “had backed out or came apart or wasn’t tight enough when it was originally put in and the cable had fell [*sic*] out of the bushing” TR 356. He explained that the bushing (a restraining clamp) fell off the disconnect box. TR 356-57. The disconnect box is a metal box used to turn the power to the motor on and off. TR 356. Lewis stated that the danger from the cable falling out of the box was that someone could accidentally jerk the leads out of the box, which could cause the box to become energized. This would create a shock hazard or even an electrocution hazard. TR 356, 363. But Lewis pointed out that the cable had an outer jacket covering all three leads, and each lead was covered by an inner jacket as well. Although the inner leads were exposed at the cable box, it appears from Lewis’s testimony that the inner jacket covering the leads was still intact. TR 364-65. Lewis does not know how long this condition existed. TR 362.

The disconnect box was outside the mine, between 300 and 500 feet from the mine opening and about 150 to 200 yards from the preparation plant. TR 359, 637. It was connected at about eye level to the head drive of a refuse belt. TR 359-60, 362. The cable was also at eye level, not on the ground. TR 362.⁷ Lewis also testified that the refuse belt is started remotely, so a miner does not have to come to the box to start the motor. TR 406. Lewis testified that there were two contractors working in the general area, although they were 50 feet from the box. TR 361-62. He stated that a miner would be in the area once a day, although he could not say what that miner would be doing in that area, and once a month an electrical inspection would occur. TR 362. Lewis rated this violation as reasonably likely to cause injury rather than highly likely “because of where it was at and the fact that it was only required to be examined once every 30 days” TR 363.

Webb testified that no one worked around the belt drives in the refuse area. Two men operated bulldozers to spread out the refuse deposited by the belt. TR 638-39. They would not have occasion to go near the box. If anything went wrong with the belt, the plant foreman would be the one to go and fix it; and no work would be done until the electrical equipment was locked and tagged out. TR 639. Accordingly, the only person likely to be close to the box on some kind of regular basis would have been the person conducting the monthly electrical inspection.

Although a violation of §77.505 did occur, I find that there was no likelihood of an injury because of it. Only one person had any reason to go near the box unless it had to be repaired, and that was only once a month. Further, although the leads were exposed, their inner covering was still intact, which would appear to reduce or eliminate the possibility of the box being energized accidentally. In addition, the only people who would have had any occasion to be around the box - the plant manager and the electrical inspector - should have known to lock and tag out the power to the box prior to doing any work on it. Further, I find that Respondent’s negligence in regard to this violation was low. There is no evidence that the bushing had failed at the time the last electrical inspection of the area was conducted. However, if an injury were to occur from this condition, I have no reason to question the inspector’s conclusion that it would reasonably be expected to result in at least lost workdays or restricted duty.

Since I have found that there is no likelihood of an injury, I hold that the violation cannot meet the standards required to be S&S.

Finally, in light of Respondent’s low negligence and that there was no likelihood an injury would occur due to the violation, a penalty of \$100 is appropriate.

⁷ Lewis testified that the cable at issue was at the bottom of one of the three small boxes which appear to be attached to a large vertical box with a red on/off handle near the center of the photograph in RX 11. TR 402. Since he testified that the cable was at eye level, it would appear the cable was at the bottom of the highest of the three small boxes, although it is not visible in the photo.

LAKE 2011-198

Safeguard 8423514 and Citation 8423560

The primary area of contention in this case concerns this safeguard and the citation for allegedly violating the safeguard. Respondent contends that the safeguard should not have been issued, but even if it was properly issued no violation of the safeguard has occurred. The Secretary argued in a *Motion in Limine* that the safeguard was presumptively valid and the “condition or practice” set out in the safeguard could not be challenged in this proceeding. The Secretary moved to have any evidence regarding the condition or practice excluded from the record. Respondent opposed the motion, which I denied at the hearing. TR 7-12.⁸ Therefore, both the validity of the safeguard issued on February 23, 2010, and whether the safeguard had been violated as alleged in the citation issued on June 22, 2010, are at issue.

On February 23, 2010, Inspector Roberts issued Safeguard No. 8423514 to Respondent. On that date, Roberts traveled on the main south travel road from crosscut 2 to crosscut 175. TR 144. He was accompanied on this inspection by Guy Webster, an out by supervisor at the Mine. The safeguard states as follows:

Bottom irregularities in the form of pot holes, wash-board areas are present on the Main South travel road from XC-2 to XC-175 of Headgate #3. These same conditions along with thick mud and muddy ruts are present on the travel road in the Headgate #3 cross entries.

These conditions present a distinct safety hazard to persons operating mobile equipment on these roadways in that the steering and traction control are compromised. Also, the road conditions will further exacerbate the condition of injured miners being transported out of the mine.

These conditions represent a violation of Section 314(b) of the Mine Act as well as Section 75.1403. This is a Notice to Provide Safeguard(s) requiring that all travel roads and haulage ways, including working section haulage roads, *be maintained as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment.*

GX 12, at 1-2 (emphasis added). The italicized words in the preceding paragraph are a quote from §75.1403-10(i). Roberts testified that he encountered these conditions while in a pick-up truck being driven by a Mach employee. TR 135. He stated that these hazards could

⁸ Due to the short time between the filing of the *Motion in Limine* and the hearing, I informed the parties via an email dated June 14, 2012, that the motion was denied and I would explain my ruling at the hearing.

cause someone in a vehicle to be “catapulted into the underside of the canopies” and make it difficult to control the vehicle unless the vehicle was being driven at “an extremely slow rate of speed.” TR 135-36. The vehicle he was riding in was being driven at an extremely slow rate of speed so no problems were encountered. TR 135. Further, he did not testify to seeing any other vehicles in the mine being driven at hazardous rates of speed. *Cf.* 137. The safeguard was terminated on February 24, 2010, when “the roadways were restored to a safe, travelable condition.” TR 169; GX 12, at 1.

The Mach Mine, due to its location in Southern Illinois, tends to be very dry in the winter so that the roadbed has to be watered every shift to keep down dust. TR 242-43, 495, 569. Dave Adams, one of Respondent’s mine examiners, testified that when the road is damp it will get ruts in it. TR 496. Adams and Webster both stated that moving equipment such as longwall shields increases the rutting. TR 497, 577. The inspection which caused Roberts to issue the safeguard occurred in the winter. Webster testified that on February 22, 2010, the roads on which he and Roberts traveled probably had some washboard areas and potholes, since that is typical due to the traffic in the Mine. TR 573, 578. But he did not notice any unusual conditions. *Id.* The Mine is more humid in the warmer months and does not have to be watered as often. TR 242, 495.

I find that the safeguard was properly issued on February 22, 2010. There is essentially no disagreement that the conditions observed by Inspector Roberts existed; the only dispute is the extent of these conditions. Moreover, even if Respondent had reasonable explanations for the existence of the washboard roads and potholes (*e.g.*, they are unavoidable; the Mine’s road grader may have been broken at the time), that does not change the fact that road conditions existed which could have resulted in injury if a vehicle was traveling faster than the road conditions would allow. Further, fault or negligence is not required for the issuance of a safeguard. The only requirement is that the safeguard “minimize hazards” with respect to transportation of men and materials. *See* §314(b) of the Mine Act.; *see also* §75.1403. Maintaining roads as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment meets this standard. Accordingly, on June 22, 2010, when Inspector Roberts revisited the Mine, the safeguard was in effect.

The remaining issue is whether the citation issued for violating the safeguard was proper.

Citation No. 8423560 states:

Bottom irregularities in the form of pot holes and wash-board areas are present on the Main South travel road from XC-2 to XC-75 of Headgate 5 and on the Headgate 5 travel road from XC-1 to XC-105.

These conditions present a distinct safety hazard to persons operating mobile equipment on these roadways in that the steering, traction control and braking are compromised. Also, the road conditions will further exacerbate the condition of injured miners being transported out of the mine.

These conditions represent a violation of Section 314(b) of the Mine Act as well as Section 75.1403 and Notice to Provide Safeguard(s) No. 8423514 requiring that all travel roads and haulage ways, including working section haulage roads, be made as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment.

Gravity was listed as reasonably likely and could reasonably be expected to be lost workdays or restricted duty, and was found to be S&S with one person affected. Negligence was listed as moderate. The Secretary assessed a penalty of \$3,200 for this violation. Respondent contends that even if the safeguard is valid, it did not violate it and this citation should be dismissed.

The key requirement in the safeguard is that Respondent's travel roads be "as free as practicable" from the hazardous conditions found to exist in the safeguard. The Secretary has failed to prove that Respondent did not keep the roads in question as free as practicable of washboard areas and potholes. The evidence establishes that road conditions in the Mine change frequently. TR 172, 495. Washboard areas and to a lesser extent potholes on the Mine roads are inevitable due to the movement of very heavy equipment. TR 573, 630. To keep the roads in as good condition as possible, Respondent has a road grader. TR 497. Respondent uses the grader to grade the roads in the Mine on the day shift every day, and two or three times a day when they are moving the longwall. TR 631. Roberts testified that on his visits to the Mine other than on June 22, 2010, the grader was in operation. On June 22, 2010, the road grader was out of service, and apparently had been for a few days. TR 169-70. To smooth out the roads when the grader was inoperable, Respondent would tie a six or eight inch steel I-beam behind a piece of equipment and drag it along to fill in the holes in the roadway. TR 517, 577. According to Skelton, "[i]t's not as good as a grader, but it will do until you get the grader running." TR 517. Webb testified that it is in Respondent's best interests to keep the roads in good shape. Of course, he is concerned for the safety of the miners. But in regard to coal production, a rough road is hard on their fleet of only 21 trucks, and if trucks break down it takes longer to transport the miners to the face and decreases efficiency. TR 631-32. He added that "there was nothing else I knew that I could do" to keep the roads free of bottom irregularities. TR 632. The citation was terminated on June 24, 2010, two days after it was issued, by MSHA Inspector Larry Morris. GX 11, at 3. Morris stated that "[t]he Main South and HG#5 road ways have been graded", which Roberts takes to mean that the grader was back in service. TR 179-80.

Roberts testified that if the grader was going to be down for several days, it was up to Respondent to find other ways to maintain the roads. TR 175. He first suggested that

Respondent might take a grader from another of its mines. *Id.* But he did not indicate how long that would take to transport the grader from the other mine or how the other mine was supposed to grade its roads while the Mach Mine was using its grader. Absent a grader, he stated that the most effective way would be the installation of some kind of ballast material such as gravel into the ruts and potholes. TR 170-72. But Roberts did not explain how long it would take to complete this temporary expedient or the cost involved. Obtaining the necessary gravel, delivering it to where it was needed in the Mine, and spreading it over more than four miles of road where he found bottom irregularities⁹ sounds like a daunting and time-consuming task which would take longer than it took to repair the Mine's grader.

Finally, there is extensive evidence that Respondent's drivers did not operate their equipment faster than the road conditions allow for safe operation. Roberts conceded that the trucks he was being driven in on both February 23, 2010, and June 22, 2010, did not encounter any problems on the roads. TR 248-50. Further, he did not see any vehicles which were out of control. TR 250. He stated that the vehicles were traveling at very slow speed both on February 23 and June 22. TR 135, 247-49. Further, testimony from Respondent's witnesses confirms that drivers go as slow as they have to keep control of their vehicles if the road conditions are not ideal. TR 497-98, 503, 584.

I find that by using the heavy I-beam to grade the roads until the grader could be repaired, Respondent was maintaining its haulage roads as free as practicable from bottom irregularities that would affect the control of equipment. Accordingly, I hold that Respondent did not violate the safeguard, and Citation No. 8423560 must be dismissed.

LAKE 2011-619

Citation No. 8424580

Danny Ramsey is an MSHA mine inspector, ventilation specialist and roof control specialist. TR 34. He has worked in the coal mining industry since 1972. He started out as a coal miner performing various jobs for about five years. Subsequently, he was a section foreman, longwall foreman, underground mine manager, and mine superintendent, among other management positions. He began working for MSHA in September, 2003. TR 35-37. Prior to becoming a coal miner, he was a welder. TR 35.

On February 2, 2011, Ramsey was at the Mine to perform a ventilation inspection or review as part of an EO1 inspection of the mine. TR 40-41. He was accompanied on his inspection by Norman Quertermous and John Duty, who were maintenance foremen at the Mine. TR 42. They were aboveground in Duty's truck driving to the mine entrance when Ramsey told

⁹ The distance between crosscuts in the Mach Mine was 120 feet. TR 446. Roberts found the bottom irregularities in the Main South travel road to cover a distance of 74 crosscuts, daunting and time-consuming task which would take longer than it took to repair the Mine's grader.

Duty to stop because he believed he saw a miner, Josh Dixon, cutting with an oxygen and acetylene torch without any eye protection. TR 45-47, 522. He issued Citation No. 8424580, alleging a violation of 30 C.F.R. 77.1710(a), which requires face shields or goggles to be worn while welding or cutting. GX 4. He found a permanently disabling injury to be reasonably likely; Respondent's negligence to be moderate; and the violation to be S&S. A penalty of \$1,412 was assessed.

Ramsey testified that he was 40 to 50 feet away from Dixon when he spotted him. TR 46. He stated that Dixon was cutting a piece of channel, and had already cut two pieces off of it. Each cut probably took between 30 seconds and one minute. TR 48. Ramsey testified that he walked up to Dixon and spoke to the two foremen about safety and the use of goggles, and they in turn instructed Dixon. He did not talk to Dixon. TR 53. He did not see Dixon take off safety glasses. TR 47. He testified that if Dixon had been wearing safety glasses he probably would not have written the citation even though safety glasses provide less protection than a face shield or goggles. TR 50-53.

Both Dixon and Duty testified at the hearing. Dixon is a diesel mechanic at the mine. His job requires him to use an oxygen and acetylene torch almost every day. TR 470. He has welded since he was a boy. TR 483. He testified that he was not wearing goggles because there was a fire at the mine shop a couple of days earlier that destroyed all of his tools and those of the other diesel mechanics. TR 472. But he testified that he was wearing clear safety glasses which protected his eyes. He stated that the only difference between the safety glasses he was wearing and "cutting glasses" was that the safety glasses were clear, not dark. TR 474-77. He added that he does not weld without safety glasses because sparks can come back and hit him in the face. TR 478.

It was Dixon's testimony that Duty's truck was about 100 feet from him and Ramsey never got out of the truck. TR 476, 483. He had just finished cutting when Duty came over to talk to him and told him the inspector said he has to have goggles on. TR 475. He does not think Duty knew beforehand that he was cutting without a face shield or goggles. TR 477. When asked whether Respondent provided any training about eye protection, Duty replied "they kind of pound it into you, be sure to wear glasses, be sure you wear gloves, all your protective gear." TR 480.

Duty corroborated Dixon's testimony regarding the location of the truck when Ramsey saw Dixon and that Ramsey never got out of the truck. TR 523. Ramsey agreed to let Duty talk to Dixon about "not wearing cutting glasses", and he did. TR 522-23. Duty does not remember whether Dixon was wearing safety glasses when he walked up to him. TR 523-24.

Respondent does not contest that a violation of §77.1710(a) occurred, since it is undisputed that Dixon was not wearing a face shield or goggles. Respondent also concedes that if Dixon was not wearing any eye protection then it was reasonably likely that a permanently disabling injury could occur. The dispute here is whether Dixon was wearing safety glasses.

Both Dixon and Duty are adamant that Ramsey never left the truck. It strikes me as odd that Ramsey would have gotten out of the truck to walk over to Dixon yet not say a word to him. Moreover, if Ramsey was even as close as 40 or 50 feet from Dixon, it is quite possible that if Dixon was wearing clear safety glasses Ramsey would not have seen them. I also have trouble believing that an experienced welder would use a torch without any eye protection.

Accordingly, I find the Secretary has established that a violation of §77.1710(a) occurred, since Dixon admittedly was not wearing a face shield or goggles. I also find that Dixon was wearing safety glasses in the brief time he was cutting with the torch.

Since a violation occurred, the other elements of the citation must be evaluated. The citation lists injury as reasonably likely and alleges that this injury could reasonably be expected to be permanently disabling. Cutting with a torch without proper eye protection would be reasonably likely to cause a permanently disabling burn injury to one or both eyes from sparks or molten metal. TR 46, 49. As stated in the citation, only one person would be affected. At his deposition, Ramsey conceded that if Dixon was wearing safety glasses Respondent's negligence would be low. TR 74. I do not agree that simply because Dixon was wearing safety glasses Respondent's negligence was low. Nor do I agree with Respondent's contention that this is simply a "technical violation" of the standard. Although safety glasses would provide some eye protection - perhaps a great degree of protection (TR 52, 477) - the standard mandates a higher level of protection, which at a minimum would be goggles. Nevertheless, I agree that Respondent's negligence was low. For one thing, Dixon used the torch for three cuts which probably took no more than a couple of minutes, and he had completed the job when Duty walked up to talk to him. TR 475. Had he been cutting or welding for a substantial period, then I would have found Respondent's negligence to be at least moderate. Moreover, there is no evidence that anyone in a supervisory position knew that Dixon was cutting without a face shield or goggles.

Significant and Substantial

The Secretary further contends that Respondent's violation of §77.1710(a) was S&S. Respondent contends that since Dixon was wearing safety glasses the violation could not be S&S. But negligence is not a factor in determining whether a violation is S&S, and I find that despite Respondent's low negligence the four conditions for a violation to be S&S are present.

First, Respondent concedes that it violated a safety standard, *i.e.*, §77.1710(a). Second, the violation presents the discrete safety hazard of a serious eye injury. Third, I have found that there is a reasonable likelihood that such an injury would occur. Finally, I have found that this injury would be of a reasonably serious nature. Accordingly, the violation is S&S.

Penalty

The last element regarding this citation is the amount of the penalty to be assessed. The Secretary assessed a penalty of \$1,412 for this violation. This violation was premised on the

inspector's belief that Dixon had used a torch without any eye protection, which would have been extremely hazardous. This led Ramsey to find moderate negligence. But Ramsey indicated that had Dixon been using safety glasses he probably would not have issued a citation. TR 50. The Secretary did not suggest an appropriate penalty in the event I found that Dixon was using safety glasses. Respondent proposed a minimal penalty of \$112.00.

The violation history provided by the Secretary (GX 2) shows no violations of §77.1710(a) going back as far as late 2007. Further, there is no contention by the Respondent that the proposed penalties are unfairly large or would affect Respondent's ability to remain in business. Next, I have found that Respondent was negligent, although its negligence was low, and the violation was S&S. The final factor appears inapplicable to the facts of this case, since Dixon had finished cutting before he was informed that Ramsey had ordered him to stop.

Neither party's proposed penalty is realistic. The violation was much less significant than the Secretary contends, but the potential for serious injury was greater than Respondent admits. Taking all of the applicable factors in §110(I) of the Mine Act into consideration, I conclude that a penalty of \$500 is appropriate for this violation.

Citation 8428128

Chad Lampley has been an MSHA mine inspector since 2007. He graduated from college in 2003, and taught at a college for two years prior to working in the mining industry. TR 414. The record does not indicate the type of work Lampley performed in his short stint in the mining industry prior to becoming an MSHA inspector. On February 3, 2011, he was inspecting equipment at the Mach Mine. TR 416. A scoop was brought to him to inspect. He did not see where it was brought from or where it had been operating, but testified that the miner who brought it to him stated that it was near the stage loader area of the longwall. TR 424-25, 429, 446, 456. Lampley did not know precisely where the stage loader was located, but he believed it was about 80 to 100 feet from the face. TR 425. There is no dispute that when Lampley inspected the scoop it was outby the last open crosscut of the longwall, at which location it did not have to meet permissibility standards.¹⁰ The parties agree that, in this instance, the permissible zone was within 150 feet of the face. TR 431, 643.

Under §75.503,

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

¹⁰ To avoid unnecessary repetition, please see the discussion of permissible equipment in the section of this decision regarding Citation Nos. 8362917, 8362918 and 8362923 *supra*.

While inspecting the scoop, Lampley found that the scoop's breaker enclosure had a gap in excess of 8/1000 of an inch. TR 418. He testified that a gap of 5/1000 of an inch or greater in the breaker enclosure exceeds the requirement for permissibility of the scoop. *Id.* He also found defects in the front light of the scoop which the Secretary contends could have caused sparking and would also render the scoop impermissible. Respondent has not contested these assertions. TR 649. The issue, then, is whether the scoop was being operated in the permissible zone.

Lampley testified that the scoop in question was used at the #3 Headgate, and there were no limits on where the scoop could operate in the mine. TR 424, 426. But as was just pointed out, he has no personal knowledge of where the scoop was operating when he was inspecting the Mine on February 3, 2011. Lampley testified that the #3 headgate has three entries. TR 426-27; *see* RX 1-B. The scoop could not drive into the #1 entry because the stage loader and belt take up too much room. TR 427. But the scoop could operate in the #2 and 3 entries in the permissible zone. *Id.*

Lampley's testimony was contradicted by John Duty, the maintenance supervisor, and Webb, who testified that the scoop could not be used within the permissible zone. Duty assumes he was with Lampley during the inspection at issue but does not specifically remember what transpired (TR 525); Webb was not there when Lampley inspected the scoop. But they both testified that supplemental support, called cans, is installed as the longwall face retreats to prevent the roof from falling. TR 642-43. These cans are kept 150 feet from the longwall face, which is the boundary of the permissible zone. TR 643. The cans are deliberately set that far from the face so the equipment which sets the cans does not have to be permissible. TR 644. The scoop cannot physically move in by the cans. TR 533, 553, 649. Due to Duty and Webb's familiarity with the Mine, I credit their testimony that the scoop could not have been in the permissible zone.

Even without the testimony of Duty and Webb, the Secretary would not have proven that a violation of §75.503 occurred. For there is no competent evidence that the scoop had been operating in the permissible zone. Lampley has no direct knowledge of where the scoop was operating; he did not see the scoop in the permissible area; and the only evidence that it may have been in the permissible area was the imprecise comment regarding the scoop's location by an unnamed miner who apparently was not even the scoop's operator at the time. In any event, the testimony of Duty and Webb that it would have been physically impossible for the scoop to have been in the permissible zone is persuasive. Therefore, this citation must be dismissed.

Summary

In sum, I have approved the safeguard; dismissed five citations; modified four citations; and reduced the assessed penalties from \$12,058.00 to \$1,450.00.

ORDER

In accordance with the foregoing discussion, ***IT IS ORDERED*** that:

1. Safeguard No. 8423514 is affirmed.
2. Citation Nos. 8362917, 8362918, 8362923, 8423560 and 8428128 are dismissed.
3. Citation No. 8362941 is modified from moderate negligence to low negligence. The penalty for this violation is reduced from \$946.00 to \$750.00.
4. Citation No. 8362942 is modified from injury reasonably likely to injury unlikely; from moderate negligence to low negligence; and from significant and substantial to not significant and substantial. The penalty for this violation is reduced from \$946.00 to \$100.00.
5. Citation No. 8423584 is modified from injury reasonably likely to unlikely; from moderate negligence to no negligence; and from significant and substantial to not significant and substantial. The penalty for this violation is reduced from \$946.00 to \$100.00.
6. Citation No. 8424580 is modified from moderate negligence to low negligence. The penalty for this violation is reduced from \$1,412.00 to \$500.00.

IT IS FURTHER ORDERED that Respondent pay to the Secretary the sum of \$1,450.00 within 30 days of the date of this Decision.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

August 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	
	:	DOCKET NO. KENT 2011-1579
	:	
Petitioner,	:	
	:	
v.	:	
	:	A.C. NO. 15-02132-264085-01
WEBSTER COUNTY COAL, LLC,	:	
	:	Mine: Dotiki Mine
Respondent.	:	

DECISION

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

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky, for
the Respondent

Before: Judge Moran

In this challenge to a Section 104(a) citation, issued to Webster County Coal’s Dotiki Mine during an inspection, it is undisputed that a section of loose roof approximately 10 feet long, by 4 feet wide, and 0 to 4 inches thick was observed by the MSHA Inspector. Webster disputes that the cited standard, 30 C.F.R. § 75.202(a), was violated. The standard requires that areas of roof where persons travel be supported or otherwise controlled to protect such persons from roof falls. Webster also challenges the citation’s “high negligence” and “significant and substantial” designations and the assertion that lost work days or restricted duty would result if a miner were struck by the loose roof. For the reasons which follow, the Court sustains the violation and the special findings.

Findings of Fact

Citation No. 8499036

On January 10, 2011, MSHA Inspector Abel De Leon¹ issued Citation No. 8499036 under Section 104(a) of the Mine Act, after spotting a hanging rock, suspended from the mine's immediate roof. Tr. 86.² The Citation, citing 30 C.F.R. § 75.202(a),³ stated:

A section of loose roof was observed above the 9008 substation for # 3 Unit. The section of loose roof was approximately 10 feet long, by 4 feet wide, by 0 to 4 inches thick. This area was where miners worked and examined the power box. The 6329 continuous miner cathead and breaker was just below the loose roof. Location: MMU 033/036. Standard 75.202(a) was cited 38 times in two years at mine 1502132 (38 to the operator, 0 to a contractor). Ex. P-8.

Prior to finding the condition, upon arrival at the Respondent's Dotiki Mine that day, Inspector De Leon first examined pre-shift books for Units 1, 3, and 5 and gave a safety talk to 75 miners before proceeding underground with Webster's Assistant Safety Director Jimmy Ray. Tr. 87-88. At around 9:30 a.m., the Inspector was walking with Mr. Ray toward the area MMU 033-036, which had three possible entries into the working area: the supply road entry, the belt entry, and the power entry. Tr. 88. The Inspector entered through the power center entry, where the unit substation was located, whereupon he immediately noted a "huge piece of rock...right over the unit . . . [which was in between a rectifier and a substation] . . .the rock was hanging over where they were both separated." Tr. 88-89. The Inspector stated that he instantly recognized the loose roof, adding that the draw rock was hanging from the immediate roof and over the

¹ Inspector De Leon is a field office supervisor at MSHA's office in Madisonville, KY. Tr. 80. He has worked for MSHA for 14 years, and had 11 years' mining experience prior to his employment with MSHA. Tr. 80-81. In his private mining employment, he worked for three different mine operators, was trained to operate all pieces of mining machinery, and received his mine foreman certificate. Tr. 81.

He also has specific experience with mine roofs and ribs through his work on a mine rescue team in mines with adverse roof conditions. *Id.* The Inspector spells his last name as "De Leon," not "DeLeon." Tr. 80.

² At hearing, the Secretary elected to vacate Citation No. 8499578, which citation was originally part of this docket. It had been issued for an alleged violation of 30 C.F.R. § 75.403, which pertains to the required incombustible content of coal dust, rock dust and other dust. Ex. P-1.

³ 30 C.F.R. § 75.202(a), provides: "The 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."

walkway area that separated the rectifier and the substation, and that miners could pass through the area. *Id.*⁴ Assistant Safety Director Jimmy Ray, the mine management representative who accompanied the Inspector during his examination, did not object to De Leon's issuing the citation; rather, Mr. Ray was in agreement that they needed to remove the hanging rock. Tr. 93.

As noted above, the hanging rock was approximately 10 feet long by 4 feet wide and 0 to 4 inches thick, and it had separated from the main roof. Tr. 104. The significant weight of the rock and its position in a high traffic area of the mine were additional causes of concern for the Inspector when he issued the citation. Tr. 90. Among the people who traveled through this area were mechanics assigned to check the power box, on-shift miners, the electrical examiners who would check the electric boxes, and the pre-shift examiner. Tr. 90, 96-97. The face boss of the unit was also supposed to do an on-shift examination of the area. Tr. 91. In addition, the area served as a passage for miners heading to lunch. Tr. 96-97. The Inspector asserted that, even if he had seen this condition in a more remote area of the mine, he still would have issued the citation. The significant number of miners walking through the cited area increased the gravity. Tr. 90.

Inspector De Leon stayed in the area as the miners took down the loose rock. He recorded in his notes that they used two 4 inch by 4 inch timbers to bring down the rock "because [the rock] was so big that they were afraid it was going to damage the power boxes...the buttons and breaker buttons, and...there was a cat head directly underneath it that supplied power..." Tr. 93-94; Ex. P-9, p. 7. Rather than setting the timbers underneath the rock, the miners set two timbers "long ways from the unit substation to the rectifier to break the fall of the rock. Not necessarily to support the rock." Tr. 94. Despite the placement of the two timbers laid horizontally across the unit, the Inspector recalled that pieces of rock hit the emergency stop button that supplied power to the entire unit on their way down, and it took five minutes to restore the power to the unit. *Id.*⁵; Ex. P-9, at p.7. On cross-examination,⁶ although the Inspector stated that the timbers did not break under the weight of the falling rock, the rock's fall did damage equipment and knocked out the power on the substation. Tr. 147. Thus, the Court would note that this was a significant piece of rock that came down and that no one contends otherwise.

⁴ Inspector De Leon testified that his immediate reaction to seeing the condition was, "I'm going to issue a citation and we need to get this piece of rock down." Tr. 92.

⁵ The emergency stop button is used to kill power in the event that methane levels get too high in the unit and the equipment needs to be de-energized. Tr. 94.

⁶ When asked why he did not issue an imminent danger order for this condition, Inspector De Leon acknowledged that, while he could have issued such an order, the condition was taken care of immediately and therefore did not require such action. Tr. 96. He recalled that they had flagged off the area and "we weren't going to let anybody, you know, the face boss, the safety rep, nobody was going to get underneath it because we were standing right there. And, also, it was isolated." Tr. 95.

The Inspector did not believe that the condition had developed during the previous shift, but rather had existed for two or three shifts. Tr. 98-99. The appearance of the loose rock and the lack of certain “telltale signs” led him to this conclusion. Tr. 99. He explained that a fresh break or crack “will be solid black or charcoal gray, whatever the rock color is, and...[t]he pillars will take weight and you will hear stuff pop and crack and see sloughage and see cutters and other things.” *Id.* Unlike a fresh crack, here “there was dust back in...where [the rock] fractured from the mine roof. So it had enough time for dust to collect. So in my opinion it had been there for a little while. I think I put [in] my notes 2 to 3 shifts.” *Id.* The fact that there was no coal sloughage off the ribs, nor popping and cracking sounds emanating from the hanging rock, also informed De Leon’s opinion and his conclusion that the condition was older than one shift. Tr. 99-100. The Inspector also attributed his ability to distinguish newer from older conditions to his years of mine experience. Tr. 103.

De Leon marked the citation as significant and substantial (“S&S”) and believed a miner could sustain injuries such as broken bones, lacerations, bruises, and even a concussion, depending on how the rock might land if it fell. Tr. 104, 112. In his experience, he has seen thinner rocks kill a man. Tr. 104. He noted that he had probably marked the citation “on the light side” and, although he could have marked the citation as “permanently disabling,” he thought lost workdays “was fair.” *Id.*

The Inspector also referenced the notes he recorded from the inspection. In particular, his notes included an overhead-view sketch diagram of the power center entry, denoting the draw rock he observed by hash marks between the substation and a rectifier. Ex. P-9, p. 8. He added that the dotted lines he used to signify the hanging rock “probably extended further out” over the miner walkway. Tr. 105. Next to the rock in the sketch, he labeled the miner cable to indicate a power cable that reached through the unit, which was energized and running at the time the citation was written. *Id.* De Leon described the sketch as an “outline of the rock and where it was located” and later noted of his sketch that it was not a “Rembrandt – but [that] there’s part of the roof that’s protruding out into the walkway by the rectifier – by the substations.” Tr. 106, 152.

De Leon stated that the draw rock was located in the area around the power entry of the No. 3 Unit, which holds the unit power box, where the rectifier is located. Tr. 107. He discussed the various kinds of electrical equipment that were situated in the area underneath the fractured rock, which included a “cat head,” or male plug, that was plugged into the substation. *Id.* The substation functioned as a receptacle with an energized plug that powered the continuous miner, which was actively cutting coal at the time of the citation. *Id.* The emergency stop button was also located underneath the rock area, along with breakers, amp setting dials, and different electrical components to both boxes. Tr. 108.

The Inspector considered it reasonably likely that the rock would fall, expressing that when the miners pulled down the rock, it “came right down...just with little effort. In other words, it was just barely hanging there.” Tr. 108. The miners used a coal bar to pull down the rock, which is a heavy gauge metal tool kept on roof bolters and continuous miners that is used to scale coal ribs or roofs. Tr. 108-109. The size of the rock, however, rather than the speed with which the rock detached and fell, led De Leon to his reasonably likely determination. Tr.

109. De Leon calculated that, based on the regulatory formula for determining the weight of slate rock, the fallen rock in its totality weighed between 2,500 and 2,600 lbs. Tr. 112, 156. The timbers broke up the rock as it fell, resulting in the rock falling to the ground in multiple pieces.⁷

Inspector De Leon also designated any injury which could ensue as reasonably to be expected to result in lost workdays and restricted duty. He believed that the location of the rock combined with its substantial size and weight meant that someone could have received injuries that could keep the person out of work for several days. Tr. 111. The Inspector informed Mr. Ray that this citation would be specially assessed, which he based on the Dotiki Mine's recent history of citations for violations of the same standard. Tr. 113-114; P-9, p. 9.⁸ The mine had been cited 38 times in the two years preceding the examination, and cited 28 times by 10 different inspectors within one year of the examination for the same safety standard. Tr. 114. Notably, one month prior to his January 10 inspection, De Leon accompanied MSHA Inspector Mike Dillingham on an E02 inspection in the same power entry area of the Dotiki Mine. *Id.* During that prior matter, De Leon observed the same condition of loose rock hanging over a high traffic area. *Id.* Inspectors Dillingham and De Leon spoke with the operators at that time and offered suggestions about setting timbers for roof control. *Id.*⁹

Inspector De Leon marked the subject citation as high negligence because the operator had been put on notice on several occasions prior to the examination, and, as just noted, ten different inspectors had issued 28 citations involving Section 75.202(a) violations in the past year. Tr. 116. Two roof fatalities in April 2009 also informed the Inspector's high negligence determination. Tr. 116-117.¹⁰ Despite marking the condition as high negligence, De Leon did not find it to be an unwarrantable failure. While he acknowledged that he could have marked the Citation as an unwarrantable failure, he chose to "be fair and mark the boxes that I did." Tr. 120. However, he believed that an on-shift face boss, pre-shift examiner, or the unit mechanic should have known about this condition because they were responsible for examining and correcting or

⁷ Once the rock fell, Inspector De Leon noted that the miners did not have to add additional support to the roof. Tr. 111.

⁸ As noted, Inspector De Leon was familiar with the Dotiki Mine. At the time of his examination, he informed, it was one of the largest non-longwall mines. It then spanned three counties, with its two different coal seams and about 30 miles of belt that pushed several hundred miles of air courses, and five working sections with ten mechanized mining units. Tr. 121.

⁹ De Leon explained: "And we even talked to the operator about pulling this rock prior to putting the power boxes in it or setting timbers or just whatever they had to do to control the roof before they put the power boxes in these areas. I mean, we gave suggestions." Tr. 114.

¹⁰ Respondent objected to the Inspector's reference to the April 2009 fatalities, as they were the result of a catastrophic failure of the upper mine roof, and were not related to the skin control problem at issue in this case. Tr. 116-117. The Court admitted this testimony for the limited purpose of assessing how the Inspector's consideration of the mine roof history factored into his high negligence determination. Tr. 117. These fatalities are not determinative of the fact of violation, nor the S&S, nor the degree of negligence determinations made here.

reporting any hazards in that area.¹¹ Tr. 120. Before mine production started, a pre-shift examination of the area was also required three hours prior to running the coal.

On cross-examination, De Leon agreed that the immediate roof can take pressure off the main mine roof, which can result in the immediate roof developing cracks. Tr. 131-132. He also agreed that changes in air temperature, heat from the substation in the entry, and changes in air moisture all can cause deterioration in the immediate roof. Tr. 132. It is also the case, he agreed, that draw rock, or the pieces that hang down from the immediate roof, can form over various amounts of time, sometimes developing very quickly and other times over an extended period. Tr. 132-133.

In the face of the Respondent's contentions during cross-examination that the substation fell *outside* of the working area that would be subject to on-shift examinations, the Inspector maintained that the substation was a part of the working area that would be subject to on-shift examinations. Tr. 137-138. The tailpiece was the loading point for the working section, and the substation was located one crosscut outby the working section. Tr. 138. For the Respondent, this meant that the area at issue did not have to be on-shifted, per the definition of "working section" in 30 C.F.R. § 75.2. Tr. 138-140. The on-shift duty issue aside, the Respondent agreed that the area was subject to pre-shift examinations. Tr. 140. De Leon admitted that he did not know exactly what time the pre-shift examination had taken place on the morning of January 10, 2011, nor did he speak to the third shift lead man who had performed the pre-shift exam or ask anyone what the condition looked like during the pre-shift exam. Tr. 142.¹² The Inspector also did not speak with the section foreman in the unit about the appearance of the condition the day prior to the examination. *Id.* As he was not present at that time, Inspector De Leon agreed that he did not know *exactly* what the condition looked like one shift before the examination. Tr. 146-147.

Inspector De Leon also agreed that miners did not eat their lunches in the area between the rectifier and the substation, nor would they crawl over the lines between the rectifier and the substation to get to the dinner hole. Tr. 149-150. However, the cited rock did protrude out into the walkway between the rectifier and substation, which area miners would pass through to reach that lunch area. Tr. 152. He further asserted that he was confident in the accuracy of his notes from the inspection, including his note that the miner cable was located between the rectifier and the substation. Tr. 150.

De Leon also clarified that he did not only see rock dust gathered in the rock, but also mining dust. It clearly was not "freshly solid white rock dust that...had just been applied." Based on his experience, "it looked like that rock had been fractured for a little while." Tr. 153.

¹¹ With regard to the mine's roof control plan, the Court notes that the Inspector did not see any indications of compliance problems with the mine's plan at that time, nor did he observe any improperly installed or spaced roof bolts. Tr. 131.

¹² The Inspector agreed that the pre-shift examination would have occurred at some time between 4:00 a.m. and 7:00 a.m., up to 5.5 hours prior to his inspection of the area. Tr. 142.

In that regard, he noted that if the rock dust had been applied on the third shift, it “would have been a little bit brighter white in color...[but] it wasn’t a bright white.” *Id.*

As noted, Webster’s Jimmy Ray accompanied Inspector De Leon during the inspection. Mr. Ray has 35 years of coal mining experience, 27 of which have been with Webster County Coal at the Dotiki Mine. Tr. 159-60. Prior to becoming an assistant safety director at the Dotiki Mine in 2006, he worked as a section mine foreman for about 14 years along the No. 9 Kentucky coal seam, where Dotiki is located. Tr. 162-63. He was working as an assistant safety director on January 10, 2011, the date of the inspection.

Mr. Ray disputed the Inspector’s identification of the location of the loose rock. Tr. 164. Unlike the Inspector, who recorded that the roof condition was suspended in the No. 3 Unit between the substation and the rectifier and was protruding over the miner walkway, Mr. Ray recalled that the roof condition occurred in the No. 6 Unit crosscut between the substation and the rib in the power center entry. Tr. 165. He marked his own recollection of the condition’s locale on the Inspector’s sketch, maintaining that it was situated further away from the passageway where miners would travel. Tr. 166; Ex. P-9, p.8.¹³ However, on cross-examination, Mr. Ray acknowledged that Inspector De Leon’s designation of the condition’s location in his notes was probably correct, as he had no reason to think this was incorrect. Tr. 175.¹⁴ Mr. Ray could not recall whether he noticed the loose rock on his own or whether it was pointed out to him. Tr. 174. As he did not take notes during the January 10 inspection, he was relying strictly on memory to recall the location and appearance of the separated draw rock. *Id.*¹⁵

In order to abate the citation, Mr. Ray retrieved timbers from the belt entry and “laid them at an angle from the sub down to the floor and then pulled the rock down.” Tr. 167. He testified that he did not lay the timbers flat; rather, he placed the timbers at an angle from the substation to the floor towards the rib. *Id.* He did not remember the power going off once the rock was pulled down with a coal bar, but said that it could have. Tr. 168. He also mentioned that there are “whisker switches” that stick out from underneath the lids of substation tops and will automatically disconnect the power whenever they are knocked. *Id.*

Mr. Ray stated that the area was pre-shifted between 4:00 and 7:00 a.m., up to 5.5 hours before Inspector De Leon’s examination around 9:30 a.m. Tr. 169. He asserted that that condition could have developed “within seconds” because “it [doesn’t] take long for that roof just to pop.” Tr. 169. Ray added that the No. 9 coal seam roof could pop very quickly because “[i]t’s kind of in layers, and it’s slate. It’s kind of like you take a board and put some weight down on it and the bottom will splinter out. That’s kind of what happened.” Tr. 170. He had not

¹³ Mr. Ray’s recollection of the loose rock area was marked in blue on the exhibit.

¹⁴ Mr. Ray asserted that the substation was located one crosscut outby the working section and that this area was not flagged on the day of inspection. Tr. 176, 178.

¹⁵ When asked whether it was hard to remember what happened a couple years ago during the inspection, Mr. Ray responded, “I’m sure it is, yes.” Tr. 174.

paid attention to the rock dust in the cracks prior to taking down the loose rock. *Id.* Rock dusting, he informed, occurs toward the end of the third shift, during the pre-shift examination. Tr. 170-71. With respect to handling draw rock conditions, Dotiki trains its miners, to look at the ribs and roof on the way to the equipment and either pull it down, if possible, or notify the mine and/or supervisors. As he expressed it, you “let somebody know about it.” Tr. 172-73.

On cross-examination, Mr. Ray clarified that his testimony supported the proposition that roof conditions *can* change within a matter of seconds, not that the loose rock at issue here *did* change within a matter of seconds. Tr. 175. When asked whether the loose roof was located at the No. 3 Unit, as Inspector De Leon recorded in his sketch, or at the No. 6 Unit, as Mr. Ray recalled on direct examination, Ray conceded that “it probably was number 3 I would say.” *Id.*¹⁶

Mr. Ray also testified that the area he circled on the Inspector’s diagram was not highly traveled, asserting that “the only reason you go up there is if you had power trouble.” Tr. 175. He did acknowledge that when he saw the separation in the roof, he knew a timber would be needed to prevent the rock from knocking the cat head off and that if the cat head were disengaged, the power would be turned off. Tr. 176.

The Parties’ Arguments

The Secretary’s Contentions

The Secretary maintains that Webster County Coal’s violation of Section 75.202(a) was significant and substantial, constituted high negligence, and that MSHA’s special assessment civil penalty designation of \$9,800.00 was appropriate. Both the Secretary and Respondent refer to the Commission’s “reasonably prudent person” test, set forth in *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987), for analyzing alleged violations of Section 75.202(a). That test asks “what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Id.* at 669. The Secretary asserts that the violation is supported under this test, as Inspector De Leon was able to reasonably ascertain that the condition existed prior to his inspection. Despite not knowing the exact time of the last pre-shift examination, the Inspector knew that the fractured roof had existed for several shifts, based on the absence of any sign that the immediate roof was settling during the inspection as well as the presence of coal and mine dust accumulations within

¹⁶ Mr. Ray’s full response to this line of questioning reads:

Q: If you are not sure – if Inspector De Leon’s notes show that this particular loose roof was on the number Section 3 unit, do you have any reason to disagree with that?

A: Disagree about what?

Q: About the loose roof being on the number 3 unit. You said you didn’t know whether it was 3 or 6. If his notes say number 3, you don’t have any reason to think what he said is wrong, do you?

A: Well, it probably was number 3 I would say. Tr. 175.

the fracture. Sec. Reply Br. 3. Thus, the Inspector's conclusions were based on observable facts, and informed by his 25 years of experience in the mining industry. *Id.* (citing Tr. 80-81).

Regarding Inspector De Leon's S&S designation, the Secretary highlights the Inspector's testimony that the hanging rock was in such a precarious position that he did not feel comfortable leaving the site until the rock was scaled down, and that he could have issued an imminent danger order, but did not because the issue was being handled immediately. Sec. Br. 10; Tr. 95-96. The Secretary further asserts that not only was the rock likely to fall, but its fall was likely to injure a miner. Sec. Br. 10. Inspector De Leon testified that the loose rock covered an area above the substation where the mechanic and examiners were likely to be during normal mining operations, and that it also extended over the walkway where miners would travel at their lunch break. Sec. Br. 10; Tr. 152. The Inspector believed that if the rock fell, it would cause contusions, concussions, bruises, lacerations, and broken bones, and he noted that he had seen a thinner rock kill a miner. Sec. Br. 10-11; Tr. 104. The Secretary's reply brief further illuminates its contention that there was a reasonable likelihood that this violation would result in injury by noting that persons expected to be in the area included (1) the mechanic; (2) the section foreman who conducts the on-shift examination; (3) the pre-shift examiner; and (4) when going to lunch, miners would travel on a walkway over which the fractured roof protruded. Sec. Reply Br. 4; Tr. 90-91, 120, 152; Ex. P-9, p. 8. Mr. Ray and Inspector De Leon agreed that two persons, the pre-shift examiner and a mechanic, would both likely be in the area affected by a roof fall. Sec. Reply Br. 4; Tr. 171-73. Additionally, as noted earlier, while Mr. Ray's testimony calls into question Inspector De Leon's assertion that the roof protruded over the miner walkway, the Inspector made notes and a diagram at the time of his inspection, while Mr. Ray relied solely on his memory, which he admitted was poor regarding the Citation. Sec. Reply Br. 5; Tr. 174.

The Secretary also asserts that the Citation was a result of Respondent's high negligence. Although Inspector De Leon agreed on cross-examination that changes in the immediate roof can happen over a matter of days, minutes, or seconds, and further agreed that this area of the Dotiki Mine was subject to overburden that can contribute to changes in the immediate roof, he previously explained on direct examination that if the fracture had recently formed, the area would have shown signs of settling or working under the overburden during inspection; however, the mine showed no such signs during Inspector De Leon's examination. Sec. Br. 12. The combination of rock dust and mine dust that had settled into the fracture also showed that the violation had existed for two to three shifts. *Id.* Inspector De Leon explained that a fresh break would be completely black, unless it was rock dusted right after breaking, in which case it would be the color of the rock dust. De Leon, however, did not see the rock dust in its pure form; rather, he saw dust that was a mixture of rock dust and mine dust that would have settled over time. Sec. Br. 12; Tr. 99, 101, 153. Last, the Secretary points to Respondent's history of similar violations, as the operator had been cited 38 times in the two previous years for violations of the same standard, and cited 28 times in the year immediately preceding this citation. De Leon had spoken with management approximately one month prior to the examination about the importance of monitoring roof conditions, and even provided suggestions for controlling these conditions. Sec. Br. 13; Tr. 114.

Respondent's contentions

In its challenge to the violation itself, as noted, the Respondent agrees that the test is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided, but it asserts that the Secretary ignores how the standard is to be applied. Resp. Reply Br. 7. In this regard it asserts that the test contemplates an objective analysis of all the circumstances and that such observer must have "knowledge of the relevant facts." This includes facts "reasonably ascertainable **prior** to the alleged violation." *Id.* (emphasis in original). By Respondent's lights, the Secretary's view is that if there is loose rock present and it needs scaling at the time it is viewed by the inspector, a violation has been established. *Id.* It views Inspector De Leon's determinations as "conclusory, [] uninformed, and subjective." *Id.* at 8. The Court rejects these assertions.

Respondent then offers a litany of its perceived shortcomings with the Inspector's determination listing. These include, among other deficiencies, the Inspector's failure: to speak with others about the conditions at the time of the last examination; to speak with anyone about the conditions 24 hours earlier; to inquire about when the last rock dusting occurred and; to check the main mine roof with a stratascope. The Court's reaction to this list of asserted failings is quite simple: the Inspector didn't have to do those things because his observations of the condition, coupled with his experience and knowledge, sufficiently informed him about the condition he saw and supported his view that it was not a recent development. Thus, the Court finds the Inspector's observations and conclusions to be the well-established facts.

Continuing with its argument, Respondent does not dispute that Inspector De Leon and Mr. Ray observed a large piece of draw rock in the area around the substation. Resp. Br. 6; Tr. 88, 164-66; Ex. P-8. Nor does it dispute that immediately upon observing the draw rock, Mr. Ray took precautionary steps to try to protect any equipment located below the draw rock and immediately scaled the condition down from the mine roof. Resp. Br. 6; Tr. 92-93, Ex. P-8. Respondent does contest, however, that the mere fact that the draw rock, in need of scaling, was observed during the course of inspection does not alone establish a violation of Section 75.202(a). Resp. Br. 6. The Court agrees with this last assertion, but finds that the record is not limited to that mere fact.

In any event, it is the Respondent's position that the Secretary's case is not predicated upon objective facts, and that the Inspector failed to examine objective facts which were reasonably ascertainable. Resp. Br. 7.¹⁷ Rather, it asserts that the Secretary's case is built upon the mistaken premise that the existence of draw rock at the time of Inspector De Leon's examination and De Leon's own assumptions, are sufficient. As noted, the Respondent has offered a litany of supposed failings on the Inspector's part that prevented him from conducting an objective inquiry before issuing the Citation. In particular, Respondent stresses that De Leon did not ask the third shift lead man who had conducted the prior pre-shift examination, nor did he ask the section foreman present during De Leon's own inspection, about what the roof conditions looked like in the power entry 24 hours earlier. Instead, De Leon made a subjective determination based upon the observation of rock dust (or mine dust) in the laminations of the loose rock. Resp. Br. 8. The Inspector never took any steps to objectively determine when the power entry had last been dusted, and he admitted¹⁸ at the hearing that the area around the 9008 substation could have been rock dusted on the third shift and since the last pre-shift examination had occurred. *Id.* (citing Tr. 143-45).

As also noted, Respondent contends that De Leon's assumption that the substation would have been examined under an additional on-shift examination for the working section was factually and legally incorrect. Resp. Br. 8. Section 75.2 defines "working section" as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." Inspector De Leon could not definitively state where the substation was in relation to the loading point, while Mr. Ray testified without hesitation that the substation was located one crosscut outby the working section and the next person required under normal mining to be in the substation area would be the *pre-shift* examiner for the following shift. Resp. Br. 8; Tr. 138-39, 171-72, 177-78.

Respondent alternatively asserts that, even if the violation is affirmed, the Secretary's version of the likelihood of injury, and the S&S and negligence determinations should be rejected. Resp. Br. 9. The Secretary failed, it contends, to support the claim that the fracture was not recently formed. In this regard, it criticizes the Inspector's failure to assess whether overburden was the cause of the loose draw rock. Further, the Inspector conceded there are a multitude of rapid creators of loose or separated draw rock, which rapid creator sources he failed

¹⁷ Respondent identifies what it considered to be the objective facts related to this Citation: (1) the last preshift examination of the substation occurred up to 5.5 hours prior to De Leon's issuance of the citation; (2) De Leon found no record of draw rock at the substation from the last pre-shift examination in the pre-shift books; (3) De Leon did not issue citations for inadequate pre-shift or on-shift examinations, which he was obligated by law to issue if he believed those standards had been violated; (4) De Leon's inspection of the power center entry and inby working section found WCC to be in full compliance of the mine's MSHA-approved roof control plan; (5) roof conditions within the Kentucky No. 9 Coal Seam can and do change quickly; (6) upon scaling the piece of draw rock subject to the Citation, no additional roof support was needed in the affected area; and (7) abatement of the condition took approximately 3 minutes. Resp. Br. 6-7.

¹⁸ As the Court notes *infra* at n. 21, Respondent inaccurately characterizes Inspector De Leon's testimony here as an "admission."

to investigate. According to the Respondent, the Inspector should have evaluated “weather, air moisture, mine temperature and heat, including heat generated by the substation.” *Id.* at 9-10. The Court would observe that, if an inspector were to do all of the items on the Respondent’s “wish list,” a single citation’s issuance would take an entire day to provide sufficient information for the Respondent. This is both wildly impractical and unnecessary.

Continuing with its views, Respondent asserts that the factual record does not support the Secretary’s high negligence finding. It maintains that Inspector De Leon did not reveal any active experience with the Kentucky No. 9 coal seam, yet he opined that the condition existed for two to three shifts. Resp. Br. 10; Tr. 80-82, 100-102, 145-46, 153, 157, Ex. P-9. The Inspector admitted that the power center entry could have been rock dusted prior to the last required pre-shift examination. Tr. 137. This citation was the only one issued in the five-mile stretch Inspector De Leon spanned during his examination. Respondent stresses that it is vital to consider the size of the Dotiki Mine when evaluating its prior history with respect to the specific standard at issue. Dotiki is a huge underground mine. Resp. Br. 12; Tr. 121. For all the miles of air courses, Dotiki only had 23 finalized citations for violations of 30 C.F.R. § 75.202(a) for the fifteen-month period prior to the Citation’s issuance. Ex. P-11; *see* Ex. R-17. In the one 10-foot long area where the Inspector did find an issue with the roof, De Leon never spoke to anyone about the conditions at the time of the last required examination, never determined the precise time of the prior examination, and never spoke to anyone about what the roof conditions looked like 24 hours earlier. Resp. Br. 11. Furthermore, Mr. Ray’s response was more precise than the Inspector’s in determining how long the condition had existed. Ray believed that the loose draw rock could have developed in a matter of seconds and he testified that there was no way of pinpointing an exact time that the condition began. Tr. 169-70, 174.

Regarding the S&S designation, Respondent asserts that the dispute in testimony over the location of the separated rock does not change the end result, which is that a miner’s actual exposure to the specific area over which the draw rock was hanging would be minimal to non-existent under continued normal mining operations. Resp. Br. 14. De Leon repeatedly referred to an “area” without clarifying whether this “area” was beneath the draw rock at issue or the entry in which the 9008 substation was located. *Id.* This area is not the high traffic area that Inspector De Leon made it out to be, for miners do not eat their lunches between the rectifier and the substation, and they would not crawl over the power lines between the rectifier and the substation to reach their lunch spot. Tr. 148-150. Furthermore, mechanics are not in this area “all the time” and De Leon conceded that a mechanic only does a “once-over” around the box. Tr. 150-51. Mr. Ray described the condition as existing between the substation and the coal rib within the entry. Tr. 165-67. He explained that under normal mining conditions, the only people likely to travel to the substation would be the pre-shift examiner or a mechanic in the event of power trouble. Resp. Br. 16; Tr. 171-73.

Respondent’s Reply Brief raises three areas of contention. Although the Respondent makes clear that it is not contesting the type of injury that could be expected (i.e. lost workdays or restricted duty), nor the number of persons affected (i.e. one), it does challenge the likelihood

of injury (i.e. that it was reasonably likely) and the S&S designation and negligence (high) designations. Resp. Reply Br. 2.¹⁹

Respondent also takes issue with the Secretary's assertion that the 'lost work days' designation should be *upheld, if not increased*, as an attempt to enter a post-hearing amendment or have the Court unilaterally increase Box 10B of the Citation. Resp. Reply Br. 3 (citing Sec. Br. 11). Respondent, unsure of the intent behind the Secretary's argument, objects if the Secretary is seeking to amend the injury box from lost workdays or restricted duty to permanently disabling or fatal or to have the Court to make such a change on its own. Either way, Respondent objects to an upward designation of that aspect of the gravity. Resp. Br. 3. As to the former interpretation of the Secretary's remark, the Respondent, citing the decision of another administrative law judge, notes that judge held there that, as no formal motion to amend was filed by the Secretary, and as the issue was not tried, expressly or impliedly, and since the Respondent did not have a fair opportunity to defend against the issue, the attempt to amend the citation was rejected. Webster also cites to *Mechanicsville Concrete*, 18 FMSHRC 877, 879 (June 1996), where the Commission reversed the decision by the administrative law judge to add an S&S designation.

Interestingly, the Court notes that in that *Mechanicsville* decision, *it was the Secretary* who was objecting to the judge's new designation. While the Commission found that the judge overstepped his authority by his *sua sponte* action to add the S&S designation, it upheld that judge's decision to increase the penalty four-fold. Penalty determinations on the Commission's part are bounded by the proper consideration of the statutory criteria and the deterrent purpose of such penalties.

The Court does not view the *Mechanicsville* decision as instructive here. The Commission pointed out in that case that the Mine Act expressly provides the Secretary with the authority to designate a violation as S&S. It noted that the Commission judges are not authorized representatives and therefore do not have authority to charge an operator with violations of Section 104. It concluded that to allow a judge such authority would be to grant that judge prosecutorial discretion, an action that would usurp the Secretary's role. 18 FMSHRC 877, 880.

However, the matter here is fundamentally different from that addressed in *Mechanicsville*. As noted, the Secretary has urged the change as a possible outcome, but beyond that, the subject of the challenge is simply whether the record supports that the type of injury could be listed as "permanently disabling" and/or "fatal." Just as the evidence of record in a given case could support a judge's finding that "no lost workdays" would be the likely injury, that the injury was "unlikely" or "highly likely" or that a matter was *not* S&S, the Court is free,

¹⁹ Respondent further contends that the Secretary miscalculated the penalty assessment, without the special assessment, at \$3,224.00, when the figure would have actually been \$2,902.00 based on 30 C.F.R. § 100.3(f). Resp. Reply Br. 12. Such claims are no longer material, as the Court is to assess any civil penalty based upon the statutory criteria. Part 100 is not applicable once a matter goes to hearing.

assuming the record evidence supports such a finding, to find that the injury in a given case could be “permanently disabling” even though initially marked by an inspector with a lesser expected injury. Such findings do not involve usurping the Secretary at all. Indeed, though not a prerequisite, here the Secretary urges that it be considered and the Inspector in his testimony of record stated that he could well have designated the expected injury to be more serious than he marked on the citation. Webster did not object to the Inspector’s testimony on this and it had a full opportunity to challenge the Inspector’s revisiting of the injury to be expected. The foregoing stated, Respondent has lost sight of the fact that, ultimately, the Inspector’s testimony was that although he could have marked the citation permanently disabling, he thought lost workdays “was fair.” Tr. 104. Accordingly, as that was the only testimony on the extent of injury that could occur, that carries the day for that finding.

Discussion

In addition to the Court’s previously expressed observations and comments, the following additional conclusions are expressed here.

Violation of 30 C.F.R. § 75.202(a)

Section 75.200, which is derived from Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the related standards within Subpart C – Roof Support – are all part of the mandatory safety standards of central importance in the crucial regulatory area of roof control in underground coal mines. *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). With respect to the particular requirements in section 75.202, that roof and ribs “be supported or otherwise controlled,” this standard is expressed in general terms so that it is adaptable to myriad roof condition and control situations. *Id. See, generally Kerr–McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981).

As expressed above, the Commission evaluates alleged violations of roof standards under Subpart C, Roof Support, Section 75.200 *et seq*, such as the Citation at issue here under Section 75.202(a), under the “reasonably prudent person” test articulated in *Canon Coal Co.*, 9 FMSHRC at 668. In *Canon Coal*, the Commission stated that “[q]uestions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent.” *Id.* (citations omitted). “Specifically, the adequacy of particular roof support or other control *must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.*” *Id.* (emphasis added). The Commission stated that “the reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on

the inquiry in issue.” *Id.* (citing *Great Western Electric Co.*, 5 FMSHRC 840, 842–43 (May 1983); *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)).²⁰

The Commission has recognized that the various factors, bearing upon what a reasonably prudent person would know and conclude, include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP Minerals Int'l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5). It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based on the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *Id.* (quoting *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992)).

Here, the parties do not dispute that Inspector De Leon and Mr. Ray observed a large piece of draw rock suspended from the area above the substation. Respondent does contend, however, that the mere observation of draw rock, in need of scaling, during the course of an inspection does not establish a violation of 30 C.F.R. § 75.202(a). Resp. Br. 6. As noted, it is Respondent’s position that the Secretary’s case is not predicated upon objective facts, but rather, upon Inspector De Leon’s subjective determinations.²¹ It further argues that the Secretary has failed to rely on objective facts that were reasonably ascertainable *prior* to the alleged violation,

²⁰ The Commission reiterated this interpretation in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), wherein it stated that “in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but 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.”

²¹ Among the litany of Inspector De Leon’s “subjective determinations” with which Respondent takes issue, Respondent contends that “De Leon never took any steps to objectively determine when the power entry had last been rock dusted and, at hearing, admitted the area around the 9008 substation could have been rock dusted on the third shift and since the last pre-shift examination had occurred.” Resp. Br. 8 (citing Tr. 143-45). This reference to Inspector De Leon’s “admission,” however, is an exaggeration of his testimony. Inspector De Leon’s response regarding the possibility that the area had been rock dusted since the last pre-shift examination reads:

Q: Rock dusting could have been performed in that belt entry after the last required pre-shift from 4:00 a.m. to 7:00 a.m. Correct?

A: Could have happened, yes.

Q: You just don’t know one way or another.

A: Right.

Tr. 145. Agreeing to a possible scenario, as Inspector De Leon did here, is more accurately characterized as a concession, not an admission.

as the Inspector failed to conduct an objective inquiry regarding the state of the roof conditions at the time of the prior pre-shift examination. Resp. Br. 7. However, it is the Court's view that the Respondent's refrain that there is a lack of "objective facts" in the Secretary's case mischaracterizes the nature of the evidence adduced and applied to the reasonably prudent person test. The Court disagrees with the Respondent's characterization of the evidence and does not find the Inspector's observations and testimony to be incompatible with the objective inquiry. To the contrary, Inspector De Leon's visual observations of the loose rock's size, weight and appearance, coupled with his 25 years of experience in the mining industry and personal familiarity with this area of the Dotiki Mine, establish this violation under Section 75.202(a).

While the Court must engage in an objective inquiry when applying the reasonably prudent person test, this does not restrict its considerations solely to undisputed facts. Inspector De Leon's failure to inquire about the state of the roof prior to the MSHA inspection does not negate the weight of his visual observations, his years of experience with mine roof conditions, or his personal history with this area of the Dotiki Mine under the reasonably prudent person test. Respondent's efforts to discredit the information upon which the Inspector acted when making his determinations do not authorize this Court to disregard this testimony from the analysis. Rather, the Court must evaluate whether the conclusions Inspector De Leon drew as an objective observer on January 10, 2011 correlated to those of a reasonable person familiar with the mining industry when presented with such conditions. An objective observer such as Inspector De Leon could make determinations based solely upon the observations and information gained through his sensory and personal experience without deviating from or undermining the reasonably prudent person standard.

When applying the reasonably prudent person standard in the roof fall context, the Commission has emphasized that the Secretary must produce evidence that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person that there was a hazardous condition. *Canon Coal Co.*, 9 FMSHRC at 668. Inspector De Leon discerned, based in part on his years of specialized experience in examining mine roofs, that the break in the roof had occurred two to three shifts prior to the last pre-shift examination. Tr. 99. He substantiated this determination with his observation that rock dust had gathered in areas that would have been black if the break were fresh. *Id.* He noted that mining dust was intermixed with the rock dust such that it was not a freshly solid white color that would have indicated recent application. Tr. 153. Furthermore, the Inspector informed that if the fracture had recently formed, the area would have shown "telltale signs" such as coal sloughage off the ribs or popping and cracking sounds from the roof settling under the overburden. *Id.* Each of these observations constituted an objective visual sign that existed prior to the inspection and would have alerted a reasonably prudent miner to take additional steps to prevent an accident. In addition, the Court agrees with the Secretary that Inspector De Leon did not need to know the exact time of the last pre-shift examination prior to his inspection, because his finding that the condition had existed for at least two to three shifts was based upon his objective observations combined with his years of mining experience.

Respondent has noted that the Inspector did not issue a citation for an inadequate pre-shift examination in this area, despite finding in the Citation that the condition had existed for two to three shifts. Resp. Br. 11. The issuance of such an additional citation, however, is not a *sine qua non* precondition, the lack thereof which would preclude the Court from determining the validity of the Citation at issue here. The visual observations and years of experience that contributed to Inspector De Leon's decision to issue the Citation exist irrespective of his decisionmaking process regarding the issuance of an inadequate pre-shift examination citation. This same reasoning likewise applies to Respondent's contentions about the Inspector's failure to issue a citation for an inadequate on-shift examination.

Inspector De Leon's personal history with the Dotiki Mine is another objective factor that adds to the aspects associated with the violation of Section 75.202(a) under the reasonably prudent person standard. De Leon was familiar with the roof conditions around the No. 3 Unit power entry area of the Dotiki Mine, for he had accompanied another MSHA inspector on an E02 inspection in this same area one month earlier on December 14, 2010. Tr. 114, 154. During this December 14 inspection, he observed rock hanging similarly to the rock at issue here in the same power entry. Tr. 114. He then spoke with the operator about additional measures that need to be taken to control the roof around the power boxes. Tr. 154. Respondent argues that Inspector De Leon did not have active mining experience with the Kentucky No. 9 coal seam. However, the Inspector's experiences at Dotiki one month prior to issuing Citation No.8499036 indicate his timely familiarity not only with this coal seam, but also with the very area of Dotiki at issue in this case.

Given the credible objective signs Inspector De Leon observed, the Court credits his finding that the hazardous condition had existed for at least two to three shifts prior to the MSHA inspection. As such, Webster could have reasonably ascertained this condition prior to Inspector De Leon's examination and taken steps to support or otherwise control the roof to protect persons from hazards related to falls of roof.

It is noted that there is a dispute in the testimony regarding the location of the cited, large, loose rock. As noted, whereas Inspector De Leon marked on his sketch in his inspection notes that the rock was protruding over a miner walkway, Mr. Ray believed the loose rock's location was further away from the power sources and miner traffic. *See* Tr. 105-107 (De Leon testimony), 164-167 (Ray testimony); Ex. P-9, p.8. Respondent argues that Inspector De Leon gave a vague description of the "area" which failed to pinpoint the precise location of the loose draw rock that he denoted in his sketch. Resp. Br. 14-15. The Court disagrees with this characterization of the Inspector's testimony as vague, for he specifically denoted that the rock was hanging between the substation and the rectifier and protruded over a miner walkway. Tr. 88-89, 152. Inspector De Leon was confident in the notes he made on the day the citation was issued, and these notes included his sketch of where the condition was located. Tr. 150. In contrast, whereas Inspector De Leon corroborated his testimony with the notes he recorded on the day of the inspection, Mr. Ray relied solely on his memory to indicate the location of the fractured rock. Tr. 174. Furthermore, Mr. Ray conceded on cross-examination that the Inspector would have no reason to inaccurately report the rock's location in his notes recorded at the time of the MSHA inspection. Tr. 175. The Court therefore credits Inspector De Leon's testimony

over that of Mr. Ray, regarding the location of the separated rock between the unit substation and rectifier in his sketch and its proximity to power sources and the miner walkway.

Respondent further argues that the area between the rectifier and the substation was not “high traffic” as the Inspector asserted, for miners do not eat their lunches in that area and mechanics only do a “once-over” around the power box. Resp. Br. 15; See Tr. 148-151. First, it was never Inspector De Leon’s testimony that miners would eat lunch under the rock; he asserted from the outset that the walkway through which miners would pass to reach their lunch spot was located under the loose rock. Tr. 97. Furthermore, to perform a “once-over” around the power box still requires a miner to enter the area, albeit for a presumably shorter period of time. Even assuming the walkway underneath the rock was not a major thoroughfare for miners, this area was not completely cut off from miner access. Respondent acknowledges that mechanics and pre-shift examiners did travel through the area between the rectifier and substation where the rock was hanging to access the power center entry. Tr. 171-173. This ongoing miner presence in the area contributes to the reasonable likelihood that the hanging rock would result in an injury.

Significant and Substantial

The S&S terminology is taken from Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to “significant and substantial,” i.e., more serious, violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

For the reasons discussed *supra*, the separated draw rock suspended from the immediate roof constitutes a violation of Section 75.202(a), a mandatory safety standard. Furthermore, the discrete safety hazard is the risk of a roof fall. Citation No. 8499036 therefore satisfies the first two requirements of the *Mathies* test.

Despite Respondent’s contentions that the Secretary has not established the third prong of the *Mathies* test, the size of the loose rock and its proximity to power sources and miner pathways has led this Court to the opposite conclusion. Inspector De Leon attributed his S&S designation to (1) the size and weight of the loose rock and (2) the rock’s proximity to miner walkways and power sources. Tr. 104, 109. With an estimated area of 10 feet long by 4 feet

wide and a weight of about 2,500 lbs., this separated rock was both heavy enough and large enough to fall on its own and result in an injury-producing event. The damage the rock caused to power sources as it was pulled down with the support of timbers illustrates the extent of harm that was possible had the rock fallen in an uncontrolled manner. *See* Tr. 147.

Given the size and weight of the fractured rock and its proximity to the ongoing miner presence through the area, it is reasonably likely that this rock would have fallen during the course of continuing mining operations and caused an injury-producing event to a miner either working in or passing through the area, thus satisfying the third prong of *Mathies*. Accepting, as Respondent does, that the injury would reasonably be expected to result in lost workdays or restricted duty, such an injury constitutes a reasonably serious injury, meeting the fourth prong under the *Mathies* test.

Negligence

The Court finds that Respondent either knew or should have known about this violation of Section 75.202(a) in the No. 3 Unit of the Dotiki Mine at the time of Inspector De Leon's examination and that there were not mitigating circumstances.

Negligence is defined as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d) (2011). Under the Mine Act, "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent previous hazardous conditions or practices." *Id.* Moderate negligence exists when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances," while high negligence is when "the operator knew or should have known of the violative condition or practice, but there are *no* mitigating factors." *Id.* (emphasis added).

As noted above, the Court credited Inspector De Leon's testimony that the separated rock had existed for at least two to three shifts prior to his examination, a finding supported by the Inspector's visual observations of the rock, the surrounding conditions, and mine dust accumulations in the immediate roof. Tr. 99. Unlike a fresh crack, here the condition was covered in rock dust, indicating that it was not a recent development. Inspector De Leon also noted that other "telltale signs" of a recent break, such as coal sloughage from the ribs or popping sounds emanating from the roof, were not occurring during his inspection. *Id.* Furthermore, Mr. Ray's testimony that conditions in the mine roof can change within a matter seconds was a general statement about immediate roof conditions; this testimony was not an assertion that the loose rock did in fact break within minutes or seconds before De Leon's inspection. Tr. 175.

Inspector De Leon's trip to the Dotiki Mine on December 14, 2010, one month prior to issuing this citation, placed the operator on notice of the need to tend to its roof conditions in that area of the mine. Not only did Inspector De Leon participate in an E02 inspection on that day where he noticed loose rock conditions in the same power entry area, but he also spoke with the operator and offered suggestions for ways to control the roof before placing power boxes in

those areas. Tr. 114. The break in the roof on January 10, 2011 therefore could not have blindsided the operator, as this same issue had arisen within the past month. The mine had also been issued a number of citations for the same standard over the past 2 years, which included twenty-three (23) finalized citations for violations of Section 75.202(a) in the fifteen (15) month period prior to the Citations issuance. Resp. Br. 12; Ex. P-11. Although that section is a broad standard, it is a relevant consideration which is applicable to the issue it covers: protection from falls of roof, face and ribs.

Civil Penalty Assessment

Section 110(i) of the Mine Act confers upon the Commission the authority to assess civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of violation.

It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1288-89 (Oct. 2010) (citing *Cantera Green*, 22 FMSHRC 616, 620 (May 2000)). In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in Section 110(i) and the deterrent purposes of the Act. *Cantera Green*, 22 FMSHRC at 620.

The Court has considered the six penalty criteria set forth in Section 110(i), and concludes that a civil penalty to \$9,800.00 is appropriate under the terms of the Act. Respondent had a documented history of violations of 30 C.F.R. § 75.202(a) prior to Inspector De Leon's issuance of Citation No. 8499036 on January 10, 2011. The Secretary offered evidence that Respondent was cited for violations of this standard thirty-eight (38) times at the Dotiki Mine in the two years prior to this Citation, twenty-eight (28) of which were during the preceding twelve months. Sec. Br. 14; Ex. P-11; Tr. 114. Respondent clarified that only twenty-three (23) violations of this standard were finalized in the fifteen months prior to the Citation's issuance. Resp. Reply Br. 13; Ex. P-11 at 2. The Court has taken that into consideration. Despite Respondent's efforts to distill this information and place it in the context of a mine with hundreds of miles of air courses, 23 violations within a fifteen month timespan is not a negligible figure, regardless of the size of the mine. These finalized violations, coupled with Inspector De Leon's testimony that he spoke with Dotiki operators about roof control problems in the same area of the mine one month prior to the issuance of this Citation, weigh into this Court's penalty assessment analysis.

The Court additionally finds that this penalty assessment is proportionate to the size of Webster County Coal. Respondent asserted at length the large size of the mine albeit in the context of finding in the single 10-foot hazardous condition. Resp. Br. 11; Tr. 121. Prior to the

hearing, Respondent stipulated that the proposed penalty of \$9,800 for this Citation would not affect Webster County Coal's ability to continue in business. Sec. Br. 3.

For the reasons stated above, Citation No. 8499036 was significant and substantial, reasonably likely to contribute to an injury, and the associated negligence was high. The gravity has been discussed at length in this decision. Respondent acted in good faith in its efforts to abate the Citation, as Assistant Safety Director Jimmy Ray took immediate steps upon encountering the fractured roof to remove the hanging rock.

ORDER

Within 40 days of this decision, Webster County Coal is ORDERED to pay a civil penalty in the total amount of \$9,800.00 for the violation identified above. Upon payment of the civil penalty imposed, this proceeding is DISMISSED.

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

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constitute an immediately reportable accident because it was not an “injury” under 30 C.F.R. § 50.10(b). Accordingly, Vulcan’s Motion for Summary Decision is **GRANTED**, Citation Number 6516682 is **VACATED**, the Secretary’s Motion for Summary Decision is **DENIED**, and this case is **DISMISSED**.

Introduction/Syllabus

In 2009, Rex Lowe suffered a heart attack while working at a mine and was taken to a hospital where doctors performed open-heart surgery, saving his life. Doctors determined his heart attack was the culmination of many years of progressing coronary atherosclerosis. MSHA learned of Mr. Lowe’s heart attack seven days later when Vulcan submitted a mine accident, injury, and illness report. MSHA then cited Vulcan for violating the immediate accident notification requirement found in 30 C.F.R. § 50.10. The regulation requires mine operators to notify MSHA within fifteen minutes of an accident involving an injury of an individual at a mine which has a reasonable potential to cause death. MSHA argues that heart attacks are included within the meaning of “injury” and Vulcan violated the standard when it did not immediately report Lowe’s heart attack as an accident. Vulcan responds that Lowe’s heart attack was not immediately reportable as an accident because it was an illness, not an injury. This dispute requires me to determine whether Lowe’s heart attack was an immediately reportable accident, and if so, whether Vulcan should have known it.

Along with their cross-motions, the parties filed the following joint stipulation of facts and exhibits:

Stipulated Facts

1. During all times relevant to this matter, the Respondent, Vulcan Construction Materials, LP, was the owner and operator of the Fort Payne Quarry, Mine ID No. 01-00028.
2. Fort Payne Quarry is a “mine” as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. The mining operations in Fort Payne Quarry are subject to the jurisdiction of the Mine Act and the Administrative Law Judge and the Federal Mine Safety and Health Review Commission have Jurisdiction over these proceedings.
4. Fort Payne Quarry is a surface metal/non-metal mine.
5. On July 6, 2009, Rex Lowe was an employee of Vulcan Construction Materials.
6. On July 6, 2009, Rex Lowe was 54 years of age with a date of birth of September 25, 1954.
7. On July 6, 2009, Mr. Lowe was employed as a bagger/warehouse man by Vulcan Construction Materials, LP.
8. On July 6, 2009, Mr. Lowe began his shift at 6:30 a.m. at the Fort Payne Quarry.

9. On July 6, 2009, Mr. Lowe was in the quarry near a tail pulley when he appeared to be suffering from an undiagnosed medical condition.
10. On July 6, 2009, Mr. Lowe was cleaning underneath the tail pulley at the onset of his physical symptoms.
11. On July 6, 2009, at 7:30 a.m. Mr. George Grguric, Plant Manager, observed that Mr. Lowe was demonstrating physical signs of a yet undiagnosed heart attack.
12. On July 6, 2009, at 7:30 a.m., Jason Weeks, shipping loader operator, Roger Barron, repairman, and Olin Summerall, stock truck driver, each observed Mr. Lowe suffering from an undiagnosed medical condition.
13. On July 6, 2009, the physical signs and symptoms that Mr. Lowe exhibited are that he became faint and discolored.
14. On July 6, 2009, at 7:30 a.m. Mr. Grguric transported Mr. Lowe to the hospital.
15. On July 6, 2009, at approximately 8:30 a.m., Rex Lowe was diagnosed as having suffered a heart attack while working at the mine.
16. On July 6, 2009, Mr. Lowe underwent open heart surgery.
17. On July 6, 2009, a cardiac catheterization was performed on Mr. Lowe.
18. On July 6, 2009, the cardiac catheterization performed on Mr. Lowe revealed a total occlusion of his right coronary artery.
19. On July 6, 2009 the cardiac catheterization performed on Mr. Lowe revealed a severe occlusion of the left main and left anterior descending coronary arteries.
20. On July 6, 2009, a thrombus extraction and balloon angioplasty, followed by stent replacement, was performed on Mr. Lowe.
21. On July 6, 2009, at 8:30 a.m., George Grguric, Plant Manager, who transferred Mr. Lowe to the hospital was told by doctors at the hospital that Mr. Lowe had suffered a heart attack.
22. On July 6, 2009, Mr. Grguric did not notify MSHA that Mr. Lowe had suffered a heart attack within fifteen (15) minutes of learning Mr. Lowe's diagnosis at 8:30 a.m., by calling 1-800-746-1533.
23. Respondent alleges that sometime after 8:45 a.m., Ms. Misty Hillis, Vulcan Construction Material's representative, called and left Mr. Wyatt Andrews of the Southeastern District a voicemail to report Mr. Lowe's condition.

24. Respondent alleges, that at approximately 1:30 p.m., Ms. Hillis reported Mr. Lowe's condition to the MSHA toll-free number at 1-800-746-1533.
25. On July 6, 2009, Ms. Hillis did not notify MSHA that Mr. Lowe had suffered a heart attack within fifteen (15) minutes of learning Mr. Lowe's diagnosis at 8:30 a.m., by calling 1-800-746-1533.
26. On July 13, 2009, Wilma Gooch, Health and Safety Coordinator for Respondent, submitted MSHA Form 7000-1 to report Mr. Lowe's heart attack.
27. Pursuant to the MSHA Report on 30 C.F.R. 50, Directorate of Technical Support dated December 1986, PC-7104, "heart attacks are classified as illnesses because they do not normally result from work accidents or a single instantaneous exposure in the environment."
28. On July 28, 2009, MSHA Inspector Charles M. Morrison issued Citation No. 6516682 alleging a violation of 30 C.F.R. § 50.20(a).
29. On January 24, 2012, the Secretary amended Citation No. 6516682 from 30 C.F.R. § 50.20(a) to 30 C.F.R. § 50.10(b).
30. Citation No. 6516682 was served on Respondent or its agent as required by the Mine Act.
31. The MSHA inspector, Charles M. Morrison, who issued Citation No. 6516682, was acting in his official capacity as a duly authorized representative of the Secretary of Labor.
32. The size of the mine and the size of the controller are accurately reflected and accounted for in the Proposed Assessment of penalty for Citation No. 6516682.
33. The Respondent worked 25,707 hours at the Fort Payne Quarry for the calendar year 2008.
34. The assessed penalty, if affirmed, will not impair Respondent's ability to remain in business.
35. Pursuant to Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Secretary originally assessed a civil penalty in the amount of \$100 against Respondent for the cited standard of 30 C.F.R. § 50.20(a).
36. Pursuant to Section 110(a)(2) of the Mine Act, 30 U.S.C. § 820(a)(2), the Secretary amended the originally assessed civil penalty to the statutory minimum of \$5,000 against Respondent for the cited amended standard of 30 C.F.R. § 50.10(b) on January 24, 2012 which is the minimum penalty the Secretary may assess for failure to timely report a death at a mine or an injury at a mine that has a reasonable potential to cause death.

37. MSHA designated the negligence as moderate negligence for the assessed violation.
38. Since the violation at issue was a reporting violation, MSHA designated the gravity of the violation as follows: (a) “no likelihood,” (b) “no lost workdays,” (c) “non-significant and non-substantial.”
39. Vulcan Construction Materials, LP demonstrated good faith in achieving rapid compliance after notification of the alleged violation.
40. On July 6, 2009, Vulcan Construction Materials was aware of the requirement in 30 C.F.R. § 50.10(b) to report accidents involving injuries at a mine, that have a reasonable potential to cause death to MSHA within 15 minutes of the reportable accident.

Secretary’s List of Exhibits

1. Citation No. 6516682
2. Inspector’s Notes for citation No. 6516682
3. MSHA Form 7000-1

Respondent’s List of Exhibits

- A. Yellow Jacket – Report on 30 C.F.R. Part 50
- B. Physician’s notes regarding Mr. Lowe’s diagnosis

Statement of Facts

Rex Lowe worked as a bagger and warehouseman at Vulcan Construction Materials, L.P.’s Fort Payne Quarry in DeKalb, Alabama. Stip. 1, 7. On July 6, 2009, Lowe began his shift in the quarry at 6:30 a.m. Stip. 8. While cleaning underneath the tail pulley of a belt conveyer, Lowe began experiencing signs of physical distress including chest pain. Stip. 9; R. Ex. B p. 2. At 7:30 a.m., Lowe’s coworkers, including Vulcan’s plant manager, Mr. Grguric, noticed that he became faint and discolored, and appeared to be suffering from an undiagnosed medical condition. Stip. 11, 12, 13. Grguric then transported Lowe to a hospital, and at 8:30 a.m., doctors diagnosed him as having suffered an acute myocardial infarction—a heart attack—while working at the mine. Stip. 14, 15. Doctors performed a cardiac catheterization which revealed a total occlusion of his right coronary artery and a severe occlusion of the left main and left anterior descending coronary arteries. Stip. 17, 18, 19. That day he underwent open heart surgery, and doctors successfully performed a thrombus extraction and balloon angioplasty, followed by a stent replacement. Stip. 16, 20. Seven days later, Vulcan reported the heart attack to the Mine Safety and Health Administration (MSHA) by submitting MSHA Form 7000-1. Stip. 26. MSHA received Form 7000-1 within the regulation’s ten-day requirement for reporting accidents, injuries, and illnesses, but an inspector later cited Vulcan for failure to notify MSHA

of a mine accident within fifteen minutes of the heart attack. Stip. 28. The citation alleged a violation of 30 C.F.R. § 50.10(b), which requires operators to notify MSHA within fifteen minutes of a mine accident involving an injury of an individual at a mine which has a reasonable potential to cause death. Stip. 29. Vulcan contested the citation, arguing there was no accident to report. Both parties have moved for summary decision.

Vulcan's Argument

Vulcan challenges the citation, contending that it did not violate the immediate notification requirement for accidents because there was no accident to report. Until doctors told Vulcan's plant manager, Mr. Grguric, of the heart attack, Vulcan did not believe Lowe was in serious danger, and it was completely unclear what he may have been suffering from, if anything.³ After Vulcan learned of the diagnosis, it relied on MSHA's longstanding guidance to determine that Lowe's heart attack was an illness, not an injury, and thus not immediately reportable as an accident. Moreover, MSHA and the Secretary have never included heart attack within the definition of an injury, and MSHA's only public policy pronouncement on this issue—MSHA Report on 30 C.F.R. Part 50, Directorate of Technical Support dated December 1986, PC-7014 (the "Yellow Jacket")—specifically states that a heart attack is not an injury. Thus, the Secretary's interpretation of "injury" here is merely a litigating position that does not deserve deference. Finally, the Secretary's reading of the regulation is overbroad and unreasonable because it would force operators to construe a broad range of symptoms as reportable. The reporting requirements of section 50.10(b) would then be limitless because they would require operators to call the immediate reporting line every time an employee is either taken to a hospital or a doctor.

The Secretary's Argument

The Secretary responds that this Court should grant deference to his interpretation that a heart attack constitutes an injury within the meaning of 30 C.F.R. § 50.2(h) (2), because the regulation is ambiguous and his interpretation is reasonable. Interpreting the term to include heart attacks is consistent with common dictionary definitions and judicial usage in a variety of contexts. In addition, recent mine safety case law confirms that heart attacks are reportable injuries. Because of this, Vulcan knew or should have known it had experienced a reportable accident when its Plant Manager, Mr. Grguric, observed Lowe to be faint and discolored. In addition, Vulcan knew or should have known it had experienced a reportable accident when Mr. Grguric personally transported Lowe to the hospital. Moreover, Vulcan knew or should have known it had experienced a reportable accident when hospital doctors informed Mr. Grguric that Lowe had suffered a heart attack and was admitted to the hospital for open heart surgery. Finally, allowing Vulcan to interpret a heart attack as an "illness" is impermissible because it defeats the purpose of the standard. It would incentivize a mine operator to wait until it learned the medical cause of a potentially fatal occurrence before reporting it to MSHA. This would compromise the

³ Under the Mine Act, notice to an operator's agent is imputed to the operator. *See S. Ohio Coal Co.*, 4 FMSHRC 1458, 1463-64 (Aug. 1982). In this case Mr. Grguric, the Plant Manager, is Vulcan's agent.

health and safety of miners by preventing MSHA from immediately investigating and preventing any further exposure to hazards.

Discussion

Deference

The Secretary argues that his interpretation of heart attack as an “injury” within the meaning of 30 C.F.R. §§ 50.10 & 50.2(h) (2) deserves deference. Sec’y’s Mot. Summ. D. 15, Oct. 16, 2012. The Supreme Court has said that when reviewing a challenged interpretation of regulatory language, the Secretary’s interpretation of his own regulation is “controlling unless plainly erroneous or inconsistent with the regulation.” *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, “*Auer* deference is warranted only when the language of the regulation is ambiguous.” *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to “the language itself, the specific context in which that language is used, and the broader context as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). My review of the immediate notification requirement in 30 C.F.R. § 50.10(b), along with its specific and overall context within the regulation, leads me to conclude that it unambiguously does not include heart attacks within the meaning of injury. Accordingly, deference to the Secretary’s interpretation of the regulation is not warranted.

Unambiguous / Plain Text

Rex Lowe was diagnosed as having suffered a myocardial infarction. Since the Secretary alleges that Vulcan violated 30 C.F.R. § 50.10(b), the starting point is to determine whether a heart attack fits within the plain meaning of “injury” under section 50.10. The regulations never explicitly mention a heart attack; it has no special regulatory meaning that would preclude consideration of the ordinary meaning of the term. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (noting that in the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning). Merriam Webster defines a heart attack as “an acute episode of heart disease marked by the death or damage of heart muscle due to insufficient blood supply to the heart muscle usually as a result of a coronary thrombosis or a coronary occlusion and that is characterized especially by chest pain—called also myocardial infarction.” *Heart Attack Definition* <http://www.merriam-webster.com/medlineplus/heart%20attack> (last visited Aug. 25, 2013). In short, a heart attack is an acute episode of heart disease marked by the death or damage of heart muscle. The fact that a heart attack is “an acute episode of heart disease” is significant because the immediate notification provision in 30 C.F.R. § 50.10 never mentions disease:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;

(c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or

(d) Any other accident.

30 C.F.R. § 50.10.

The explicit language of section 50.10 requires immediate notification only when there has been an accident involving a death, an injury which has a reasonable potential to cause death, an entrapment which has a reasonable potential to cause death, or any other accident. It says nothing about disease. But, the explicit text of section 50.10(b) doesn't exclude disease either. Section 50.10(b) requires an operator to contact MSHA within 15 minutes once it knows or should know that an accident has occurred involving an injury at a mine which has a reasonable potential to cause death. Thus, if a heart attack is a disease process, and the regulation's meaning of injury does not implicitly contemplate disease, then a heart attack is not subject to the immediate notification requirement. If, however, the regulation could implicitly include "disease" within the meaning of "injury with a reasonable potential to cause death," the meaning of injury might be ambiguous.

The Secretary argues for the latter interpretation, but an isolated reading of one subsection of a regulation is not the standard by which ambiguity is determined. The Supreme Court has noted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Hence, the regulation is not necessarily ambiguous even though an expansive reading of subsection 50.10(b) would not explicitly exclude "disease" from the meaning of "injury." In this case, other Part 50 regulations provide critical guidance on the statutory context of "injury" by supplying the regulatory meaning for the terms "accident," "occupational injury," and "occupational illness," as found in section 50.2:

§ 50.2 Definitions.

As used in this part:

(e) Occupational injury means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

(f) Occupational illness means an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made.

(h) Accident means

(1) A death of an individual at a mine;

(2) An injury to an individual at a mine which has a reasonable potential to cause death;

- (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;
- (4) An unplanned inundation of a mine by a liquid or gas;
- (5) An unplanned ignition or explosion of gas or dust;
- (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
- (7) An unplanned ignition or explosion of a blasting agent or an explosive;
- (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;
- (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;
- (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;
- (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and
- (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

30 C.F.R. § 50.2.

At first blush, the definition of accident does not seem to add much insight to the meaning of the section 50.10 notification requirement for purposes of this analysis. Section 50.2(h) (1)-(3) are nearly identical to section 50.10(a)-(c), and section 50.2(h) (4)-(12) does not deal with injury at a mine. Likewise, the section 50.2(e) definition of occupational injury does not appear to settle the meaning any more than section 50.10 does because it neither explicitly rejects nor includes disease. However, when the meanings of accident and injury are considered in light of the Part 50 regulatory definition and its reference to occupational illness, it becomes clear that the immediate notification requirement unambiguously does not include heart attacks within the meaning of injury.

The regulation defines occupational illness as “an illness or disease . . . which may have resulted from work at a mine.” 30 C.F.R. § 50.2(f). A heart attack fits within the meaning of occupational illness when it may have resulted from work at a mine, because occupational illness includes “illness or disease,” and a heart attack is an “acute episode of heart disease.” Moreover, throughout the Mine Act and the Part 50 regulations, the terms “accident,” “injury,” and

“illness,” are presented as separate and distinct concepts.⁴ To include heart attacks within the meaning of “injury” would make at least some occupational illness a subset of occupational injury. The plain text of the regulation does not contemplate this result because such a construction would render the meaning of “illness” superfluous.

The rules drafters—MSHA and Congress—assigned specific meanings to the terms, “accident,” “injury,” and “illness,” by consistently listing each one in every provision meant to address all three, and by excluding mention of one when a requirement was not meant to address that particular term. In section 50.2(h) (3) for example, entrapment with a reasonable potential to cause death is defined as an accident, irrespective of whether the individual has been injured or not.

Likewise, illness is conspicuously absent from the immediate notification provisions in sections 50.10, 50.11, and 50.12, even though nearly every other section of the Part 50 regulations lists accident, injury, and illness. In fact, none of the Subpart B regulations dealing with immediate accident notification ever mentions illness or disease, anywhere.⁵ This is also true of the Mine Act’s immediate notification provisions.⁶

The immediate notification requirement’s complete failure to mention illness or disease supports the conclusion that it does not include mere illness or disease, and hence, does not include heart attacks. If the immediate accident notification requirement were read to include heart attacks within the meaning of injury, the result would be an overlap of the concepts of injury and illness that would write the term “illness” out of the regulation.

Since an accident involving an injury under 50.10(b) requires immediate notification when the injury has “a reasonable potential to cause death,” and occupational injury includes “any injury to a miner which occurs at a mine,” occupational injury’s broad definition also includes those injuries that satisfy the immediate accident notification requirement. Hence, an accident involving an injury with a reasonable potential to cause death is a subset of occupational injury. This is confirmed in section 50.20(a) where the accident reporting requirements distinguish between section 50.10 accidents involving occupational injuries, and those that do not. *See*, 30 C.F.R. § 50.20(a) (specifying the proper forms to complete “[w]hen an accident specified in § 50.10 occurs, which does not involve an occupational injury”). But because a heart attack is a disease, and an occupational illness is defined as “an illness or disease,” to include heart attacks within the meaning of “injury” would make at least some occupational illness a subset of occupational injury -- a tortured, contradictory, and illogical result.

⁴ *See, e.g.*, 30 U.S.C. §§ 801(b), 801(c), 801(f), 801(g), 802(k), 811(a), 813(a), 813(b), 813(d), 813(j), 813(k); 30 C.F.R. §§ 50.1, 50.2, 50.20(a), 50.20(b), 50.20-1, 50.20-2, 50.20-3, 50.30-1, 50.41.

⁵ *See* 30 C.F.R. §§ 50.10, 50.11, 50.12.

⁶ *See* 30 U.S.C. §§ 813(d), 813(j), 813(k).

The plain text of the regulation does not contemplate this result. Conspicuously absent from the definition of accident, is any reference to illness or disease. Nor does section 50.20 make any distinction between accidents that do and do not involve occupational illnesses, as it does with occupational injuries. In fact, except for the explicit inclusion of injury with a reasonable potential to cause death within the meaning of “accident,” accident, injury, and illness are referred to throughout the Mine Act and Part 50 regulations as separate and distinct concepts.⁷ Additionally, even though nearly every section of the Part 50 regulations lists accident, injury, and illness, none of the Subpart B regulations—dealing with immediate accident notification—ever mentions illness or disease, anywhere.⁸ This is also true of the Mine Act’s immediate notification provisions.⁹ This complete lack of mention leads to the conclusion that the meaning of injury does not, by virtue of intent of the drafters or reasonable interpretation, include mere illness or disease, and hence does not include heart attacks. The rules drafter—MSHA—showed that it knew how to draft regulations that carefully and separately addressed the concepts of illness and disease. It could have explicitly included disease in the immediate notification provision had it really meant to expand “injury” as argued by the Secretary. Because it did not, I conclude the plain text of the regulation unambiguously does not include within the meaning of “injury” mere illness, including heart attacks. Given the plain text and regulatory context of the immediate notification requirement, such an interpretation would be overly broad and altogether unwarranted because it would render superfluous the regulation’s use of the term “illness.”

Specific Context

Immediate reporting of heart attacks would be inconsistent with the specific context of the Subpart B regulations, 30 C.F.R. §§ 50.10, 50.11, and 50.12. In addition, a review of the overall context of Part 50, and the specific context of the immediate notification requirement in Subpart B, confirms that the regulation unambiguously does not include heart attacks within the meaning of injury.

MSHA promulgated the immediate notification requirement in 2006 after an explosion at the Sago Mine in Tallmansville, West Virginia resulted in 12 fatalities, and a fire at the conveyor belt drive at the Aracoma Alma Mine No. 1 in Melville, West Virginia resulted in two fatalities in January of that year. *See* Emergency Mine Evacuation, 71 Fed. Reg. 12252, 12254. Of the 12 miners killed at the Sago Mine, one died of carbon monoxide poisoning shortly after the explosion. *See* Richard A. Gates et al., MSHA, Report of Investigation: Fatal Underground Coal Mine Explosion, January 2, 2006, Sago Mine, Wolf Run Mining Company, Tallmansville, Upshur County, West Virginia, ID No. 46-08791 188 (May 9, 2007), *available at* <http://www.msha.gov/Fatals/2006/Sago/ftl06C1-12.pdf>. The rest were trapped underground.

⁷ *See, e.g.*, 30 U.S.C. §§ 801(b), 801(c), 801(f), 801(g), 802(k), 811(a), 813(a), 813(b), 813(d), 813(j), 813(k); 30 C.F.R. §§ 50.1, 50.2, 50.20(a), 50.20(b), 50.20-1, 50.20-2, 50.20-3, 50.30-1, 50.41.

⁸ *See* 30 C.F.R. §§ 50.10, 50.11, and 50.12.

⁹ *See* 30 U.S.C. § 813(d), 813(j), 813(k).

See id. at 31. The mine operator did not notify the Secretary of Labor’s Mine Safety and Health Administration of the accident until approximately two hours after it occurred, and it was later learned that most of the miners lived for hours after the initial blast but ultimately succumbed to carbon monoxide poisoning. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71433; Gates et al., *supra*, at 29-33. The Federal Mine Safety and Health Act of 1977 was amended later that year to require that mine operators immediately notify MSHA within fifteen minutes once the operator knows or should know that a mine accident has occurred.

The amended rule helps assure that miners, mine operators, and MSHA will be able to respond quickly and effectively to mine disasters, emergencies, and other potentially life threatening situations. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71431; *see also* 30 U.S.C. § 813(j) (granting the Secretary authority to supervise and direct rescue and recovery activities and take whatever action deemed appropriate to protect the life of any person in the event of a mine accident). Immediate notification also serves “to prevent the destruction of any evidence which would assist in investigating the cause” of an accident. *See id.* (requiring operators to prevent destruction of any evidence which would assist the Secretary in investigating the cause or causes of an accident). In short, immediate notification allows MSHA to address unsafe or potentially life threatening conditions and practices at mines when a quick response could make a difference.

MSHA listed some of the types of injuries that require immediate reporting under the amended rule:

Based on MSHA experience and common medical knowledge, some types of “injuries which have a reasonable potential to cause death” include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. These injuries can result from various events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability.

Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71434.

In this case, the Secretary has not alleged or shown that Lowe’s heart attack was caused, even in part, by an unsafe or unhealthful condition or practice in the mine or that his investigative function was thwarted by Vulcan’s failure to immediately notify. Thus, immediate reporting of a heart attack is inconsistent with the concerns addressed in Part 50’s Subpart B regulations when the event is completely unrelated to mine activities or conditions, is not preventable by MSHA or the operator, and poses no threat to the health and safety of other miners

Overall Context

Reporting heart attacks pursuant to the Subpart C regulations of 30 C.F.R. § 50.20 within ten days instead of fifteen minutes is not inconsistent with the overall context of the regulation and preserves MSHA’s interest in compiling incident statistics.

In addition to immediate response to and investigation of accidents, the Mine Act also gives MSHA the general responsibility of “obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines.” 30 U.S.C. § 813(a); *see also Akzo Nobel Salt, Inc.*, 18 FMSHRC 1950, 2014 (Nov. 1996) MSHA is able to fulfill this function through its regulations promulgated in Part 50, charging that “[t]he principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review [Form 7000-1]. *See* 30 C.F.R. § 50.20(a). Thus, heart attacks and other illnesses that are not immediately reportable are nonetheless reportable in the normal course of events. MSHA’s need to gather and analyze event data that is not immediately reportable is in no way compromised.

Differing Dictionary Definitions

The Secretary contends that the regulation is ambiguous because the word “injury” has alternative dictionary definitions that are consistent with his interpretation. He cites *Catawba Cnty, N.C. v. EPA*, 571 F.3d 20, 38-39 (D.C. Cir. 2009) and *NMA v. Kempthorne*, 512 F.3d 702, 708 (D.C. Cir. 2008) (cert. denied, 129, S.Ct. 624 (2008)) for the proposition that the existence of differing dictionary definitions indicates ambiguity. Sec’y Resp. to Resp’t Mot. S. Decision p. 4. In support, he plucks definitions of “injury” from Webster’s Third New International Dictionary and The American Heritage Dictionary to show that the term means “2: hurt, damage, or loss sustained,” and “1. Damage or harm done to or suffered by a person or thing,” respectively. Sec’y Resp. to Resp’t Mot. S. Decision p. 3. With those definitions in hand, he asserts that a “heart attack constitutes “damage” or “harm” “sustained” or “suffered” by the person having the heart attack.” Sec’y Resp. to Resp’t Mot. S. Decision p. 3.

However, courts have recognized that if Congress uses a term susceptible of several meanings, it does not follow that Congress has implicitly authorized an agency to choose any one of those meanings, depending on the litigation needs of a particular case. *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C.Cir.2006). The Supreme Court has noted that “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Brown v. Gardner*, 513 at 118. In the absence of any regulatory context for the meaning of “injury,” reliance on a dictionary meaning might make more sense than it does in this case. But, as discussed above, “injury” is defined in the regulation, and its context within the regulation fills in any definitional gap.

The Secretary makes much of the fact that heart attacks are serious enough to have a reasonable potential to cause death, even going so far as to imply that cardiac catheterization performed in a hospital after a heart attack is more likely to result in death than full cardiac arrest requiring cardio-pulmonary resuscitation (“CPR”) on the jobsite. *See* Sec’y Resp. to Resp’t Mot. S. Decision p. 5. Although a heart attack can be said to cause “injury” to the heart muscle, it is not the type of injury contemplated by the regulations. The effect of any illness or disease can be said to cause damage or harm to an individual’s body.

The immediate notification provision makes it clear that to qualify as an injury, an event must have a reasonable potential to cause death. The issue here, however, is the plainness or ambiguity of the word “injury,” not the serious nature of heart attacks. A heart attack cannot be

forced into the definition of “injury” merely because it has a reasonable potential to cause death. Many diseases and illnesses have a reasonable potential to cause death. Illnesses and diseases such as diabetes, pneumonia, cancer, depression, and black lung disease could all be swept into the immediate reporting requirement as well if the Secretary’s argument prevailed. Operators would be required to immediately notify MSHA anytime an employee left work to see a doctor or go to a hospital in relation to any number of ailments. Without proper consideration of whether something is an illness or an injury, focusing on “damage or harm,” or the “potential to cause death,” will lead to absurd results. In addition to writing illness and disease out of the regulations, it would have the effect of creating new duties, something the Secretary cannot do without notice and comment. *See Am. Min. Cong. v. MSHA*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (noting that the legislative or interpretive status of an agency rule turns on the prior existence or non-existence of legal rights and duties). The regulations do not contemplate a heart attack as an injury.

Differing Judicial Interpretations

The Secretary points out that just as the existence of differing dictionary definitions might indicate ambiguity, so too does the existence of differing judicial interpretations. Sec’y Resp. to Resp’t Mot. S. Decision p. 4. He cites three cases¹⁰ from the Fifth Circuit, all of which he claims support his interpretation of “injury” here because they characterize heart attacks as injuries in a variety of inapposite contexts. *See* Sec’y Resp. to Resp’t Mot. S. Decision p. 3-4.

While it is true that these cases characterize heart attacks as injuries, they do it in the context of discussing whether a heart attack is a compensable injury under workers’ compensation insurance contract law. The reasoning in all three cases undercuts the Secretary’s position by requiring some sort of causal connection—physical or mental—between work activity and the heart attack in order to show a compensable injury. *See Bridgestone*, 381 F. App’x at 472-74 (discussing the Louisiana Supreme Court’s interpretation of “accident” in *Ferguson v. HDE, Inc.*, 270 So. 2d 867, 870 (La. 1972), where it construed the Louisiana state worker’s compensation statute and insurance contract law to grant compensation for accidental injury when a heart attack was precipitated by job-related mental or emotional causes); *C & D*, 376 F. App’x at 392 (denying review of a Department of Labor Benefits Review Board decision granting death benefits under the Longshore and Harbor Workers Compensation Act because the causal nexus required for a compensable injury under the Act was present when strenuous work activities precipitated the fatal heart attack); *Gooden*, 135 F.3d at 1069 (vacating a Department of Labor Benefits Review Board decision for improperly denying workers compensation benefits under the Longshore and Harbor Workers Compensation Act based on the Administrative Law Judge’s improper focus on the employee’s pre-existing heart condition, and remanding for a finding of whether the conditions of employment constituted the precipitating cause of his heart attack).

¹⁰ *Bridgestone Firestone N. Am. Tire, L.L.C. v. Liberty Mut. Ins. Co.*, 381 F. App’x 467 (5th Cir. 2010) (unpublished); *C & D Prod. Serv’s. v. Dir., Office of Worker’s Comp. Programs*, 376 F. App’x 392, (5th Cir. 2010) (unpublished); *Gooden v. Dir., Office of Worker’s Comp. Programs, U.S. Dep’t of Labor*, 135 F.3d 1066, (5th Cir. 1998).

These cases support Vulcan's motion to dismiss. The Secretary has not alleged a causal nexus between Lowe's work activity and the heart attack. The facts support Vulcan's assertion that Lowe's heart attack was the result of natural causes and in no way work related, something the Secretary does not dispute.

Even if these cases were relevant, they would be of little help in determining the meaning of "injury" under the Mine Act, because they interpret workers' compensation insurance contract law under the Longshore and Harbor Workers' Compensation Act, and the Louisiana State Workers' Compensation Statute. The Secretary has failed to show how those statutory frameworks are related to the policy elements that underlie the immediate reporting requirements MSHA is trying to expand in this case. The Supreme Court has said that regulatory language "cannot be construed in a vacuum." *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* The context of the immediate notification requirement, as discussed above, does not require or allow for a meaning of "injury" that is consistent with the meaning central to the workers' compensation cases cited above. Accordingly, the nuances of what may be a compensable personal injury for Longshore and Harbor workers in Louisiana is of no help in determining whether an acute myocardial infarction at a mine in Alabama is immediately reportable. In sum, neither the text, the legislative history, nor the general safety purpose of the regulation indicates any ambiguity in the regulation.

Finally, MSHA has consistently interpreted heart attacks to be outside the meaning of injury since at least the December 1988 release of the Part 50 Program Policy Letter. The "Yellow Jacket" states that "heart attacks are classified as illnesses because they do not normally result from work accidents or a single instantaneous exposure in the environment." *See* Stip. 27; MSHA Report on 30 C.F.R. 50, Directorate of Technical Support dated December 1986, PC-7014.

The Yellow Jacket gives the following guidance regarding heart attacks:

HEART ATTACKS

38. Q. What if an employee suffers a heart attack at work, is taken home and subsequently dies. Is this a reportable case?
- A. Yes. All fatal or nonfatal heart attacks occurring on mine property, occupational injuries and occupational illnesses must be reported. Heart attacks are classified as illnesses because they normally do not result from work accidents or single, instantaneous exposure in the environment. Most fatalities due to heart attacks are considered to be the result of natural causes and not from work activity. However, all such incidents whether or not the employee dies on the mine property should be reported and a final chargeability determination will be made by MSHA on a case-by-case basis.

MSHA Program Information Bulletin No. 88-05, p. 30 (Sept. 28, 1988) (Review and Update of Program Circular (PC) 7014-Report on 30 CFR Part 50), *available at* <http://www.msha.gov/stats/part50/rptonpart50.pdf>.

Plainly erroneous or inconsistent

The Secretary's interpretation is plainly erroneous and inconsistent with the regulation for all of the same reasons that make it unambiguous. Specifically, the regulation plainly does not require immediate notification of illnesses or diseases because illness is not listed in the definition of accident. Since a heart attack is an "acute episode of heart disease," and the regulation deals with disease and illness together and regards illness and injury as distinct and separate concepts, a heart attack is not an injury. Such an interpretation is also inconsistent with the regulation because the immediate notification requirement is meant to enhance MSHA's accident investigation and response capabilities. Immediate notification of a heart attack that was not the result of any mine activity or condition and poses no threat to the safety or health of other miners detracts from MSHA's accident response abilities by tying up valuable resources dealing with information that is properly reported on Form 7000-1.

Fair & Considered Judgment

Had I found the regulation to be ambiguous, the Secretary's interpretation would still not merit deference because it is inconsistent with the existing regulation and does not represent the agency's fair and considered judgment on the matter.

The Secretary argues that his interpretation that a heart attack is an injury within the meaning of Part 50 deserves deference because: (1) it is reasonable; (2) numerous federal courts have interpreted the term injury to include heart attacks; (3) and doing otherwise would eviscerate the standard's language, limiting MSHA's options to enforce important mine safety provisions. Sec'y's Mot. Summ. Decision 14-15, Oct. 16, 2012.

It would be improper to apply *Chevron* deference here because the Secretary's position in this case is a litigating position, an interpretative guideline which does not receive *Chevron* deference. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991) (noting that interpretative rules and enforcement guidelines are not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers). Furthermore, courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation only where they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. at 462; *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000).

The interpretation advanced by MSHA is not its fair and considered judgment because it is inconsistent with the apparent regulatory and reporting scheme and has no support in regulations, rulings, interpretive guidance, or administrative practice. It is inconsistent because the Secretary has done nothing to refute the validity of the Yellow Jacket guidance, which directly contradicts his litigation position in this case. There is no evidence that MSHA has taken any policy-level action to counteract the language in the preamble to the 2006 immediate

notification rule amendment. “As stated by the Commission in *Cougar Coal*, ‘it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required.’ 25 FMSHRC at 52”. *Newmont USA Ltd.*, 32 FMSHRC 391, 397 (Apr. 2010).

The Secretary argues that three cases in particular are persuasive authority, and are relevant to the issue of whether a heart attack is a reportable injury. But while I agree they are persuasive, neither case addresses the precise issue presented here. The facts and reasoning of each are distinct from those found here. Accordingly, the reasoning and holding of each are not dispositive. The cases are *E.S. Stone & Structure, Inc.*, 33 FMSHRC 515 (Jan. 2011) (ALJ), and *Standard Sand & Silica Co.*, 2011 WL 6880704 (Dec. 2011) (ALJ), both of which cite *Cougar Coal Co.*, 25 FMSHRC 513 (Sept. 2003).

Cougar Coal

The circumstances in *Cougar Coal* were very different from those at issue in this case. In *Cougar Coal*, a miner fell 18 feet, hitting his head on the edge of a power center on the way down, after being electrocuted by 7200 volts of electricity while working on top of a utility pole. *Cougar Coal Co.*, 24 FMSHRC 176, 186-87 (Feb. 2002) (*rev'd* on appeal, 25 FMSHRC 513 (Sept. 2003)). Coworkers administered CPR after finding him unconscious and in cardiac arrest. He was revived, but as a result of the shock and fall, suffered lacerations to his head, serious burns, a fractured vertebra in his neck, and had to be hospitalized for several weeks. *Id.* at 187. After the accident, Cougar Coal employees moved the boom truck from the accident site without first obtaining permission from MSHA, and failed to notify MSHA of the accident. *Id.* at 186.

The operator in *Cougar Coal* conceded that the employee had been injured, but argued there had been no accident because the injuries did not pose a reasonable potential to cause death. *Cougar Coal*, 25 FMSHRC at 520. In overturning the ALJ’s decision, the Commission held that the ALJ incorrectly discounted testimony relating to the “nature of the accident” or the “act of the accident” as irrelevant to the question of whether the injuries had a reasonable potential to cause death. The Commission labeled his analysis hypertechnical because the nature of the accident was such that any reasonable person would know it had a reasonable potential to cause death. *Id.* at 521. The ALJ focused on proof of life-threatening injuries, holding that the Secretary did not prove the injuries had a reasonable potential to cause death because no official medical records explicitly stated as much. “It is significant to note that when transferred [the miner’s] condition was described in the emergency record as “serious.” Thus, this medical evidence fails to establish that [his] injuries were deemed either critical, or very serious by the emergency department.” *Cougar Coal*, 24 FMSHRC at 187 (emphasis in original). The judge also erroneously discredited the inspector’s opinion of [the] injuries and required that the Secretary furnish a medical opinion that [the] injuries had a reasonable potential to cause death. *Cougar Coal*, 25 FMSHRC at 520 (citing *Cougar Coal*, 24 FMSHRC at 187-88).

Here, Lowe had no external injuries. He was not found unconscious, unresponsive, or not breathing. More importantly, he was not found in a state of cardiac arrest and subsequently revived only after CPR. The Commission’s *Cougar Coal* ruling created a *per se* rule that incidents involving CPR are injuries with a reasonable potential to cause death. The

Commission did not interpret “injury” to include heart attacks, nor did it set out a *per se* rule requiring immediate notification of illnesses with a reasonable potential to cause death. Finally, the label of “hypertechnical” does not apply to Vulcan’s defense because it relies on the meaningful distinction between illness and injury, not the subtle and nebulous distinction between serious and very serious.

E.S. Stone

The Secretary argues that in *E.S. Stone*, the ALJ “concluded that a heart attack itself was a reportable injury.” Sec’y Resp. to Resp’t Mot. S. Decision p. 5. He did not. The issue in that case was not whether heart attacks are reportable injuries, or even whether heart attacks are reportable accidents. The issue was whether a mine operator can delay reporting a fatality to MSHA beyond the 15 minute deadline, for purposes of conducting a brief and reasonable investigation into the incident. *E.S. Stone*, 33 FMSHRC at 518. This is not the question at issue in this case.

In *E.S. Stone*, a miner was discovered lying on the ground. Coworkers quickly determined that he was not breathing, had no discernible pulse, and was unresponsive. *Id.* at 518. Although coworkers performed CPR on the miner for 25 minutes before an ambulance and a medical response helicopter arrived, all efforts to revive him were unsuccessful. The coroner pronounced him dead at the site. *See id.* at 519. The citation alleged that the mine operator failed to contact MSHA within fifteen (15) minutes of a fatality. *Id.* at 519. The operator argued that even though it notified MSHA 32 minutes beyond the 15 minute deadline, it reported the fatality in full compliance with the regulation because the preamble to the regulation authorizes and anticipates a brief and reasonable investigation into an incident prior to notifying MSHA. *Id.* at 518. The ALJ concluded that the operator failed to comply with the requirements of 30 C.F.R. § 50.10 because it knew it had experienced a reportable accident *arguably* at 11:23 a.m. (fifteen minutes after CPR was initiated) and *conclusively* at 12:20 p.m. (fifteen minutes after the official pronouncement of death), but did not contact MSHA until 12:52 p.m. *Id.* at 519-20 (emphasis added).

Contrary to the Secretary’s reading of this case, the holding is not that a heart attack itself is a reportable injury: MSHA cited the operator for violating section 50.10(a), and unlike this case, there was no dispute over whether the incident was reportable or not. Rather, the holding was that there is no exception to the 15 minute reporting requirement. In addition, the operator’s argument in *E.S. Stone* focused on the justification that it conducted a brief, reasonable investigation into the incident prior to notifying MSHA, and that such an investigation was authorized and anticipated by the preamble to the regulation.

Standard Sand & Silica Co.

The Secretary argues that *Standard Sand & Silica Co.* is persuasive authority because “the facts are very similar.” Sec’y Resp. to Resp’t Mot. S. Decision p. 6. However, the facts of *Standard Sand* are analogous to *E.S. Stone*, not this case. In *Standard Sand*, a miner was discovered lying on the ground, unresponsive, not breathing, and without a pulse. 2011 WL 6880704 at *2. A coworker performed CPR until an ambulance arrived and emergency personnel

took over but the miner was never revived. The operator failed to notify MSHA until more than 15 minutes after the miner was pronounced dead. *Id.* at *2.

Although the mine operator in *Standard Sand* made the same argument as Vulcan—that the heart attack was not an injury, but an illness—the case was decided on facts that are inapposite to those at issue in this case. Unlike Mr. Lowe, the miner in *Standard Sand* was found lying on the ground, not breathing, unconscious, and without a pulse. *Id.* at *2. Also unlike Mr. Lowe’s situation, CPR was performed on the *Standard Sand* miner, and the miner died. *Id.* at *2. In his ruling, the ALJ held that the operator “failed to comply with the requirements of 30 C.F.R. § 50.10” when it “contacted MSHA reasonably promptly, although not immediately, after learning of the death.” *Id.* at *4. In finding against the operator, the judge focused on the time CPR was performed and the time the miner was pronounced dead. Both of those events are explicitly listed in the regulations and case law as immediately reportable accidents. Heart attacks are not. Mr. Lowe survived his illness, and he never received CPR.

Allowing the operator in *Standard Sand* to stand on the argument that the miner’s heart attack was not an injury would have been bad policy for a number of reasons. Most importantly, to do so would have defeated the purpose of the Mine Act by allowing operators to wait for an official medical diagnosis or an autopsy report before making a decision, *ex post*, on whether to report a death at a mine. Indeed, the ALJ correctly ruled that the operator in *Standard Sand* violated the immediate notification requirement because all the operator knew at the time of the accident was that an employee had been found unconscious and was in cardiac arrest. Emergency lifesaving efforts (CPR) were immediately attempted, but the miner was never revived. There was no way for the operator to know that mine activities or conditions did not cause the cardiac arrest without an official medical diagnosis or autopsy report. Had some unknown or hidden mine hazard caused the harm to the miner, valuable time would have been wasted during the operator’s delay. It is exactly that type of delay that was intended to be remedied by the new regulations. There was no way for the operator to know that the miner had experienced a heart attack at the time, and allowing it to justify its failure to report based on an *ex post* autopsy report might incentivize operators to adopt a wait and see approach, possibly leaving other miners exposed to unknown hazards.

Due Process

Vulcan relies on the Yellow Jacket’s guidance that heart attacks are illnesses. The Secretary did not dispute Vulcan’s contention that it was acting in reliance on the Yellow Jacket. The Secretary’s position in this litigation is directly opposed to the Yellow Jacket guidance, a position that would leave all mine operators guessing as to which of the two contrary positions MSHA will elect to enforce.

Even if the Secretary’s litigating position had been reasonable and consistent with the Mine Act, Vulcan’s Motion for Summary Decision prevails given the lack of fair notice. The due process clause prevents an agency from enforcing a new interpretation of a regulation when there is no advance warning of the conduct prohibited or required. *See, Gates & Fox Co. v. Occupational Safety and Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986). The Commission has not required MSHA to provide operators with actual notice of its interpretation

prior to enforcement. *Energy W. Mining Co.*, 17 FMSHRC at 1318. Instead, it has used an objective standard of notice, asking “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.” *Id.* (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)).

Vulcan alleges that for years it has consistently relied on MSHA’s longstanding and well-known guidance in the Yellow Jacket. Resp’t Opp. to Sec’y Mot. S. Decision p. 2-3. As discussed above, the Yellow Jacket classifies heart attacks as illnesses “because they do not normally result from work accidents or a single instantaneous exposure in the environment.” Stip. 27. Vulcan alleges the Yellow Jacket public policy pronouncement is the only guidance MSHA has ever provided specifically on this issue, and that it reasonably relied on it as the Agency’s only public guidance to conclude Lowe’s heart attack was not an injury that is immediately reportable. Resp’t Op. to Sec’y Mot. S. Decision p. 1-4.

The Secretary failed to dispute any of Vulcan’s allegations regarding the inconsistency of MSHA’s prior pronouncements with its litigating position. The Secretary has not alleged the Yellow Jacket guidance is no longer valid or has been superseded, or even that MSHA has ever before advanced an alternate or differing interpretation. In fact the Secretary declined to even directly address Vulcan’s claim that it never believed Lowe’s condition was immediately reportable based on its good-faith reliance in the language of MSHA’s Yellow Jacket. Instead, of directly addressing Vulcan’s claim that it reasonably relied on the Yellow Jacket language, the Secretary focused on the question of whether there is an exception to the 15 minute reporting requirement, something Vulcan never argued.

Reasonable Potential to cause death

The facts of this case indicate that Vulcan did not know and should not have known that an accident occurred because Lowe’s symptoms were indicative of illness, not injury. Vulcan argues that before doctors diagnosed Lowe’s heart attack, it did not know, and should not have known, that he was in serious danger. When Lowe appeared faint and discolored, it was unclear what may have been causing his distress, if anything. Such symptoms did not indicate a condition that had a reasonable potential to cause death because any number of things could cause someone to become faint and pale. Second, Vulcan alleges convincingly that if it thought Lowe’s situation had been life-threatening, Grguric would not have driven Lowe to the hospital, but would have called an ambulance instead. And finally, when doctors diagnosed Lowe as having suffered a heart attack at work, Vulcan relied on the Yellow Jacket’s guidance to conclude it was not an immediately reportable accident.

This Court recognizes that the ultimate cause of an incident does not control whether it must be immediately reported as an accident. But the apparent cause, or lack thereof, bears heavily on whether a mine operator knew or should have known that an injury with a reasonable potential to cause death has occurred. *See Cougar Coal Co.*, 25 FMSHRC at 520 (noting that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death).

Accordingly, in the preamble to the 2006 Miner Act, the Secretary listed—based on MSHA experience and common medical knowledge— certain types of injuries, along with their apparent cause, that are specifically likely to have a reasonable potential to cause death. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71434. Those injuries include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. *See Id.* at 71434. The Secretary has specified that such injuries can result from various events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability *See Id.* at 71434. Notably absent from the list is any type of illness or disease, including heart attacks. Despite a longstanding admonition by the Commission to clarify the reporting requirements, the Secretary did not add illness or disease to the regulation even when he had the opportunity to do so. Instead of creating an expansive rule requiring immediate notification for any medical emergency or any incident requiring a trip to the hospital, the Secretary listed amputations, concussions, blunt force trauma, and intermittent or extended periods of unconsciousness.

In this case, the Secretary did not allege that Lowe experienced any of the enumerated injuries or any visible wound. Nor did the Secretary allege that Vulcan had reason to believe any of those injuries had occurred. Moreover, the Secretary did not allege that Vulcan was aware of any event or condition at the mine that may have been the cause of Lowe’s condition, or that it was caused by the work environment, work conditions, work activity, or even that there was any event such as an irrespirable atmosphere or ignitable gas, compromised ventilation controls, or roof instability, that would have alerted Vulcan to a potential accident. Finally, the Secretary did not allege that any of this might have occurred, but that the proof of it had been lost or destroyed because Vulcan did not preserve the site of the accident in violation of section 50.12.

Far from such grave injuries and indicative events, the Secretary relies on the fact that Lowe “became faint and discolored,” and that “Mr. Grguric transported Mr. Lowe to the hospital,” to assert that Vulcan knew it had experienced an immediately reportable accident. Stip. 13, 14. In this case, Lowe began experiencing his physical symptoms at 7:30 in the morning after he had been at work for just one hour. Unlike the miners in *Cougar Coal, E.S. Stone*, and *Standard Sand & Silica*, he was not found unconscious and in cardiac arrest, and did not require CPR. Instead, Lowe was breathing on his own, had no external injuries or wounds, and there was no mine equipment or activity that appeared to play any part in his condition. Given all that, and the fact that he was outdoors in the quarry where irrespirable atmosphere, ignitable gas, compromised ventilation controls, and roof instability, were not an issue, I conclude that before hospital doctors diagnosed Lowe as suffering from a heart attack, Vulcan reasonably did not know, and could not have known he was suffering from an injury with a reasonable potential to cause death.

Moreover, when hospital doctors diagnosed Lowe as suffering from a heart attack, it was confirmed to Vulcan that Lowe’s medical condition was an illness or disease, and not the result of an injury. At that point, Vulcan knew that Lowe’s medical condition was not an immediately reportable accident. Vulcan reasonably believed heart attacks were illnesses, not injuries, and thus not accidents subject to the immediate notification standard

Accordingly, it is **ORDERED** that Citation No. 6516682 is **VACATED** and this case is **DISMISSED**.

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

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/rcw

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2013

DEAN B. HILDRETH, SR.,	:	TEMPORARY REINSTATEMENT
Complainant	:	PROCEEDING
	:	
v.	:	Docket No. WEST 2013-401-DM
	:	MSHA Case No. WE-MD-13-07
TECK ALASKA, INC.,	:	
Respondent	:	
	:	Mine ID: 50-01545
	:	Mine: Red Dog Mine

ORDER RETAINING JURISDICTION OVER
TEMPORARY ECONOMIC REINSTATEMENT PROCEEDING
PENDING SETTLEMENT OR DETERMINATION OF REMEDY
IN UNDERLYING DISCRIMINATION PROCEEDING

Before: Judge McCarthy

This Temporary Reinstatement Proceeding is before me pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). In support of this Order, the following uncontradicted factual representations were taken as true.¹

I. Factual Background

On November 4, 2012, Hildreth filed a discrimination complaint with MSHA under § 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 et seq. (1994). He alleged that his termination was motivated by discriminatory animus toward his protected activities. *See Discrimination Complaint, MSHA Form 2000-123*, dated Nov. 4, 2012. On January 16, 2013, MSHA sent Hildreth a letter documenting its finding that no discrimination had occurred under § 105(c) of the Mine Act.² MSHA erroneously sent that letter to an unrelated, non-party mine operator, N.A. Degerstrom, Inc., from Veradale, Washington, instead of also sending a copy of that letter to Respondent or its Counsel.

¹ During an April 4, 2013 conference call, the Secretary took the position that the Secretary’s party status had terminated as a result of MSHA’s “no discrimination” determination made on January 16, 2013.

² On January 18, 2013, MSHA sent Hildreth a second letter. The difference between the letters is immaterial since the only update was the inclusion of the Commission’s correct address.

On a March 7, 2013 conference call with the undersigned, counsel for the Secretary stated that on or about January 20, 2013, Hildreth and counsel for the Secretary discussed the terms of the proposed Joint Motion to Approve Settlement. Counsel stated that during the January 20, 2013 meeting, he explained to Hildreth that under the proposed Joint Motion, Hildreth could only receive economic reinstatement between January 14-16, 2013 due to MSHA's "no discrimination" determination. Counsel further stated that he did not notify Respondent of MSHA's "no discrimination" finding because he assumed MSHA properly served Respondent with the January 18, 2013 letter.

On January 28, 2013, the Secretary filed two documents: 1) an Application for Temporary Reinstatement after finding that Hildreth's discrimination complaint was not frivolous; and 2) a Joint Motion to Approve Settlement signed and approved by the Secretary, Hildreth, and Respondent. Respondent entered into the Joint Motion without notice of MSHA's "no discrimination" finding. *Resp't Mot. For Appropriate Relief*, 3, dated Mar. 29, 2013. Pursuant to the Joint Motion, Hildreth was entitled to receive temporary economic reinstatement equivalent to his predischarge compensation and benefits, effective January 14, 2013. *Id.*

On February 5, 2013, I issued an Amended Consent Order that approved the agreed upon terms in the January 30, 2013 Joint Motion. *Am. Consent Order*, 1, dated Feb. 5, 2013. The Amended Consent Order was designed to terminate Hildreth's temporary economic reinstatement upon MSHA's finding of no discrimination. *Id.* at 2.

On February 9, 2013, Hildreth exercised his right under § 105(c)(3) of the Mine Act to file a pro se discrimination complaint with the Commission. Hildreth also sent a copy of his pro se complaint to Respondent, which was received by administrative personnel on February 14, 2013. *See Resp't Mot. for Appropriate Relief*, 4. Respondent's administrative personnel did not communicate the receipt of Hildreth's complaint to its counsel. *Id.*

On March 3, 2013, Respondent's counsel learned of MSHA's determination of "no discrimination" through a status update discussion with my office. *Id.* at 5. Respondent then terminated further temporary economic reinstatement to Hildreth. *Id.* Respondent had already paid Hildreth retroactive temporary economic reinstatement payments from January 14, 2013 through February 13, 2013, which, before tax and including the value of benefits, totaled \$8,327.68.³ *Id.*

During a March 7, 2013 conference call with the undersigned, Hildreth stated that all of the money received from Respondent had already been spent on car payments and the repayment

³ Respondent requests relief only through February 13, 2013, the day before its administrative offices received Hildreth's pro se complaint. *Resp't Mot. for Appropriate Relief*, Attachment D.

of loans from his father, which were incurred in order to get to California.⁴ Respondent claims that Hildreth is lawfully entitled to retain \$1,496.82 for the three-day interval of January 14-16, 2013. *Id.* Respondent requests reimbursement of \$6,830.86 that represents the total paid to Hildreth after January 16, 2013. *Id.* Hildreth requests an order that Respondent comply with the Amended Consent Decree, and an order to compel the Secretary to represent him as counsel. *Resp. To Mot. For Appropriate Relief*, 3, dated Apr. 15, 2013.

II. Legal Analysis

The novel issue presented by Respondent's Motion for Appropriate Relief is whether and to what extent Hildreth can be compelled to repay Respondent for temporary economic reinstatement payments that Hildreth received and spent despite his knowledge of MSHA's finding of "no discrimination" on January 16, 2013.

A. Retention of Jurisdiction Over The Temporary Economic Reinstatement Proceeding

In relevant part, Rule 45(e)(4), 29 C.F.R. § 2700.45(e)(4), provides that "a judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding." Respondent has not filed a motion to dissolve temporary economic reinstatement, and I will not now Order its dissolution *sua sponte*. Accordingly, I retain jurisdiction over the proceeding. My retention of jurisdiction does not change the fact that Hildreth's economic reinstatement terminated on January 16, 2013. The legal mechanism that terminated economic reinstatement by operation of law was MSHA's "no discrimination" finding, *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012), which is distinct from a Rule 45(e) jurisdictional dissolution analysis.

B. Hildreth's Temporary Economic Reinstatement Was Terminated On January 16, 2013

The Commission Procedural Rules do not address whether temporary economic reinstatement must end after MSHA's "no discrimination" finding.⁵ The terms of the Joint

⁴ The Respondent's Red Dog Mine is located in an area called Northwest Arctic Borough, Alaska. *Appl. for Temporary Reinstatement*, 2, Jan. 28, 2013. Following his departure from employment with Respondent, Hildreth lived in Fresno, California. As per a May 5, 2013 email to this Commission, Hildreth indicated that he currently lives in Alaska and has a P.O. Box in Anchorage, Alaska.

⁵ The Commission deleted the requirement in Rule 45(g), 29 C.F.R. § 2700.45(g) that the judge dissolve the order of temporary reinstatement after the Secretary has found "no
(continued...)

Motion and the Amended Consent Order, however, state that Hildreth's temporary economic reinstatement was to terminate upon MSHA's finding of "no discrimination." Furthermore, Circuit Courts have found that "upon the Secretary's determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement." *N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744-46 (6th Cir. 2012) ("it is difficult to understand why Congress would favor reinstatement after the Secretary has found the miner's complaint to lack merit") (Sutton, J., concurring); *see also Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012) (holding that a finding of "no discrimination" terminates temporary economic reinstatement because of "the unambiguous language of [§ 105(c)]") In spite of MSHA's "no discrimination" finding, Hildreth argues that the Secretary should be Ordered to represent him in prosecution of his § 105(c)(3) complaint. *See Resp. to Mot. for Appropriate Relief*, 3, dated Apr. 15, 2013. Compelling the Secretary to represent Hildreth is not an available remedy.

Hildreth's right to temporary economic reinstatement terminated on January 16, 2013 by operation of law pursuant to the above precedent and the terms of Amended Consent Order.

C. Hildreth Was Unjustly Enriched By His Continued Receipt Of Temporary Economic Reinstatement Payments After He Knew That Temporary Economic Reinstatement Terminated On January 16, 2013

In *North Fork*, the Commission denied a mine operator's motion to stay pending appeal by holding that a miner can not be compelled to reimburse a mine operator for temporary economic reinstatement that the miner *rightfully* received in compliance with a valid consent order. *N. Fork Coal Corp.*, 33 FMSHRC 589, 597 (Mar. 2011) (repayment of reinstatement "would run counter to the very spirit of [§ 105(c)(2)], which is to provide immediate relief to complaining miners while they wait for their cases to be decided"), *rev'd on other grounds*, 691 F. 3d 735, 744 (6th Cir. 2012). In that case, the mine operator did not pay the miner by mistake in contravention of the consent order, or under circumstances where the Secretary and the Complainant both knew that the right to temporary economic reinstatement had terminated. *Id.* Accordingly, the Commission was clear that repayment of the mine operator for economic reinstatement rightfully received is not an appropriate remedy under the Mine Act. *Id.*

But the situation in *North Fork* is distinct from the issue in this case. Here, Hildreth was paid more than he was rightfully entitled under the Amended Consent Order and thus became unjustly enriched. Furthermore, Respondent makes no similar claim that Hildreth must repay the

⁵(...continued)
discrimination". *See* 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). The preamble explained "that the deletion leaves open for litigation . . . whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under § 105(c)(3)." *Phillips v. A&S Constr. Co.*, 31 FMSHRC 975, 986 n. 11. (Sept. 2009); *see also* Rule 45(g).

value of the temporary economic reinstatement Hildreth rightfully received for work between January 14-16, 2013.

In light of these distinctions, I find the following rule governing unjust enrichment by mistake to be especially compelling: “[p]ayment by mistake gives payor a claim in restitution against the recipient to the extent payment was not due.” Restatement (Third) of Restitution & Unjust Enrichment § 6 (2011) (emphasis added). Liability in restitution for payment not due is commonly challenged by interposing the “change of position” defense. That defense may reduce a recipient’s liability in restitution for mistaken payments “[i]f receipt of a benefit has led a recipient *without notice* to change position in a manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient’s liability in restitution is to that extent reduced.” Restatement (Third) of Restitution & Unjust Enrichment § 65 (2011) (emphasis added). This defense, however, is not available to a recipient of mistaken payment that was notified that payment was no longer due and accordingly knew or had reason to know he was being unjustly enriched by receipt of subsequent payments after such notice. *See* Restatement (Third) of Restitution & Unjust Enrichment § 69 (2011) (defining the phrase “without notice”).

In this case, Hildreth’s right to temporary economic reinstatement terminated on January 16, 2013. Respondent continued Hildreth’s temporary economic reinstatement after January 16, 2013 based on the mistaken belief that MSHA had not yet issued a “no discrimination” finding. Therefore, Respondent has a strong case for restitution from Hildreth for economic reinstatement paid to after January 16, 2013. *See* Restatement § 6.

Since Hildreth signed the Joint Motion that I granted through the Amended Consent Order, he manifested assent to the terms of the Joint Motion. *See Paterson v. Reeves*, 304 F.2d 950, 951 (D.C. Cir. 1962) (per curiam) (“[o]ne who signs a contract which he had an opportunity to read and understand is bound by its provisions”); *see also Simon v. Circle Assoc., Inc.*, 753 A.2d 1006, 1012 (D.C. 2000) (holding that courts must look to objective manifestations of assent when assessing settlement agreements). Accordingly, Hildreth is held to the provision within the Joint Motion stating that his right to economic reinstatement terminates upon MSHA’s “no discrimination” finding. Once Hildreth received MSHA’s finding of “no discrimination,” he was on notice that he was not entitled to economic reinstatement after January 16, 2013.

Moreover, on a March 7, 2013 conference call with the undersigned, the Secretary stated that he told Hildreth that the proposed Joint Motion entitled Hildreth to economic reinstatement, from January 14, 2013 until the date of the “no discrimination” finding on January 16, 2013. Therefore, Hildreth was on notice that his economic reinstatement terminated on January 16, 2013, well before Hildreth received the first economic reinstatement payment made by Respondent on February 8, 2013. *See Resp’t Mot. For Appropriate Relief*, 4.

Hildreth also had reason to recognize the payments that he received and spent greatly exceeded the amount of payment he would have expected to receive in three days. Hildreth had experience working for and being paid by Respondent. Hildreth’s completion of the

Discrimination Complaint Form 2000-123 verifies his detailed knowledge of those payment terms. Thus, I find that Hildreth knew that he was receiving more than three days worth of economic reinstatement pay from Respondent.

In sum, Hildreth was uniquely positioned among the parties to *know* each factor relevant to reach the conclusion that he was not entitled to temporary economic reinstatement after January 16, 2013. Since Hildreth *knew* of the factors causing his own unjust enrichment as a result of the overpayment, he was on notice.

Therefore, Hildreth is ineligible for the defense of change of position.⁶ *See* Restatement § 65. Hildreth's ineligibility for the defense is illustrated by the following example:

Licensee continues to pay royalties to Patentee following expiration of the licensed patent. Patentee, a charitable trust, uses its royalty to support medical research. When facts come to light, Licensee sues Patentee to recover the amount of its excess payments under section 6 [payment by mistake]. Patentee interposes a defense of change of position, offering to prove that the receipt of additional royalties led it to make additional expenditures in its charitable endeavors. The court finds that the Patentee knew that its patent had expired; knowledge of this fact constituted notice that the post-expiration royalties were being made by mistake. Patentee is not entitled to defense of change of position.

Restatement (Third) of Restitution & Unjust Enrichment, § 65 cmt. f, illus. 21 (2011).

D. The Value of Hildreth's Unjust Enrichment
Recoverable in Restitution is \$4,739.97

Respondent claims that Hildreth owes Respondent a total of \$6,830.86. *Resp't Mot. For Appropriate Relief* at 6. That figure was formulated based on the belief that Hildreth should pay the entirety of Respondent's "out of pocket" expenses caused by the payment of economic reinstatement after January 16, 2013, regardless of Hildreth's enrichment by those expenditures. That methodology, however, erroneously inflates the value of Hildreth's actual restitution. Hildreth never gained possession of the taxes withheld, nor did he derive any value greater than

⁶ The sloppy handling of this case by MSHA and the Secretary gives me great pause. Hildreth's unjust enrichment was caused as much by the absence of adequate communication from MSHA and the Secretary to Respondent and its counsel, as it was by Hildreth's knowing receipt of overpayment. This failure of communication was exacerbated by the Secretary's assumption that MSHA correctly sent Respondent the January 16, 2013 "no discrimination" letter. Due to such negligence, Respondent entered into the Amended Consent Order without notice that Hildreth's economic reinstatement had already expired.

that of any citizen taxpayer from the mistaken tax withholdings Respondent made after January 16, 2013. Moreover, Respondent may only recover mistaken taxes from the party enriched by the mistaken tax payments. *See* Restatement (Third) of Restitution and Unjust Enrichment § 19 (2011) (discussing restitution of tax payments made by mistake). Since Hildreth wasn't enriched by the tax payments, Respondent can't recover those taxes from him.

Hildreth's actual unjust enrichment between January 17, 2013 and February 13, 2013 is calculated by subtracting from the total value of economic reinstatement (\$8,327.68): 1) the total tax withheld between January 14, 2013 and February 13, 2013 (\$2,255.49); 2) the value of benefits Hildreth rightfully received during the temporary reinstatement (\$454.20); and 3) the amount of take home pay Hildreth rightfully received during the temporary reinstatement (\$878.02). The resulting figure, \$4,739.97, is Hildreth's liability in restitution for unjust enrichment.

III. Order

In light of the forgoing, it is ORDERED that I maintain jurisdiction over the temporary reinstatement proceeding pursuant to § 2700.45(e)(4) pending resolution of the underlying discrimination case in Docket No. WEST 2013-548-DM set for hearing on August 12, 2013 in Anchorage, Alaska.

It is further ORDERED that if Hildreth prevails in his underlying discrimination claim entitling him to a remedy in his favor, including settlement, the value of his back pay remedy shall be offset in restitution by \$4,739.97, the value of Hildreth's unjust enrichment.⁷

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

⁷ Should Hildreth fail to prevail in the underlying discrimination case, I will then decide whether restitution to Respondent of \$4,739.97 remains appropriate after reviewing all relevant factors.

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/TCP

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 9, 2013

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2012-161-DM
Petitioner,	:	NE MD 2012-01
	:	
and	:	
	:	
DAVID QUACH,	:	
Complainant	:	Mine: Portable Pioneer Plant
	:	Mine ID. 17-00584
	:	
v.	:	
	:	
FERRAIOLO CONSTRUCTION, INC.	:	
AND JOHN FERRAIOLO,	:	
INDIVIDUALLY,	:	
Respondents	:	

ORDER

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (2000) (“the Mine Act” or “the Act”).

On July 19, 2013, the Secretary of Labor (“Secretary”) filed a Motion to Amend the Complaint to add John Ferraiolo as a Respondent in his individual capacity. On July 26, 2013 the Respondent, Ferraiolo Construction, Inc., filed an Objection to Petitioner’s Motion to Amend Complaint. For the reasons set forth below, the Secretary’s motion is granted.

The Procedural Rules provide that the Commission’s judges shall be guided by the Federal Rules of Civil Procedure “[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act.” 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be “freely given when justice so requires.” Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, “especially when... they do not prejudice a party in preparing its defenses.” *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (2009) (ALJ).

The Secretary moved to amend the complaint to add John Ferraiolo as an individual-respondent on two grounds. First, the Secretary argues that John Ferraiolo violated Section 105(c) of the Act because he is a “person” who terminated David Quach. 30 U.S.C. § 815(c)(1). In its response to the Secretary’s motion, the Respondent does not dispute this argument.

The Mine Act prohibits a “person” from discharging, discriminating, or otherwise interfering with the exercise of the statutory rights of any miner. 30 U.S.C. § 815(c)(1). Section 3(f) of the Mine Act defines a “person” as “any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.” 30 U.S.C. § 802(f).

John Ferraiolo is a “person” under the Mine Act because he is an “individual.” Thus, he is prohibited from “discharging, discriminating, or otherwise interfering” with the statutory rights of the Complainant. John Ferraiolo admitted to discharging Mr. Quach during discovery. Respondent’s Responses to Sec’y of Labor’s First Request for Admissions 6.

While it is not common, individuals have been charged and penalized in discrimination complaints before the Commission and ALJs. *Sec’y of Labor on behalf of Knotts v. Tanglewood Energy, Inc., Fern Cove, Inc., Randy Burke and Randall Key*, 19 FMSHRC 833 (May 1997) remanded to 19 FMSHRC 1291 (July 1997) (ALJ Koutras); *Wagner v. Pittston Coal Group, Clinchfield Coal Company, Jack Crawford, Monroe West, Wayne Fields and Ann McLaughlin, Sec’y of Labor, Gerald Sloce and Kenneth Howard*, 12 FMSHRC 1178 (1990); *Sec’y of Labor on behalf of Bowling v. Perry Transport, Inc., Stevie Caldwell, Trucking, Inc., and Stevie Caldwell*, 15 FMSHRC 836 (1993) (ALJ).

Second, the Secretary argues that John Ferraiolo should be added as a Respondent because there is a risk that he is transferring corporate funds into his personal bank accounts leaving the Complainant without a remedy. On March 21, 2013, a Superior Court Judge found, upon ex parte motion by the Bank of Maine, that there was “a clear danger” that John Ferraiolo would remove or conceal his property in order to make it unavailable to satisfy a claim brought by the Bank of Maine. *Bank of Maine v. Ferraiolo*, No. RE-13-9 (Maine Sup. Ct. Mar. 21, 2013). In light of the Superior Court’s ruling, I have concerns about Mr. Ferraiolo’s financial propriety. Should the Complainant be successful on the merits, any monetary award or penalty would have to be sought through the Bankruptcy Court by the creditor. However, if the allegations that Mr. Ferraiolo is improperly transferring funds are true, then the Complainant may be left without a remedy he may be entitled to.

The Respondents argue they will be prejudiced because they will have to conduct additional discovery, which they argue will add additional expense and will delay the hearing.

The Commission has stated “[m]ere allegations of potential prejudice or inherent prejudice should be rejected,” and a Respondent must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1993 (2012); *PBS Coals*, 2013 WL 3152306 at *16 (May 2013). The Commission has given examples of actual

prejudice, which include the inability of witnesses to appear at hearing or “lateness so great as to unduly delay a hearing.” *Long Branch Energy*, 34 FMSHRC 1984, 1992 (2012).

I do not find the Respondents’ arguments persuasive. The Respondent has not demonstrated that witnesses will be unable to appear at the hearing or that the hearing will have to be delayed. The hearing is set three months from now. The theory under which John Ferraiolo is charged involves the same factual basis as the theory under which the company is charged- there is nothing additional that John Ferraiolo must defend against. Additionally, because the hearing is three months away, there is ample time to conduct additional discovery should the Respondent deem it necessary. The argument that they will incur additional costs of litigation while in bankruptcy is not a concern of this Court. The Act seeks to protect the rights of miners first and foremost. Any personal expense John Ferraiolo incurs will not be a factor in denying the Complainant’s rights should I find he has been discriminated against by the Respondents. Therefore, I find that Respondents will not be prejudiced by the addition of John Ferraiolo as a Respondent.

Any prejudice the Respondent may believe it will incur by this Order is far outweighed by the rights of the Complainant under Section 105(c) of the Act.

WHEREFORE, the Secretary’s Motion to Amend the Complaint is **GRANTED**. The Amended Complaint submitted by the Secretary shall be deemed filed as of the date of this Order. The Respondent, John Ferraiolo, shall have 30 days for file his Answer.

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

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August 19, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT	:	
OF LABOR, MINE SAFETY AND	:	DOCKET NO. VA 2010-564
HEALTH ADMINISTRATION (MSHA),	:	A.C. No. 44-04856-228677-02
Petitioner	:	
	:	
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	Mine Name: Buchanan Mine #1
Respondent	:	

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

The Secretary's representative has filed a Motion for Decision and Proposed Order Approving Settlement.¹ For the reasons which follow, the Motion is DENIED. The Motion proposes a 35% overall reduction from the originally proposed assessment.² That percentage decrease is not, per se, the problem.³ Instead, it is the lack of adequate justification for the reductions.

As the Commission observed in *Secretary v. Black Beauty Coal*, 2012 WL 4026640, 34 FMSHRC 1856, (August 12, 2012) ("*Black Beauty*"), "[t]he plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty. Section 110(k) provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or

¹ The Secretary's Representative in this instance is a Conference and Litigation Representative ("CLR").

² The originally assessed total amount was \$42,035.00 and the proposed settlement was for \$27,243.00.

³ As the Court has stated before, as a rule of thumb, the greater the decrease in the penalty from the proposed assessment, the greater the amount of information which needs to be supplied to support the reduction.

settled except with the approval of the Commission."*1861, 30 U.S.C. § 820(k). Thus, section 110(k) unambiguously sets forth the Commission's exclusive authority to approve the compromise, mitigation or settlement of a penalty after it has been contested.

The legislative history of section 110(k) explains that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement. The Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny.... Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

Black Beauty at 1861, quoting from S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632 (1978) ("Legis. Hist.").

Congress intended that the settlement of a penalty be open to scrutiny in order to better serve the purpose of civil penalties, that is, to encourage operators' compliance with mandatory standards." The Senate report provided:

The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

Id. at 633.

The Commission went on to explain that "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest, Congress authorized the Commission to approve the settlement of civil penalties. The Senate report explains: To remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission.... By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will*

assure that the public interest is adequately protected before approval of any reduction in penalties. Id. (emphasis added). To carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest.” *Black Beauty* at *1861-1862.

Thus, at its core, the Commission and its judges, acting as a sentinel, must be able to discern the basis for a proposed reduction as opposed to being presented with a mere assertion such as that there are “legitimate questions of fact.” Without being presented with at least rudimentary details about the nature of such facts, the Court cannot independently review the basis for the reduction. To accept mere unadorned assertions would turn the review exercise into a procedural formality and therefore, ultimately, an empty review.

In the present matter, the Motion itself provides no supporting information to justify the reduction; it is entirely summary in nature. Instead, it is draft order which accompanied the motion, that attempts to provide justification for the proposed reductions. Therefore, this Order will turn to the particulars in the draft order.

The draft order first refers to “Citation No. 8176813 [requesting that it] be modified from "50" to "5" Persons Affected in that all persons inby the cited condition would not be expected to receive injury because the sections use split ventilation system.” A 30% reduction was proposed. The citation, which listed the matter as “S&S” and of “moderate negligence,” stated that “[t]his mine uses belt air to ventilate the working sections therefore all miners inby this condition are exposed to the hazards associated with belt fires.” The deficiency is that more detail is needed to explain the basis for concluding that only 5, not 50, persons would be affected.

Next, the draft Order “requests that Citation No. 8176578 be modified from "Moderate" to "Low" in that the electrical cable is examined on a weekly basis and the damage could have occurred between exams.” A 30% reduction was proposed here too. The citation notes that the cables for the bonder were “damaged and the copper wires are visible 1 inch from the battery plug on the bonder.” The Inspector marked the violation as “S&S” and of moderate negligence. The Court would note that, typically, a cable will have an outer and inner jacket before bare wires are exposed. If that is true here that would tend to diminish the claim that the condition could have occurred in between the weekly examination. This is especially true where there is no information as to when the last weekly exam occurred here. More information is needed for the Court to appreciate the basis for the requested reduction.

For the next citation, “the CLR requests that Citation No. 8176581 be vacated because the mere presence of methane does not constitute a violation,” citing *Secretary of Labor (MSHA) v. RBK Construction, Inc.*, 15 FMSHRC 2099 (October 1993). While the Secretary can elect to vacate a citation, without providing any reason for that decision, the problem here is that the Secretary proceeded to state that the basis for that action is that “the mere presence of methane does not constitute a violation.” The justification appears to conflict with the citation, in that it informs that excessive methane was detected in the No. 1 heading on an active section and that

the ventilation methods employed did not keep the methane below 1%. Instead the methane ranged from 1.2% to 1.95 % across the face. The Citation also stated that the 1.95% methane was detected 5 feet from the right rib and 1 foot from the face and 1 foot from the roof and that the methane has been detected above 1% on several occasions involving the ventilation tubing. The problem with the motion is that the cited standard, 30 C.F.R. 75.323(b)(1)(ii), addresses “Actions for excessive methane.” It provides that when 1 percent or more of methane is present in a working place or an intake air course, “changes or adjustments shall be made at once to the ventilation system to reduce the concentrations of methane to less than 1.0 percent.” Thus, the standard does not talk in terms of the “mere presence of methane.” Instead it directs action occur where, as here, methane is at or above 1 percent.

Accordingly, as the Secretary has provided the basis for its action to vacate and that basis is a nullity for this standard, the Secretary’s action to vacate must be rejected.

Next, the “CLR also request[ed] that Citation No. 8176727 be reduced in penalty due to legitimate questions of fact regarding the level of negligence attributable to the operator, [and for that reason] the parties agreed to a reduction in the proposed civil penalty. A 25% reduction was sought. This is simply an unadorned assertion. There is nothing offered for the Court to appreciate exactly what are the “legitimate questions of fact regarding the level of negligence attributable to the operator.” On the other hand, the citation itself informs that the incombustible content of the rockdust was not being maintained to the “not less 65%” requirement, that this mine is on a 5 day spot inspection due to its very large methane liberation levels, and that the mine has experienced “a number of face ignitions.” Such an empty submission cannot be approved.

For Citation No. 8176728 and the request that it “be vacated because the mere presence of methane does not constitute a violation,”⁴ the same problem exists as in Citation No. 8176581, *supra*, namely that in attempting to vacate it, the Secretary has said too much by revealing an illegitimate basis for such an action. The cited standard, the same standard and section cited in Citation No. 8176581, is not about the “mere presence of methane.” Rather, it is about having methane content below 1% and there is no claim disputing the Citation’s assertion about that. On its face, the identified basis in the submission for vacating the Citation is inappropriate. Given the expressly stated basis in the submission, which basis is now part of the history of this alleged violation, doubts about the legitimacy of vacating this Citation would be created if the Secretary now were simply to announce that it has elected to vacate the matter.

Moving to Citation No. 8176818, the Secretary’s representative seeks to have the negligence modified from "Moderate" to "Low," on the basis that the section foreman was unaware that the gas tests were not made in accordance with the ventilation plan. Instead of the checks occurring, per the plan, every 10 minutes, at least double that time was elapsing between

⁴ The same case is cited for the authority to vacate: *Secretary of Labor (MSHA) v. RBK Construction, Inc.*, 15 FMSHRC 2099 (October 1993).

the checks in this high methane liberation mine. A 30% reduction from the proposed penalty amount is sought. The offered basis is difficult to understand. There is no mention in the citation, or in its action to terminate, about the foreman's knowledge, nor how that should impact the penalty. There is nothing offered in terms of whether the foreman, reasonably, should have had knowledge of the insufficient checks.⁵ In abating the citation, it was the miner operator who received a safety talk; there was no allusion to the foreman's state of knowledge. The issuing Inspector also modified his citation, noting that when it was considered along with two other citations for methane, as noted above, and another citation for a methane monitor not "operating properly," the confluence of those matters caused him to list the gravity as "reasonably likely" that a methane ignition would occur. Accordingly, absent a reevaluation of the settlement amount proposed, more supporting information is needed for the Court to appreciate the basis for the lowered penalty.

For Citation No. 7342623, the motion offers the entirely unilluminating statement that a 30% reduction in the penalty is supported by "legitimate questions of fact regarding the level of negligence attributable to the operator ..." The motion offers no additional information, beyond that assertion, to illuminate the particular "legitimate questions of fact." Accordingly, the motion fails to provide the minimum level of information for the Court to assess the legitimacy of the assertion that there are such legitimate questions.

Regarding Citation No. 8176734, the motion seeks a modification of the Citation, from "Permanently Disabling" to "Lost Workdays or Restricted Duty" in that a Permanently Disabling injury is not likely to develop from a missing latch on the dust collector door," with a 25% reduction in the proposed penalty resulting from that change. Although the issuing Inspector listed the alleged violation as non-S&S and the injury or illness unlikely, he did mark it as "permanently disabling." This focus of the cited provision, 30 C.F.R. 72.630(b), appears to be health related and therefore the concern may have been about the insidious effects of exposure to airborne contaminants. A different review process is applied when evaluating risks where impacts on health are being evaluated. For these reasons, more information is needed to properly assess the settlement motion beyond the sterile assertion that "a missing latch on [a] dust collector door" is not likely to result in a Permanently Disabling injury."

For Citation No. 8176582, the CLR seeks to have the citation modified from "11" persons affected to "5" in that the section uses split ventilation which would only affect one side of the section. As with the motion's justification for Citation No. 8176813, *supra*, more detail is needed to explain the basis for concluding that only 5, not 11, persons would be affected. An additional, significant, problem is that the citation is not even listed among the settled citations listing the original, proposed assessment, and the "Settlement Amount." It is listed at \$873.00 on Exhibit A for Docket VA 2010-564, but it disappears from the list of settlement amounts. It then appears in the proposed "Ordered" section of the draft order, seeking a 30%

⁵ See, for example, *Sec. v. Highland Mining*, 2013 WL 1856603, *3 March 13, 2013.

reduction from the proposal to \$611.00. This raises an additional issue as to whether the total proposed settlement amount is correct.

Addressing Citation No. 8176583, the motion seeks to vacate this citation with the same basis advanced for Citation No. 8176728. As with the latter, this effort to vacate says too much, revealing a legally inadequate basis to take that step. The citation, citing the same standard listed for Citation No. 8176728, is unrelated to the motion's assertion that the "mere presence of methane does not constitute a violation." The problems identified in the discussion, *supra*, for Citation No. 8176728, are incorporated for this matter. Having presented an irrelevant and deficient basis to vacate this citation, it would seem that here too the Secretary cannot now simply announce, without elaboration, that it is vacating this matter, without creating a cloud as to the legitimacy of such a decision.

In the case of Citation No. 8176735 for which the motion seeks a modification "from '10' persons affected to '5' in that not all persons on the section would be expected receive injury from the cited condition because the sections utilize split ventilation," more information is needed, as explained *supra* for Citation Nos. 8176582 and 8176813. It is noted that the issuing Inspector denominated this citation as "S&S," and with moderate negligence, a facially understandable assertion, given that the Inspector stated that he found a barrel of a roller broken, spinning on its shaft, and "very hot to the touch," presenting a fire hazard with continued normal mining operations.

For Citation No. 8176736, in which the motion seeks a modification from moderate to low negligence on the basis that the cited stopping is only examined on a weekly basis, the motion should inform when the last such exam occurred. It is noted that the citation asserts that cinder blocks were missing and that there were problems with two stoppings.

With respect to Citation No. 8176737, in which the Secretary seeks to vacate the citation, the motion runs into the same deficiency as the others, as described *supra*. See, Citation Nos. 8176581, 8176728, and 8176583. Although the Secretary could have simply announced that it was vacating the citation, having put forward an invalid basis to vacate, it is no longer in that posture, and must either provide for a settlement amount or advance a valid basis to vacate the citation or litigate the matter.

Here, the CLR requests that Citation No. 8176738 be modified from "Moderate" to "Low" in that the electrical cable is examined on a weekly basis and the damage could have occurred between exams. Given the rather stark information in the Citation, including that multiple damaged areas were found and that miners crawl over the top of the damaged cable to access the tailgate, that abating the condition involved applying 10 feet of jacket wrap and that the Inspector listed the matter as "S&S," more information is needed, including the date of the last weekly exam.

The proposed reduction for Citation No. 8176739 is similarly difficult to fathom. The CLR has requested that it be modified from “ ‘5’ to ‘1’ persons affected in that only one person would be using the fire extinguisher,” but as the cited fire extinguisher had no pressure gauge and was completely empty, the point is not simply that a miner would be trying to put out a fire with a useless extinguisher, but that others at the 13 right longwall headgate could be affected.

Although the circumstances raise questions about whether a pre-operational check would have found and corrected the problem cited by the Inspector for Citation No 6631196, at least this proposed reduction does advance a factual basis for the 40 % reduction, by stating “that the machine had just been returned to service and not examined.” The problem with that rationale is that the Inspector noted that the pre-operational check had not yet occurred and the proposed assessment was made with knowledge of that circumstance.⁶ Further, with oil alleged to be leaking directly on the engine’s exhaust, this does not appear to be a negligible matter. Given that the tram had just been returned from the repair shop and then had been lowered to the shaft bottom and was awaiting supplies, which it was then to deliver, it seems at least questionable that, upon receiving the supplies that it was about to transport, a pre-operational check would have stopped all that intended activity and the tram would have been returned to the shop for further repairs. Thus, with the misgivings identified, the proposed settlement for this Citation is accepted. Of course, as nearly all of the citations in this docket have inadequate explanations for the proposed reductions, perhaps this citation will be revisited during the review.

Regarding Citation No. 6631198, here too, because the Court is not in the business of second guessing the factual basis presented, but rather in determining if a demonstrable basis has been presented, and not merely an assertion or conclusion, this proposed settlement is accepted.

In this instance, pertaining to Citation No. 8176584, the CLR requested a 30% reduction from the proposed penalty through modification of the negligence from "Moderate" to "Low" negligence and by modifying the persons affected from "5" to "1." The motion asserts that the “condition was not obvious, and the sections utilize split ventilation,” to justify the reduction. The Citation makes no mention that the matter was not obvious and it presented a serious problem in that a roof bolt which was hot to the touch was found “hung in the scraper” and there was a 12 inch pile of coal under the scraper with dry float coal dust on top of the pile. The Inspector marked the violation as “S&S”, with moderate negligence. As with other proposed reductions in this motion, there is no explanation how the split ventilation reduces the number of

⁶ The Court’s review responsibility is to determine if there is a factual basis presented to justify a proposed reduction, as opposed to a mere conclusory assertion. Thus, the role is not to second guess the basis or the amount of the proposed reduction but rather to see if there is any factual basis presented. Typically, in motions which pass muster, a settlement will present something along the lines that the mine operator has presented evidence tending to show certain facts supporting its claimed basis for a reduction, with such facts articulated in the motion. The Secretary will then typically respond that, while it does not concede such claims, it recognizes that legitimate questions of fact exist and that such disputed facts justify the proposed reduction.

persons affected down to "1." Presumably the Inspector was aware of the ventilation system employed when he marked the number affected as "5." More information is needed.

Moving to Citation No. 8176585, the motion seeks to have the Citation modified from reasonably likely to unlikely and from "S&S" to "Non S&S," on the basis that the section equipment is equipped with protective cabs. It would seem that the issuing Inspector was aware that coal haulers and shuttle cars would have protective cabs, if that is true with regard to both of these types of equipment. Yet, the Inspector concluded that the operators of such equipment would be at risk. Further, the Citation alludes to foot travel at the location of this hazard: roof bolts extending out from the rib by 18, 21 and 32 inches from the rib. Protective cabs offer no protection for those traveling on foot. Accordingly, more information is needed to properly consider the 40% reduction proposed by the Secretary.

The lack of necessary information is plain with regard to Citation No. 8176587, for which the Secretary seeks a 30% reduction. This Citation is another that may be considered "missing in action," as it is not listed in the settlement amount table but surfaces in the Order portion of the proposed draft, where the settlement amount is listed at \$144.00. Consultation with file reveals that the \$207 was the amount originally proposed. The motion advises that the reduction is justified "due to legitimate questions of fact regarding the level of negligence attributable to the operator." The deficiency is that this is a mere averment which provides the Court with no objective basis to review the legitimacy of the proposed reduction. As such, it must be rejected.

For Citation No. 7318190, another matter for which a 30% reduction is sought, the basis advanced for the reduction, from \$1,111.00 to \$777.00, in its entirety, is that the citation "be modified from 'Moderate' to 'Low' negligence in that the section foreman was unaware of the condition." The Court is unaware that the lack of awareness on the part of the section foreman is a basis for reducing a proposed penalty by 30%. The Citation reveals that the amount of required air was 40% less than the required minimum amount and that no ventilation had been disturbed when the reading was taken. There is no indication in the file concerning the foreman's knowledge, or lack thereof, of the insufficient ventilation for this citation which was marked as "S&S" and presenting moderate negligence. Lack of knowledge on the part of a supervisor, in some circumstances, can be viewed as an aggravating, not a mitigating circumstance. *Eagle Energy*, 2001 WL 1631431, (Dec. 2001). Whether a foreman should have known of a condition is a relevant consideration.

By now, it should be apparent that the motion routinely failed to provide sufficient information for the Court or the Commission to carry out its responsibility under section 110(k) of the Mine Act. This chronic shortcoming continued with Citation No. 8176823, which avers that the citation "be modified from '8' to '4' persons affected in that not all the persons on the section would reasonably be expected to receive injury from the cited condition," to support the proposed 30% reduction. It is hard to fathom the basis for this unilluminated claim, especially when one appreciates that the cited provision pertains to lifelines which were entangled with other cable, a condition requiring escaping miners to release the lifeline at that location. The

Citation adds that 8 miners were working in by the break where the violation was detected. The motion offers no information to support the claim that the miners affected were half the number listed in the Citation. The lifeline had to be relocated to abate the Citation. Obviously, this proposed reduction does not provide a basis for the Court to conclude that the decrease in the assessment is warranted.

For Citation No. 8176742, requesting that it be modified from "Moderate" to "Low" negligence on the basis that the section foreman was unaware that the area had not been cleaned and rock dusted, the same deficiencies noted in Citation No. 7318190 are present here. In this instance the rock dust was not being maintained to 80% incombustible content. Float coal dust up to 4 inches in depth was found in two stretches and the areas had to be scooped, shoveled and bulk rock dusted to abate the conditions.

Citation No. 8176824 involving accumulations of loose coal and coal dust, seeks a 30% reduction from the proposed penalty "due to legitimate questions of fact regarding the level of negligence attributable to the operator." Those "legitimate questions of fact" are not disclosed and the issuing inspector only listed the negligence as "moderate." This would mean that the negligence was "low," but again the Court is provided with no information to understand the basis for that "low negligence" conclusion.

For Citation No. 8176743, the motion repeats the same verbiage presented in Citation No. 8176824, next above, that the reduction is warranted "due to legitimate questions of fact regarding the level of negligence attributable to the operator." The Court responds with same reaction expressed in Citation 8176824. The motion is deficient for the same reason.

The Court can only surmise that, by this point in the motion, the representative was sapped of energy as the next 4 citations addressed in the motion simply present the same, inadequate, explanation for the proposed reductions for Citations Nos. 8176826, 8176744, 8176845 and 8176846. Each of those repeat the refrain that there were "legitimate questions of fact regarding the level of negligence attributable to the operator." Each of the 4 offer nothing more and consequently, these are also fatally insufficient. Except for a break for Citation No. 8176747, which is discussed below, Citation Nos. 6631200 and 8176830 pick up with the mantra that the sought-after reduction is supported "due to legitimate questions of fact regarding the level of negligence attributable to the operator." As with each of these, nothing is presented beyond the plain claim that such undisclosed "legitimate questions of fact" exist. Accordingly, none of these meet the required level of information to support the proposed reductions.

In the last of the Citations within this docket, No. 8176747, seeks a 40% reduction from the proposed assessment resulting from modifying the negligence from "Moderate" to "Low," and from reducing the persons affected from 9 to 1. The justification offered is that "the machine is only examined on a weekly basis and only the equipment operator would receive injury from this condition." Involved was a 12 volt DC battery on a manbus that was not secured, a subject of the cited standard, 30 CFR 75.1910(j). What is unexplained in the motion is the basis for the assertion that only one person would be affected. The location of the

unsecured battery on the manbus and the relative proximity between the battery and the operator and riders needs to be disclosed. As with other instances in this motion, the date of the most recent weekly exam should be disclosed, along with information, if any, from the issuing inspector's notes as to the length of time the battery had been unsecured.

Accordingly, for the reasons set forth, the Secretary's Motion to Approve Settlement is DENIED. The Motion fails to provide sufficient information for the Court to carry out its review responsibilities under section 110(k) and the insufficient submission highlights, once again, the importance of the Commission's statutory role to ensure that no proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission. It is hoped that, prior to re-submitting the motion with the required additional information, rather than reflexively and defensively maintaining that all proposed settlements were appropriate as originally submitted, each citation will be reviewed anew to determine if any of the proposed amounts need to be adjusted.

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

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August 29, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-157
Petitioner	:	A.C. No. 15-18316-236334-01 5RG
	:	
v.	:	Docket No. KENT 2011-158
	:	A.C. No. 15-18316-236334-02 5RG
BLACK ENERGY, INC.,	:	
Respondent	:	
	:	Mine: White Star No. 1

**ORDER DENYING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

Before: Judge McCarthy

These cases are before me upon two petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act”). Black Energy, Inc. has filed a motion for summary decision seeking to vacate the order and citations in these cases for lack of jurisdiction. The Secretary opposes the motion, but has agreed to vacate Citation No. 7447652. Therefore, Citation Nos. 7447646, 7447648, 7447650, 7447656, 7447660, 8234034, 8234027, and 8234032 and Order No. 8234030 still remain in dispute. For the reasons set forth below, the motion is denied.¹

¹ References to Black Energy’s Motion for Summary Decision, Reply in Support of Motion for Summary Decision and Supplemental Memorandum in Support of Motion for Summary Decision are abbreviated as “R. Mot.,” “R. Rep.,” and “R. Memo.,” respectively. References to the Secretary’s Response to Respondent’s Motion for Summary Decision and Supplemental Response to Respondent’s Motion for Summary Decision are abbreviated as “P. Resp.,” and “P. Supp.,” respectively. Exhibits attached to Respondent’s and the Secretary’s filings are designated as “R. Ex.” and “P. Ex.,” respectively.

I. Factual Background

Black Energy supplies miners to underground coal mines and possesses a MSHA contractor identification number. P. Ex. 4, 7 at 31.² It provides contract payroll services (e.g., accepting job applications and checking training records) and conducts drug testing on its miners, both as a condition of employment and randomly after hiring. R. Mot. at 3; P. Ex. 7 at 20–21. Black Energy also prescribes rules for its employees to follow when reporting workplace accidents. P. Ex. 9A–9E.

On August 28, 2009, Black Energy entered into a contract with White Star Mining to provide miners at the White Star #1 underground coal mine. R. Ex. 2. The contract provides, in relevant part, that:

BLACK ENERGY, INC. hereby proposes to *provide workers* to WHITE STAR MINING on a contract basis. BLACK ENERGY, INC. [a]cknowledges that the workers are employees of BLACK ENERGY, INC. and that they are responsible for the payment of all payroll taxes, unemployment insurance, and workers' compensation.

R. Ex. 2 (emphasis added).

On August 31, 2010, MSHA inspector Matthew Prewitt and his supervisor James Haggard issued seven citations to both White Star and Black Energy. On September 15, 2010, Prewitt issued an additional three citations and one order to each entity. R. Mot. at 2.

Subsequently, on September 15, 2010, Black Energy entered into another contract with White Star to “provide workers.” That contract included the following provision: “[s]aid mine is responsible to pay for all foreman, electricians, and owners, and agrees to direct the entire workforce.” R. Ex. 2. Black Energy claims that it added this provision at MSHA’s insistence. R. Supp. at 5 (citing P. Ex. 7 at 38–39).³

² Black Energy’s website states:

We are a Mining Contractor that supplies labor to underground coal mine[s]. We offer a large selection of labor to help run the day to day workings of a mine. If you need a miner for a day or an extended period of time give us a call [and] one of our friendly staff will be glad to help with pricing.

P. Ex. 4.

³ Black Energy states that it “bowed” to MSHA’s demands on how to conduct its business by adding this language to its contracts. R. Supp. at 5; *see also* R. Ex. 2.

II. Principles Of Law

Under Commission Rule 67, a motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material facts, and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) (“[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law.”). When considering a motion for summary decision, the judge must draw all “justifiable inferences” from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision “upon proper showings of the lack of a genuine, triable issue of material fact.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

III. Discussion

The issue under review is whether Black Energy is an operator as defined by section 3(d) of the Mine Act. 30 U.S.C. § 802(d). Section 3(d) defines an “operator” as “any owner, lessee or other person who operates, controls, or supervises a . . . mine *or* any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d) (emphasis added).⁴ The parties dispute whether control or supervision is needed to consider an independent contractor an operator for purposes of section 3(d), and to what extent Black Energy had actual supervisory control over its miners at the White Star mine.

Black Energy argues that liability under the Mine Act is dependent upon a contractor having control or supervision. R. Mot. at 6. Black Energy further contends that it is a “labor contractor” that had no supervisory control at the mine site, and therefore cannot be liable under the Mine Act because its activities do not satisfy the definition of “operator.” *See, e.g.*, R. Mot. at 4; R. Supp. at 3–4.⁵ Black Energy states that its “only function was to provide payroll services.” R. Supp. at 9.

The Secretary rejects Black Energy’s contention that control is needed to impose liability on an entity as an operator under the Mine Act, and that Black Energy is an “independent

⁴ The plain language of section 3(d) of the Act indicates that “or” should be interpreted disjunctively. 30 U.S.C. § 802(d); *see* 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2012) (“Generally, courts presume that ‘or’ is used in a statute disjunctively unless there is clear legislative intent to the contrary.”).

⁵ Black Energy states that it resolved any uncertainty that it was not an operator by modifying the language in its clients’ contracts to appease MSHA. R. Supp. at 4-5 (citing P. Ex. 4 at 38-39).

contractor” within the plain language of section 3(d) of the Act. P. Supp. at 2–3, 5. The Secretary contends that the plain language of section 3(d) indicates that “any” independent contractor, irrespective of its amount of control, is an operator under the Mine Act. P. Supp. at 3–4 (citing *Otis Elevator Co. v. Sec’y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990)). In the alternative, the Secretary argues that should an element of control be required for an independent contractor to satisfy the Act’s statutory definition of “operator,” then the facts establish that Black Energy had some control over its miners. P. Supp. at 5. Accordingly, the Secretary maintains that there are genuine issues of material fact regarding whether Black Energy can be cited under the Mine Act for violations committed by its miners who work in coal mines; the actual working relationship and contractual relationship between Black Energy and White Star; and Black Energy’s acknowledgment that it provides a “large selection of labor” and can provide a miner for a day or an extended period of time. P. Resp. at 2.

The Commission has stated that “[b]ecause the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of “operator” must be resolved on a case-by-case basis.” *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999). Accordingly, when reviewing the Secretary’s decision to designate an entity, in this case Black Energy, as an operator under the Mine Act, the Commission must determine, based on the totality of the circumstances, whether the cited entity has a “substantial involvement” with the mine. *Id.* This involves reviewing and evaluating *all* forms of participation and involvement by the entity in the mine’s engineering, financial, production, personnel, and health and safety matters, with no single factor controlling. *Id.* (emphasis added). Hence, the issue is not one of control or supervision, but rather the scope of services performed by the entity alleged to be an operator, or more specifically an independent contractor, under section 3(d) of the Mine Act.⁶

Black Energy concedes that it provides “contractor services.” R. Supp. at 7. To ascertain whether a cited entity is an independent contractor requires focusing on the nature of the relationship between the mine and the alleged contractor. *See, e.g., N. Illinois Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 848–49 (7th Cir. 2002) (reasoning that because the cited entity performed minimal activity at the mine, its conduct could not be construed as performing services at the mine); *Joy Techs., Inc. v. Sec’y of Labor*, 99 F.3d 991, 1000 (10th Cir. 1996) (finding that Joy was an operator under the Mine Act because it sent a service representative onto the mine property to carry out his job and perform services for the mine); *Otis Elevator*, 921 F.2d at 1291 (concluding that the cited entity was an operator under the Act because it was contracted to perform services at mines); *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 97 (4th Cir. 1985) (concluding that Congress’ intent was only to include independent contractors

⁶ An “independent contractor” is “any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 C.F.R. § 45.2(c); *but see Old Dominion*, 772 F.2d at 97 (finding the regulation’s definition of “independent contractor” not controlling due to congressional intent and previous interpretation of the Act’s definition of “operator”).

engaged in mine construction or the extraction process within the definition of “operator” in section 3(d)). There is an important distinction between sending one’s employees into the mine to perform contracted services, and de minimis activities, like making deliveries to designated areas. *N. Illinois Steel Supply Co.*, 294 F.3d at 848–49 (distinguishing the case from *Otis Elevator* and *Joy Techs.* based on whether the cited entity’s employees went into the mine or below ground) (citing *Joy Techs.*, 99 F.3d at 994; *Otis Elevator*, 921 F.2d at 1287).

The Commission has set forth a two-pronged test to determine whether an independent contractor comes within the definition of “operator” under section 3(d) of the Mine Act. *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989) (Otis I) and *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989) (Otis II), *aff’d Otis Elevator Co. v. FMSHRC*, 921 F.2d 1285 (D.C. Cir. 1990). First, the Commission examines the entity’s proximity to the extraction process and whether its work is “sufficiently related” to that process. *Otis I*, 11 FMSHRC at 1902. Second, the Commission examines “the extent of [the entity’s] presence at the mine.” *Id.* As part of the second prong of this test, the Commission has looked to whether the entity’s contact with the mine is de minimis. *Id.* at 1900–01.

Consequently, the Commission focuses “on the actual relationships between the parties, and is not confined by the terms of their contracts.” *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991). While the parties’ contractual relationship evidences the parties’ actual working relationship, the existence of a contract and its terms is not dispositive of whether a party falls within the scope of section 3(d) of the Act. *Id.* Finally, it is worth mentioning that the Commission’s jurisprudence has left unresolved whether liability without fault can be assigned to an independent contractor. *See Ames Const., Inc. v. FMSHRC*, 676 F.3d 1109, 1111 (D.C. Cir. 2012) (“But we need not decide here whether liability without fault could ever be assigned to an operator satisfying only the second part of [section] 3(d).”).

Based on this precedent, I conclude that a genuine issue of law exists regarding whether the Secretary must establish that Black Energy had to exercise control or supervision before being subject to Mine Act jurisdiction. Accordingly, summary decision is not appropriate as a matter of law.

Regarding the nature of services performed by Black Energy at the White Star mine, Black Energy maintains that it only provided payroll services. R. Supp. at 9. It did, however, require employee notification of workplace injuries and it conducted drug testing on employees that could result in termination. P. Supp. 5. Accordingly, I further find that there are genuine issues of material fact in dispute regarding Black Energy’s participation and involvement with White Star’s mining personnel, and whether its activities were solely limited to payroll services. *Accord Berwind*, 21 FMSHRC at 1293 (listing factors).

In addition, the contract between Black Energy and White Star states that Black Energy will “provide workers” to White Star. R. Ex. 2. There is no mention that Black Energy’s contractual services are limited to payroll services. While Black Energy maintains that it only provided payroll services (R. Supp. at 9), the Secretary contends that there are issues involving

both the actual working relationship and contractual relationship between White Star and Black Energy. P. Resp. at 2; *see also Bulk Transp.*, 13 FMSHRC at 1358 n.2 (stating that the Commission must look at the actual working relationship between the contracting parties, not just their contract).

On this record, I find that there is a material issue of fact regarding the meaning of the phrase “provide workers” within the actual working relationship of the parties under the two contracts executed by Black Energy and White Star. This is especially true in light of Black Energy’s contention that its contractual modification purportedly altered its contractual relationship with White Star in a way that changed its liability under the Mine Act.

In sum, I find that genuine issues of material fact and law exist concerning Black Energy’s status as an operator under section 3(d) of the Mine Act. The determination of whether Black Energy is an operator for purposes of section 3(d) of the Mine Act requires that additional evidence be fully developed at a hearing. If it is determined that Black Energy is an operator under the Act, then the issue regarding the validity of the citations and order must be resolved at trial. Accordingly, I find that Black Energy has failed to establish its entitlement to summary decision under Commission Rule 67.

IV. Order

Black Energy’s Motion for Summary Decision is **DENIED**. A conference call will be scheduled shortly to set this matter for hearing.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2013

SIGNATURE MINING SERVICES, LLC,	:	EQUAL ACCESS TO JUSTICE
	:	PROCEEDING
Applicant	:	
	:	
v.	:	Docket No. EAJ 2012-02
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Coalburg No. 1
Respondent	:	Mine ID: 46-09082:

DECISION and ORDER

Before: Judge McCarthy

The case is before me is on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. § 504). Signature Mining Services, LLC filed its application against the Secretary of Labor’s Mine Safety and Health Administration based upon a negotiated settlement that the parties reached in the underlying contest proceedings.

I. Factual Background

On August 25, 2011, adverse roof and rib conditions developed at the Coalburg No. 1 Mine at the 003 MMU-2 East Panel, a retreat mining section. Order No. 8139507; Signature App. at 1-2. These conditions initially affected several entries on the right side of the section along and inby the last open crosscut. Order No. 8139507. After MSHA inspectors observed pillars taking weight on the 2 East Panel, MSHA issued imminent danger Order No. 8139507 pursuant to Section 107(a) of the Act. Order No. 8139507; Sec’y Answer at 3. This order covered the #6 and #8 entries along and inby the last open crosscut. Order No. 8139507.

Signature and the Secretary both represent that the conditions began to spread from the mouth of the 2 East Panel to the Mains. Signature App. at 3; Sec’y Answer at 3. In response to this development, Signature began withdrawing miners from the affected area, removing equipment, endangering off the affected area, and setting Heintzman jacks along the roadway at break 15 along the Mains, which was outby the area affected by the adverse roof conditions. Richmond Dep. 30:9-31:10; Canterbury Dep. 11:21-12:13; Mackowiak Dep. 60:11-14, 65:2-5, 66:14-15; 75:11-19. At 1:30 a.m. on August 27, 2011, the Coalburg No. 1 foreman reported that the pillars at the mouth of the 2 East Panel were taking weight. Richmond Dep. 18:21-19:8. Randel Richmond, Signature’s President, was then informed by his representatives that the ground failure had migrated into the Mains. Richmond Dep. 19:6-21:8. Before 10 a.m., Richmond spoke with Terry Price, MSHA’s Field Office Supervisor, and John Kinder, a representative of the West Virginia Miner’s Health, Safety, and Training, to inform them about

the adverse ground conditions. Richmond Dep. 30:20-32:2. Richmond told Price that Signature had stopped production and pulled out all its miners still working in the area. Richmond Dep. 30:22-31:3. He also provided Price with assurances that Signature had taken steps to monitor and correct the conditions. Richmond Dep. 31:5-10, 36:14-22.

Approximately fifteen minutes later, Joe Mckowiak, MSHA Assistant District Manager, called Frank Canterbury, a mine foreman at Signature, to further inquire about the adverse conditions. Mackowiak Dep. 57:8-12. Canterbury informed Mackowiak that the ground failure had migrated into the Mains and that men were underground setting jacks to prevent further migration of the adverse ground conditions. Mackowiak Dep. 73:22-74:20, 97:3-13. Mackowiak was also told that an abandoned mine existed 75 feet below the Coalburg No. 1, the ventilation controls had been crushed, and the water sumps had gone dry. Order No. 8126005; Mackowiak Dep. 81:16-82:19. The subsidence led Mackowiak to conclude that the pillar failures and ground conditions created regional instability. Mackowiak Dep 92:14-94:8. As a result, Mackowiak orally issued imminent danger Order No. 8126005 pursuant to Section 107(a) of the Act over the phone. Mackowiak Dep. 87:12-14. He also emphasized that the situation was so dangerous that everyone ought to be withdrawn, without exception. Mackowiak Dep. 99:16-19, 103:2-5.

After issuing Order No. 8126005 orally, Mackowiak contacted Price about dispatching inspectors to Coalburg No. 1 to reduce the Order to writing. Mackowiak Dep. 87:21-88:11. Mackowiak then spoke with Price and faxed him instructions to issue the imminent danger order with “[n]o exceptions,” which meant that no one was allowed to be in the mine site. Mackowiak Dep. 102:8-15; Price Dep. 54:10-20, dated Nov. 8, 2011. When Price and James Jackson, another MSHA employee, arrived at Coalburg No. 1, they reduced the Order to writing. Price Dep. 56:19-57:4. At the time they arrived at the mine, fourteen men were underground. Price Dep. 60:22-61:6. Although none of these individuals were involved in running coal, Price and Jackson did not conduct any further investigation as to the reason why these men had been underground. Price Dep. 60:7-15. Price then provided further instruction that the entire mine site was to be closed and no one was to be permitted underground without first receiving MSHA’s approval. Price Dep. 62:14-18, 63:4-64:8; *see* Richmond Dep. 36:15-20, 38:16-39:1. Price and Jackson did not travel underground to further examine the adverse conditions. Price Dep. 64:14-65:5.

On August 29, 2011, MSHA inspectors, Signature personnel, and Alpha Engineering traveled underground to observe the adverse conditions and check to see if the ground failure event had stopped. Richmond Dep. 40:23-41:13. Their inspection revealed that it was primarily the 2 East Panel and approximately ten crosscuts inby break 15 that had been affected by the roof and rib conditions. *See* Appl. For Fees and Other Expenses, at 3, dated Jan. 6, 2012. Mackowiak heard pillars breaking and continued to express concern that the ground failure posed a regional threat given the conditions of the underlying mine. Mackowiak Dep. 141:22-144:17. As a result, the imminent danger order remained in effect for the entire mine site. Order No. 8126005; *see* Mackowiak Dep. 140:7-21. Signature filed a Notice of Contest to Order No. 8126005.

On August 30, 2011, MSHA issued withdrawal Order No. 7257539 pursuant to Section 103(k) of the Act. Order No. 7257539. In this Order, MSHA alleged that “coal and floor rock outburst accident” had occurred and all mining activities inby had been disrupted. *Id.* The order covered the entire mine due to hazards presented by the crushed ventilation controls and the instability of the mine pillars. *Id.* MSHA claims that the agency was still unsure of the extent of damage at the Coalburg mine site or the need to conduct an accident investigation. Sec’y Answer at 4. On August 31, 2011, Signature filed a Notice of Contest to Order No. 7257539.

II. Procedural Background

Six days before the scheduled hearing of the contest proceedings, the parties entered into settlement negotiations. On December 2, 2011, the Secretary of Labor, MSHA, and Signature filed a “Joint Motion to Continue” in which the parties presented the terms of settlement reached with respect to the two Section 107(a) imminent danger orders and the Section 103(k) withdrawal order. *Jt. Mot. to Continue* at 3-4. With respect to the Section 107(a) imminent danger orders, Signature agreed to withdraw its Notice of Contest to Order No. 8139507 in exchange for MSHA’s promise to vacate Order No. 8126005. *See Jt. Mot. to Continue*, at 3. While negotiations on Order No. 7257539 were still ongoing at the time the Joint Motion was filed, MSHA had agreed to narrow the area of the mine affected by Order No. 7257539 and to approve Signature’s ventilation plan. *Jt. Mot. to Continue, Ex. 2.* On December 5, 2011, the undersigned granted the parties’ Joint Motion to Continue. *Order Granting Continuance.*

On December 16, 2011, the undersigned granted Signature’s motion to partially withdraw its Notice of Contest to Order No. 8139507. My Order also noted that the Secretary had promised to vacate Order No. 8126005 and directed the matter to be addressed in either a subsequent settlement motion or during the hearing. On January 4, 2012, I granted the Secretary’s motion to vacate Order No. 8126005.

On January 20, 2012, Signature filed a motion to dismiss its Notice of Contest to Order No. 7257539. By Order dated January 26, 2012, I granted Signature’s motion.

III. Disposition and Analysis

A. Prevailing Party Status

1. Legal Background

The Supreme Court has rejected the “catalyst theory” as a basis for achieving “prevailing party” status, which had previously enabled a plaintiff to prevail if he achieved any favorable change in a defendant’s conduct in the course of litigation. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001). To be a prevailing party, the Court determined that a plaintiff must be “awarded some relief by the court,” which results in a “material alteration of the legal relationship of the parties’ necessary to permit an award.” *Id.* (internal citations omitted). In holding that consent decrees constitute such judicial relief, the Court distinguished consent decrees from private settlements and stated, “[p]rivate settlements

do not entail the judicial approval and oversight involved in consent decrees. . . unless the terms of the agreement are incorporated into the order of dismissal.” *Id.* at 604, n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). While *Buckhannon* dealt with the question of prevailing party status under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA), courts have consistently applied its rationale to the EAJA. *See USA Cleaning Serv. & Bldg. Maint.* (“USA Cleaning”), 33 FMSHRC 2264, 2268, (Sept. 2011), (ALJ).¹

Although the Supreme Court held that consent decrees are sufficient to satisfy the prevailing party requirement, courts have differed in the way they examine settlement agreements lacking a formal consent decree designation. Notably, the Fourth Circuit developed a functional approach for assessing such settlement agreements. *See Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002). The court resisted the idea that *Buckhannon* set out a formalistic rule and stated, “[w]here a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court’s approval and the attendant judicial oversight . . . may be equally apparent.” *Id.* A settlement agreement under these circumstances “may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs.” *light3Id.* The majority of Circuit Courts of Appeal have adopted a similar approach.²

The Eastern District Court of Virginia has held that a voluntary dismissal with prejudice is sufficient to confer prevailing party status. *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 495, 509, 512 (E.D. Va. 2006). Significantly, the court held that the decision to grant voluntary dismissal under Rule 41(a)(2) of the Federal Rule of Civil Procedure “is committed to the discretion of the district court.” *Id.* at 508. Although the court’s holding was limited to voluntary dismissals with prejudice, the court indicated that other conditions imposed on Rule 41(a)(2) dismissals can confer prevailing party status. *Id.* at 511, n.15. (“In many cases, conditions short of a dismissal with prejudice may be sufficient to confer prevailing party

¹ This decision was upheld by the Seventh Circuit after the Commission declined to review the case. *Jeroski v. FMSHRC*, 697 F.3d 651, 655 (7th Cir. 2012) (“The Court’s approach in *Buckhannon* supports the position that eight circuits have taken with respect to the meaning of ‘prevailing party,’ and we bow to this heavy weight of authority.”).

² *See, e.g., Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009); *Perez v. Westchester Cnty. Dep’t of Corr.*, 587 F.3d 143, 151-52 (2d Cir. 2009); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Am. Disability Ass’n, Inc. v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 166 (3rd Cir. 2002); *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006) (determining that the “touchstone” for the “prevailing party” requirement is whether there was a “material alteration of parties’ legal relationship” arising from “an enforceable judgment . . . or comparable relief through a consent decree or settlement.” (citations omitted); *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134, n.5 (9th Cir. 2002) (determining that a party prevailed after obtaining a settlement agreement that is legally enforceable); *but see Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (holding that a party can only prevail if it receives either an enforceable judgment on the merits or a formal consent decree).

status.”). The court went on to suggest that the central factor in assessing conditions imposed on voluntary dismissal is the “nature of the terms and conditions that district courts can impose” *Id.*

Another influential opinion comes from the Seventh Circuit, which also held that a voluntary dismissal with prejudice made a movant a prevailing party. *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) (applying prevailing party to the FHA fee shifting scene in accordance with the principles set forth in *Buckhannon*). Most notably, the court determined, “[t]he critical fact is not what prompted the district court to act; it is instead what the district court decided to do.” *Id.* at 719. Therefore, consistent with *Samsung* and *Claiborne*, I find that the level of discretion a court exercises, rather than a merits determination, is most relevant for purposes of the prevailing party inquiry.

Courts have also applied *Buckhannon* to fee-shifting provisions in the context of administrative proceedings. Because *Buckhannon* refers to “judicial action,” courts have determined that *Buckhannon*’s principles cannot be applied literally when differentiating between “purely *administrative* . . . proceedings that give rise to a plaintiff’s ‘prevailing party’ status” since doing so would prevent fee-shifting provisions from being applied to administrative proceedings. *A. R. Ex rel R.V. v. N.Y.C. Dep’t of Educ.*, 407 F.3d 65, 76 (2d Cir. 2005). For example, the Second Circuit recognized that the Individuals with Disabilities Education Act’s (IDEA) fee-shifting provision required the court to “give effect to the IDEA’s intent to permit awards to winning parties in administrative proceedings even where there has been no judicial involvement.” *Id.* As a result, the Second Circuit concluded that the combination of an adjudicative official’s exercise of administrative imprimatur, a change in the legal relationship of the parties arising from such exercise of discretion, and subsequent judicial enforceability conferred prevailing party status on an IDEA plaintiff. *Id.* In applying these three criteria to settlements achieved in the course of administrative proceedings, the court determined that a party is entitled to “prevailing party status” where they achieve the “administrative analog of a consent decree.” *Id.* at 77. The Third Circuit has also adopted this approach. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 854 (3d Cir. 2006).

For the implementation of the EAJA in Commission proceedings, “[a]n eligible party may receive an award when it prevails over MSHA, unless the Secretary of Labor’s position in the proceeding was substantially justified or special circumstances make an award unjust.” 29 C.F.R. § 2704.103(a). Applicable adversary adjudications include, “[c]ontests of citations or orders issued under section 104 or 107 of the Mine Act (30 U.S.C. 814, 817).” 29 C.F.R. § 2704.103(a)(1).

In applying the standard set out in *Buckhannon*, the Commission’s rules require the undersigned to “give effect” to the EAJA’s intent to permit the award of attorney’s fees to parties’ that “prevail” in the course of Commission proceedings. *See A.R.*, 407 F.3d at 77; *P.N.*, 442 F.3d at 854. The purposes underlying the administration of the Mine Act thereby support adoption of the functional approach set out in *Smyth* to examine settlement agreements reached in the course of contest proceedings. 282 F.3d at 281.

Parties in contest proceedings may present the terms of a settlement arrangement to a judge though a motion. In deciding whether to approve the motion, a judge may decide to substantively review the terms of the settlement agreement. Where a judge provides such review, exercises discretion in granting the parties' motion, and incorporates the reasons set forth by the parties in their motion into an administrative order, the parties' "obligation to comply" with the terms of settlement is made part of the administrative order. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. at 381; *Smyth*, 282 F.3d at 281. In this way, the judge's "oversight" and "approval" becomes the basis for which the parties will carry out the terms of their settlement. *See Buckhannon*, 532 U.S. at 604, n.7. Additionally, the issuance of the order reveals a change in the legal relationship between parties arising from the exercise of a judge's administrative imprimatur and further permits parties to have their agreement subsequently enforced. *See A.R.*, 407 F.3d at 77; *P.N.*, 442 F.3d at 854. In determining whether a judge has afforded an EAJA plaintiff adequate administrative relief, the "critical fact" becomes the level of discretion a judge exercises in permitting parties to carry out the finalized terms of a settlement. *See Claiborne*, 414 F.3d at 719; *Samsung*, 440 F.Supp.2d at 511 n.15.

Therefore, an EAJA plaintiff achieves the functional equivalent of a consent decree in Commission proceedings where a judge substantively reviews settlement terms presented by parties in the underlying proceeding and conditions the issuance of a dispositive order on the parties' decision to be bound by the terms of the settlement agreement.

2. The Parties' Arguments

The Secretary argues that Signature is not a prevailing party because *Claiborne* requires a voluntary dismissal with prejudice. Sec'y Resp. to Signature's Reply, at 3, dated May 31, 2012. Because there was no such judgment, the Secretary claims that the dismissal of Order No. 8126005 and Order No. 7257539 amounted to "judicial housekeeping." Sec'y Resp. to Signature's Reply, at 4. The Secretary also contends that the settlement negotiations were distinct from any court order or judicial pronouncement. *Id.*

In response, Signature argues that the dismissal of Order No. 8126005 and Order No. 7257539 resulted in a court-ordered change in the parties' legal relationship. Signature's Answer in Opp'n, at 2, filed April 23, 2012. While Signature admits that the Secretary has discretion to vacate Order No. 8126005, it argues that the dismissal order resolved all issues relating to the August 2011 incident, deprived the Commission of its jurisdiction to consider any related citations or orders,³ and precluded the Secretary from pursuing any other 107(a) Orders. *Id.* Signature also claims that the undersigned had discretion to approve Signature's motion to Withdraw its Notice of Contest to Order No. 7257539, and such approval was necessary to end the parties' litigation. *Id.* at 3.

³ The Commission's discretion to retain jurisdiction and grant declaratory relief after the Secretary has vacated an enforcement action need not be addressed in the case at bar. Signature did not seek declaratory relief or request additional relief following the dismissal of Order No. 8126005. *See Sec'y v. N. Am. Drillers, LLC*, 34 FMSHRC 352, 357 (Feb. 2012).

3. Analysis of Parties' Settlement Negotiations

While the parties only examine the dismissal orders related to Order No. 8126005 and Order No. 7257539, the undersigned examines the totality of circumstances in the underlying proceeding consistent with the functional approach in *Smyth*. Accordingly, I begin with analyzing the parties' Joint Motion to Continue.

With respect to the 107(a) Orders, the Joint Motion stated, "Signature *will* withdrawal (sic) its contest of Order No. 8139507. . . MSHA *will* vacate Order No. 8126005 issued August 27, 2011." Joint Mot. To Continue at 3 (emphasis added). The use of the word "*will*" indicates that Signature and the Secretary reached a final agreement and decided to be bound by the terms set forth in the Joint Motion. This language is particularly notable since the discretion to vacate an order is vested in the Secretary. *RBK Constr. Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993). By presenting a *quid pro quo* styled arrangement in finalized terms, the parties apprised the Commission as to the fundamental bargain agreed to in resolving the 107(a) Orders.

With respect to the 103(k) Orders, the Joint Motion states, "[t]he parties *anticipate* that Signature will complete the work required by the plan in approximately three weeks. The parties will report the *progress* of these negotiations on December 21, 2011." Joint Mot. To Continue at 7 (emphasis added). Although the Joint Motion presented an attached version of Signature's ventilation plan and evidence that the Secretary had narrowed the scope of the area affected by Order No. 7257539, the language that the parties used indicates that the negotiations were still ongoing at the time the Joint Motion was filed.

When presented with the parties' Motion to Continue impending litigation, I had discretion to approve the Joint Motion. Under Commission Rule 55, the undersigned possesses broad administrative discretion to dispose of procedural requests or similar matters and make decisions in the underlying proceeding. 29 C.F.R. § 2700.55. In issuing an Order Granting Continuance, I exercised administrative discretion. The Order states, "[t]he Court hereby **GRANTS** the parties' Joint Motion to Continue *for the reasons set forth in the motion*" (emphasis added). The "reasons set forth in the motion" include the final terms of settlement reached on the 107(a) Orders and the parties' intention to settle the 103(k) Order.

Looking next at the dismissal order granting Signature's Motion to Partially Withdraw its Notice of Contest to Order No. 8139507, my administrative approval was required for Signature to execute its side of the bargain. Commission Rule 11 states that "[a] party may withdraw a pleading at any stage of a proceeding *with the approval* of the Judge or the Commission." 29 C.F.R. §2700.11. In this way, I had the administrative discretion to alter the parties' legal posture and substantively review the terms of Signature's Motion to Partially Withdraw its Notice of Contest.

In deciding to grant this Motion, I incorporated the parties' settlement terms into a dispositive order. Signature's Motion directly refers to the agreement the parties reached on the 107(a) Orders. Pl. Mot. to Partially Withdraw Notice of Contest, at 4. Signature moved for leave to Partially Withdraw its Notice of Contest based on this agreement, noting that the Secretary had promised and agreed to vacate Order No. 8126005 in exchange. Pl. Mot. to Partially Withdraw Notice of Contest, at 5-6. Central to my decision to grant Signature's motion was my endorsement of the parties' settlement arrangement. The Order Granting Respondent's

Motion to Partially Withdraw its Notice of Contest states, “The court hereby **GRANTS** the Contestant’s Motion to Partially Withdraw Notice of Contest in that docket *for the reasons set forth in the motion.*” Order Granting Resp’t. Mot. to Partially Withdraw Notice of Contest (emphasis added). The Order reveals that I actually examined the terms of agreement and conditioned my approval on these terms, which in turn made the parties’ settlement part of my dispositive order. *See Smyth*, 282 F.3d at 280-81.

My Order also imposed an additional condition on the parties’ settlement arrangement. The Order states, “[t]he Motion also notes that the Secretary has agreed to vacate Order No. 8126005. . . That matter *should be addressed* in any subsequent settlement motion or hearing in Docket No. WEVA 2011-2346R.” Order Granting Resp’t. Mot. to Partially Withdraw Notice of Contest (emphasis added). In directing the Secretary to address his promise to vacate Order No. 8126005, the parties were mutually obligated to comply with the terms of the negotiated settlement. Furthermore, this Order provided Signature with a means through which it could have its settlement arrangement judicially enforced. The incorporation of settlement terms and the imposition of conditions requiring the parties to address their obligation to comply with the agreement amounted to administrative relief.

Having granted Signature relief on the 107(a) Orders, my Order granting Signature’s Motion to Partially Withdraw its Notice of Contest to Order No. 8139507 materially altered the legal relationship between the parties. The undersigned set the terms of dismissal, afforded Signature the benefit of its bargain, indicated that the parties were obligated to comply with the terms of settlement, and provided Signature with a basis for subsequent administrative review and judicial enforceability. In satisfying the three criteria set out in *A.R.* and *P.N.*, Signature achieved the administrative equivalent of a consent decree sufficient to confer “prevailing party” in status. *A.R.*, 407 F.3d at 76; *P.N.*, 442 F.3d at 854.

The Secretary’s insistence that a dismissal with prejudice is required misconstrues the standard set forth in *Claiborne*. Although the court in *Claiborne* held that a merits determination had been rendered, the court did not address the issue of a court imposing conditions short of dismissal with prejudice. This issue was the precise question left open in *Samsung*, where the court indicated that the proper focus in analyzing a voluntary dismissal is “the *nature of the terms and conditions* that district courts *can impose.*” *Samsung*, 440 F. Supp. 2d at 511, n. 15 (emphasis added). In concluding that “conditions short of a dismissal with prejudice may be sufficient” under *Buckhannon*, *Samsung* shows that the determining factor is the court’s exercise of discretion. *Id.* Although I did not dismiss the case with prejudice, I exercised sufficient judicial imprimatur when I incorporated the terms of settlement into a dispositive administrative Order and required the Secretary to address its obligation to comply with the terms of the negotiated settlement. Because these terms of agreement were entered into the administrative Order, the agreement became “embodied” into the dispositive Order. *See Smyth*, 282 F.3d at 280-81.

It should also be noted that the Secretary’s discretion to vacate an order does not cast doubt on this analysis. As the dismissal order in Docket No. WEVA 2011-2300-R indicates, “the Secretary’s discretion to vacate a citation or order is not subject to review.” Order Granting Mot. to Withdraw Contest. Nevertheless, the exchanging of terms relating to the underlying 107(a) orders deals with a distinct issue: *the obligation* of the Secretary to vacate an order *once*

the Secretary has already exercised his discretion and determined to be bound by the parties' settlement terms. Although the Secretary is correct that the dismissal order following the Secretary's decision to vacate Order No. 8126005 was a procedural formality, Signature had already obtained administrative relief in the form of a favorable quid pro quo arrangement stamped with the undersigned's administrative "approval and oversight." See Buckhannon, 532 U.S. at 604 n. 7.⁴ Therefore, the Secretary's discretion to vacate an order is distinguishable from the issue of whether the undersigned provided Signature with administrative relief and exercised administrative discretion in a way that brought about a material change in the parties' legal relationship.

Before examining the dismissal order granting Signature's motion to withdraw its Notice of Contest to Order No. 7257539, it should be noted that the Order Granting Continuance only approved of the parties' mutual decision to engage in settlement negotiations. While this Order permitted the parties to continue talks and report on the progress of settlement at a later date, the parties were not bound to participate in these negotiations, nor were they obligated to comply with any specific set of terms. Before the Joint Motion for Continuance was filed, the Secretary already narrowed the area covered under Order No. 7257539. Additionally, the Joint Motion did not indicate that the Secretary was required to modify the "Condition and Practice" section of Order No. 7257539. See Order Granting Continuance. Whether Signature would withdraw its Notice of Contest was dependent on the progress of the parties' negotiation. The Order Granting Continuance merely postponed trial so that they could further attempt to reach settlement. Such procedural relief does not amount to a consent decree or an exercise of judicial imprimatur sufficient to confer prevailing party status.

The dismissal Order Granting Signature's Motion to Withdraw its Notice of Contest to Order No. 7257539 further confirms that Signature failed to obtain administrative relief. In granting this motion, all the undersigned "decided to do" was grant Signature leave to withdraw its Notice of Contest and have the case dismissed. *Claiborne*, 414 F.3d at 719. Because the parties had never presented the undersigned with a finalized settlement arrangement, the dismissal order was silent on the content of the parties' agreement and the substance of the terms that the parties had reached. As a result, the terms that the parties reached could not be entered into as an order of the court.

⁴ Signature appears to confuse this point as well in arguing that "all issues relating to the August 2011 incident were resolved" and "the Secretary was precluded from pursuing any other 107(a) orders" once the Secretary vacated Order No. 8126005. Under *Buckhannon*, a party must show that it achieved "some relief" that results in a material change in the parties' legal relationship. *Buckhannon*, 532 U.S. at 603. *Claiborne* then clarifies that the "critical fact" is "what the district court decided to do." *Claiborne*, 414 F.3d at 719. Achieving a favorable outcome in the course of an underlying proceeding is distinct from achieving administrative relief that arose from a judge's exercise of administrative discretion. It was only upon receiving the administrative equivalent of a consent decree that Signature "prevailed." Had the Secretary decided to vacate the order as a result of private negotiations or its own internal review, the dismissal of Order No. 8126005 would merely return the parties to the legal position they held prior to these administrative proceedings. See *USA Cleaning*, 33 FMSHRC at 2268.

Finally, the Secretary's decision to modify the 103(k) Order had been secured before Signature filed its Motion to Withdraw its Notice of Contest to Order No. 7257539. While the prospect of Signature withdrawing its Notice of Contest likely enticed the Secretary to modify the Order, incentives and good litigation tactics do not amount to administrative relief arising from a judge's exercise of imprimatur. Without such relief, the Secretary's compliance with settlement of the 103(k) Order was completely voluntary. *Buckhannon* thus requires the undersigned to reject Signature's claim that it prevailed on the 103(k) Order, as a voluntary change in conduct of the sort encompassed by the "catalyst theory" cannot be a basis for achieving "prevailing party" status. *Buckhannon*, 532 U.S. at 605.

B. Substantial Justification

1. Legal Background

Under the EAJA, a prevailing party is entitled to an award of attorney's fees and expenses "unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make the award unjust." 29 C.F.R. § 2704.100. Therefore, a court must, "examine... the Government's litigation position and the conduct that led to litigation." *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986). The government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998)(quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The agency bears the burden of establishing that its view of the facts was reasonable. *Id.* at 967 (citing *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir.1992)).

An imminent danger exists whenever "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992). For an imminent danger order to be issued under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* The Secretary bears the burden of proving the reasonableness of the imminent danger order by a "preponderance of the evidence." *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993).

In assessing the actions of an inspector, a judge "must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority." *Wyoming Fuel*, 14 FMSHRC at 1291 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)). An inspector is considered to have abused his discretion "if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners." *Island Creek*, 15 FMSHRC at 345. The abuse of discretion standard also "includes errors of law." *See, e.g., Utah Power*, 13 FMSHRC 1617, 1623, n. 6 (Oct. 1991).

2. Validity of Order No. 8126005

Signature's contention that there was no imminent danger is without merit. Although Signature had withdrawn its miners from the affected area and took steps to mitigate the adverse conditions at the time it contacted MSHA, the adverse roof and rib conditions could reasonably be expected to place miners in immediate danger were "if normal mining operations were permitted to proceed" See *Wyoming Fuel Co.*, 14 FMSHRC at 1290. The ground failure establishes that there was an imminent danger.

Signature's contention that the issuance of an imminent danger order required MSHA to go underground to physically examine the adverse conditions must also be rejected. The Commission has "resisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose." *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987); see also *Clintwood Elkhorn Mining Co., Inc.*, 35 FMSHRC 365, 369 (Feb. 25, 2013). Although Signature argues that words "upon inspection or investigation" in Section 107(a) require MSHA to conduct a physical inspection, "common usage does not limit the meaning of 'inspection' to an observation of presently existing circumstances nor restrict the meaning of 'investigation' to an inquiry into past events." *Id.* at 1547-48. Rather, "[b]oth words can encompass an examination of present and past events and of existing and expired conditions and circumstances." *Id.* at 1548. Therefore, the meaning assigned to the words "investigation or inspection" depends on the particular provision within which it appears. See *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 55 (D.C. Cir. 1988) (finding that the Mine Act "resists . . . tidy construction" of the words "inspection" and "investigation").

With respect to an imminent danger order issued under Section 107(a), the critical fact is whether an inspector "finds that an imminent danger exists." 30 U.S.C.A. § 817(a). While this language indicates that an imminent danger order must address an existing danger, the word "finds" is "not confined to the mere accidental discovery of things but extends as well to detection by effort, analysis and study." *Emerald Mines Co.*, 863 F.2d at 55 (quoting *Nacco Mining Co.*, 9 FMSHRC at 1550). Therefore, so long as an inspector acquires a level of information sufficient to enable an imminent danger finding, off site contacts are a permissible method of "inspection or investigation."

Having collected information about the ground failure at Coalburg No. 1 through ongoing phone contacts with Signature, MSHA conducted an "investigation" consistent with Section 107(a). MSHA need not place its inspectors in the midst of imminent dangers at the time they occur, as doing so would undermine the provision's goal of correcting existing adverse conditions and ensuring the safety of individuals at an affected mine site.

To assess the scope of Order No. 8126005, the undersigned must evaluate the conduct of the inspectors that issued the Order and the validity of MSHA's decision to defend the Order in the underlying contest proceeding. While inspectors possess broad authority to issue an imminent danger order, Section 107(a) grants an operator a statutory right to maintain individuals in an adversely affected area for abatement purposes. Under Section 107(a), an inspector can issue an imminent danger order "to cause all persons, *except those referred to in Section 104(c) of this title*, to be withdrawn from, and to be prohibited from entering, such area .

...” 30 U.S.C.A. § 817(a) (emphasis added). Section 104(c) includes, “any person whose presence in such area is necessary, *in the judgment of the operator* or an authorized representative of the Secretary, to eliminate the condition described in the order.” 30 U.S.C.A. § 814(c)(1) (emphasis added). Because the 104(c) exception takes effect upon MSHA’s issuance of an imminent danger order, an operator may not be deprived of its statutory rights under 104(c). Therefore, MSHA cannot withdraw or inhibit persons an operator determines to be necessary for abatement efforts at a mine site affected by an imminent danger.

In his deposition, Mackowiak revealed that he intended to deprive Signature of its statutory rights under the 104(c) exception. Although he made brief reference to the Section 104(c) exception when he spoke to Canterbury, he mentioned the exception in passing and did not otherwise explain the provision. Mackowiak Dep. 99:16-19. He also emphasized his preference that everyone be withdrawn from the mine, without exception, despite being informed that production had been halted, all miners had been withdrawn, and Signature had only kept individuals underground to prevent the further spread of conditions. Mackowiak Dep. 101:9-10; 103:2-5. His deposition provides, in relevant part:

Q: So there was nothing to stop him from going in the mine, after 10:50 a.m. on August 27th, 2011?

A: The 107(a) imminent danger order as written probably led him to believe that no one could go in the underground coal mine.

Q: Well –

A: Which was my preference, absolutely, was my preference.

...

Q: Okay. You wrote the order to give the impression that nobody could go in; is that what you are saying?

A: Yeah, but not purposely ...

...

Q: When you sent Terry Price out to the mine, did you tell Terry Price when he issued this to explain that the company had the right to go in and abate the condition?

A: Absolutely not.

Q: And why did you make that obtuse?

A: I told Terry I didn't want anyone going in that underground mine at all. And in doing so I quite likely infringed upon 104(c).

Mackowiak Dep. 101:3-10, 101:15-18, 102:8-15.

Although the Secretary contends that Mackowiak equivocated as to whether he knowingly obscured the 104(c) exception, an inspector's motives are irrelevant. Sec'y Answer 4. Instead, the undersigned must examine "*the conduct* that led to litigation." *Fed. Election Comm'n v. Rose*, 806 F.2d at 1090 (emphasis added). Mackowiak's deposition establishes that he took concrete steps towards withdrawing all individuals from the Coalburg No. 1 – both in the way he designed the written order and in the way he gave instructions to Price. In acting to deprive Signature of its statutory rights, Mackowiak abused his discretion.

The way in which Price relayed Mackowiak's instructions to Signature is also of particular relevance in determining whether Signature was deprived of its statutory rights. In relevant part, Price's deposition states:

Q: Did you give any instructions or did you tell anyone at Signature that no one was allowed underground?

A: I think Joe already had and I probably confirmed it. I don't know – they had already pulled everybody out and it was understood."

...

Q: Okay. Does the operator need the government's permission to correct an imminent danger, when an imminent danger order has been issued?

A: I think if I've got it closed, yeah. Then I need to modify and allow him to do what he needs to do with the consultants or whoever is going to do whatever he is going to do.

Q: So in order to exercise his right under section 104 of the Act, to abate the imminent danger, the operator needs the Government's permission?

A: He needs a plan and I need to modify it to allow people in the mine. [My notes] now says, "No one in the mine."

Price Dep. 62:14-18, 63:21-64:8.

Price indicates that both he and Mackowiak gave direct instructions to Signature that it withdraw all persons from the mine site. Even after Signature had been required to close off the entire site, the company received further instructions that it was required to get approval from MSHA if it planned to send anyone underground to correct the adverse conditions. Such

instructions and contacts are in direct contravention of the 104(c) statutory exception prescribed by Congress. In prohibiting Signature from exercising its rights under the 104(c) exception, Price carried out an illegal order under Mackowiak's instruction. As a result, Order No. 8126005 was overbroad and amounted to an abuse of discretion.

Price's improper understanding of the 104(c) exception also confirms why he and Jackson did not conduct a further investigation at the time they arrived at the Coalburg No. 1. At the time Richmond contacted Price, Price was aware that production had been halted, all miners had been withdrawn, and Signature had taken steps to monitor the situation. Richmond Dep. 30:22-31:10. When Canterbury spoke with Mackowiak, Mackowiak was informed that men were kept underground to prevent the spread of the pillar failure. Mackowiak Dep. 75:11-16. Despite Signature's statutory right to keep individuals underground to abate the adverse ground conditions, Mackowiak indicated to Canterbury that these men should be withdrawn and directed Price that all persons were to be withdrawn from the area, without exception. Mackowiak Dep. 102:8-15; Price Dep. 54:7-20, 62:14-18. As a result, when Price arrived at Coalburg No. 1 and found fourteen of Signature's representatives still underground, he chose not to further investigate why Signature had kept individuals underground, directed Signature to withdraw these individuals, and further instructed Signature that it was required to get MSHA's approval before anyone was permitted to reenter the site. Price Dep. 60:16-61:11, 63:21-64:8. As a matter of law, Price was obligated to investigate whether the men remaining underground were involved in abatement efforts and abused his discretion when he placed additional requirements on Signature's ability to exercise its statutory rights.

This conclusion finds further support from Richmond's deposition. When Price and Jackson arrived at the Coalburg No. 1, Richmond expressed his desire to reenter the site to further investigate the adverse conditions. Richmond Dep. 35:23-36:7. Richmond also expressed his opposition to closing off the entire site to its representatives, explaining that Signature had halted production efforts, withdrew its miners from the affected area, monitored the progression of the situation, and taken steps to correct the conditions. Richmond Dep. 36:14-22, 38:14-39:1. Despite Richmond's objections, Price further advised Richmond to follow MSHA's instructions. R. Richmond Dep. 38:14-39:1. By failing to address Richmond's objections and advising Richmond to follow Mackowiak's improper instructions, Price transgressed the 104(c) exception.

On August 29, 2011, the facts also show that Richmond engaged in discussions with Mackowiak after returning from an underground inspection of the adverse conditions. With respect to these discussions, Richmond stated, "Rather than us send a plan over and them send it back a couple days later and having both agencies that *we needed to get approval from any rehab or recovery*, I was asking if we could draw up a plan and agree to have a meeting." Richmond

Dep. 45:4-8. It is no coincidence that Richmond, after receiving direct instructions from Price to this effect, shared Price's improper understanding of the 104(c) exception at the time the Order was issued.⁵

The text of Order No. 8126005 also reveals that MSHA's officials intended to circumvent the 104(c) exception. On August 27, 2011, Signature received a modification that reads, "This order is hereby modified *only* to allow the operator to travel approximately 2 breaks underground for the purpose of charging their mantrips." Order No. 8126005. (emphasis added). On August 31, 2011, Signature received an identical modification when it was permitted to travel 2 breaks underground under the supervision of a mine foreman. Order No. 8126005. The use of the word "only" is suggestive, as it confirms that Signature was only allowed to reenter the mine to take these trips, and could not exercise its statutory rights under the 104(c) exception. This conclusion finds additional support in Jackson's deposition, as it was Jackson who was responsible for drafting the order and drew up the modification to allow mantrips under Price's direction. Jackson Dep. 22:11-21, 24:4-7. Specifically, Jackson testified that the Order precluded all persons from entering the mine at the time he wrote and modified it. Jackson Dep. 28:11-23. These findings are further corroborated by Mackowiak's own admission that the written order was designed to give Signature the impression that no person was permitted to enter the mine. and by the fax that Price received indicating that the mine was to be closed off to all persons, with "no exceptions." Mackowiak Dep. 101:5-11; Price Dep. 54:16-20.

MSHA and its representatives may not issue imminent danger orders that seek to deprive an operator of its statutory rights under the 104(c) exception. As the Commission has held, "[w]hile safety must be the paramount concern, the extraordinary measure of shutting down a mine with a withdrawal order compels safeguards to ensure that an inspector's discretion is not abused." *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 556 (Aug. 2006). To ensure that MSHA inspectors do not abuse their discretion, I find that inspectors must be evenhanded in

⁵ It should be noted that Mackowiak and Richmond present contradictory accounts of the meeting they had after the underground inspection. While Mackowiak claims that Richmond only asked about recovering the affected equipment, Richmond claims that he had asked about setting up a meeting to establish a plan to recover equipment and rehabilitate the adverse conditions. Mackowiak Dep. 105:3-15, 109:1-4, 109:14-110:14; Richmond Dep. 45:21-46:13. Although it seems improbable that an experienced mine operator would not bring up the issue of rehabilitation following an underground inspection of an imminent danger (and the burden is on the Secretary to establish its view of the facts by a "preponderance of the evidence"), the facts still reveal that Mackowiak abused his discretion in the course of these conversations. Both accounts indicate that Richmond was primarily concerned with the length of time it would take Signature to get approval from MSHA in submitting a plan to reenter the mine. This is particularly significant because Price had relayed Mackowiak's instructions that no one could reenter the mine without MSHA's prior approval. Because Mackowiak was constructively aware that Signature had been provided improper instructions regarding its right to reenter the mine for abatement purposes, Mackowiak was required to inform Signature of its rights under the 104(c) exception. In failing to adequately address the operator's concerns and requests following the underground inspection, Mackowiak abused his discretion.

explaining the 107(a) statutory requirements. Although there is no affirmative duty to remind an operator of its statutory rights under the 104(c) exception, MSHA inspectors cannot mislead, misrepresent, or circumvent Section 107(a) statutory requirements.

Having examined the conduct that led to the litigation, the undersigned is required to examine “the Government’s litigation position.” *Fed. Election Comm’n v. Rose*, 806 F.2d at 1090. Despite the fact that the breadth of Order No. 8126005 was an abuse of discretion, MSHA set out to defend the validity of the Order in the underlying contest proceeding. Further, MSHA used its promise to vacate this overbroad Order as a bargaining chip in settlement negotiations with Signature. The Secretary’s decision to defend Order No. 8126005 was without merit and cannot be substantially justified.

The undersigned need not address the additional issue of whether Order No. 8126005 was overbroad in terms of the area affected.

V. Order

The Secretary has requested an evidentiary hearing on the adequacy of Signature’s balance sheet and on the issue of whether Signature is acting as a proxy for Patriot Coal Co. (“Patriot”). Although the Secretary’s arguments appear to be without merit as a matter of first impression, the Secretary has a right to request further proceedings. 29 C.F.R. 306(b).

Further proceedings shall address: 1) whether Signature’s balance sheet meets EAJA’s financial eligibility requirements; 2) whether Patriot controlled the underlying contest proceedings; and 3) the amount of attorney’s fees to which Signature is entitled to after prevailing on Order No. 8139507 and Order No. 8126005.

IT IS ORDERED that the parties advise the undersigned within fifteen days how they intend to proceed.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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