

**April 2016**

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**No petition was filed in which review was denied or granted during the month of April 2016.**

## **COMMISSION DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

April 27, 2016

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

v.

Docket Nos. KENT 2013-566  
KENT 2013-989

MAXXIM REBUILD COMPANY, LLC

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

## **DECISION**

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). At issue is whether the Administrative Law Judge correctly affirmed the Secretary of Labor’s assertion of jurisdiction by the Mine Safety and Health Administration (“MSHA”) over an equipment maintenance facility. For the reasons stated below, we affirm the Judge’s decisions.

### **I.**

#### **Factual and Procedural Background**

##### **A. Factual Background**

Maxxim Rebuild Company, LLC (“Maxxim”) operates the Sidney Shop, a maintenance shop that repairs, rebuilds and fabricates mining equipment and parts for mining equipment in Kentucky. While the facility fabricates some additional parts for non-mining related purposes, the majority of the parts are used in mining equipment. The Sidney Shop employs seven individuals, including one who travels to the mines, and includes two work bays in the shop area: one for welding and one for fabrication.

Maxxim owns and operates seven shops in six locations in Kentucky and West Virginia and is a subsidiary of Alpha Natural Resources (“Alpha”).<sup>1</sup> Prior to January 2012, the Sidney

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<sup>1</sup> Maxxim asserts that it is merely an “affiliate” of Alpha, while the Secretary contends that the facility is a wholly owned subsidiary of Alpha. Alpha’s Form 10-K for 2012, filed with the Securities and Exchange Commission, clearly identifies Maxxim as a “subsidiary” of Alpha. S. Ex. 6.

Shop was located in West Virginia and was not being inspected by MSHA. In January 2012, the facility relocated to a site in Kentucky. The site had previously been operated by Clean Energy, an Alpha affiliate. Clean Energy subsequently closed its operation and abandoned the site. Before Maxxim took over occupancy of the abandoned Kentucky site, the shop area was modified and updated. At that time, engineers for Sidney Coal, also an Alpha company, occupied the upstairs offices in the building at the site.

At the time the citations contested in this case were issued, five of the Maxxim shops were inspected by the Occupational Safety and Health Administration (“OSHA”) and two were inspected by MSHA, including the Sidney Shop. The Sidney Shop includes a warehouse, which stores at least one piece of equipment for Alpha. This facility has been inspected twice since Maxxim took over occupancy of the Kentucky site. The first inspection resulted in two violations. The second inspection resulted in three citations that Maxxim contested in the case docketed as No. KENT 2013-566.

In July 2013, the Judge held a hearing and considered post-hearing briefs. In her decision, the Judge found that MSHA has jurisdiction over the facility and that the operator violated the standards in question. 35 FMSHRC 3261 (Oct. 2013) (ALJ).

In February 2014, the Judge issued a decision in a separate case involving Maxxim that presented an identical issue of MSHA jurisdiction (No. KENT 2013-989). 36 FMSHRC 378 (Feb. 2014) (ALJ). The Judge found the reasoning and findings in her decision in No. KENT 2013-566 to be applicable to her decision in the separate case, and again affirmed MSHA jurisdiction.

Maxxim filed petitions for discretionary review in both cases. The Commission granted both petitions and consolidated the two cases for appellate review.

## **B. The Judge’s Decisions**

In her decision in the first case, the Judge found that the Sidney Shop is subject to MSHA jurisdiction because the shop is a “mine” as defined in the Mine Act and as applied in Commission precedent. The Judge also found that MSHA acted within its discretion in exercising jurisdiction over the shop. 35 FMSHRC at 3264-65.

In finding that MSHA has jurisdiction over the shop, the Judge concluded that the plain language definition of a “mine” in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), applies to the facility. *Id.* at 3263. The Judge found that the shop is “a dedicated off-site facility of a mine operator where employees maintain, repair and fabricate equipment, used almost exclusively at Alpha’s coal extraction sites and preparation plants.” *Id.* at 3264. The Judge therefore concluded that “there is Mine Act jurisdiction in this instance because a ‘mine’ includes ‘facilities’ and ‘equipment . . . used in or to be used in’ Alpha’s mining operations or coal preparation facilities.” *Id.* at 3264-65.

The Judge rejected Maxxim’s claim that the shop is not a “mine” because the activities performed at the site are too remote from the mining process. *Id.* at 3262. Instead, the Judge



noted that a “mine,” as defined in the Act, “is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals” (citing *Harless, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994)). *Id.* at 3265.

The Judge also rejected Maxxim’s claim that the Secretary abused his discretion by inconsistently exercising jurisdiction over this facility and other Maxxim facilities. *Id.* Accordingly, the Judge affirmed MSHA’s jurisdiction over the Sidney Shop and affirmed the three citations at issue.

## II.

### Disposition

#### **A. The Judge Properly Affirmed MSHA’s Assertion of Jurisdiction.**

We conclude that the plain language of section 3(h)(1)(C) qualifies the facility as a “mine.” Section 3(h)(1)(C) defines “coal or other mine” in relevant part to mean:

lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, *facilities, equipment, machines, tools, or other property* including impoundments, retention dams, and tailings ponds, on the surface or underground, *used in*, or to be used in, or resulting from, *the work of extracting . . . minerals from their natural deposits . . . or used in . . . the work of preparing coal.*

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

The Sidney Shop is a “facility” that is “used in” the process of “extracting” and preparing coal. Specifically, the facility maintains, repairs, and fabricates equipment that is used in the mining process. The record establishes that the facility performs work on belt heads, highwall miners, loaders, excavators and other equipment that is used in coal extraction and coal preparation facilities operated by Maxxim’s parent company Alpha. Tr. 23-24. The shop also supplies parts for both surface and underground mining equipment. *Id.* Furthermore, the shop, located on property owned by Sidney Coal, another subsidiary of Alpha, has seven employees. Although six of the employees work only at the shop, the seventh visits mine sites at mine operators’ requests, completing bore holes to accommodate blasting equipment furnished by Maxxim. Tr. 18-19. Thus, the Maxxim facility works on equipment that is integral to the mining process. As a result, the facility is a “mine.”

Commission case law strongly supports this conclusion. In *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000) (“*JWR*”), the Commission held that an offsite supply shop similar to the instant one was a “mine” as defined by the Act. In that case, the supply shop housed safety glasses, hard hats, conveyor belts, and other tools and equipment that were used for mining

purposes. In holding that the shop constituted a “mine,” the Commission confirmed that the definition of “mine” must be given a broad interpretation.<sup>2</sup>

The Commission further held that a mine “is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” 22 FMSHRC at 25. As with the shop in *JWR*, the Sidney Shop constitutes a “mine,” because, despite being located off-site, it fabricates, repairs, and stores equipment that is used in connection with the extraction and preparation of coal.

Maxxim’s attempt to distinguish *JWR* from the instant case is unpersuasive. In doing so, Maxxim relies primarily on two allegedly distinguishing factors: (1) that in this case, the shop does not perform work exclusively for mining companies; and (2) that employees of the Sidney Shop are not generally on the sites of the mines to which they deliver supplies and are consequently not exposed to the same hazards as miners who work on site at the mines.

Neither of these assertions alters the fact that the Judge found that a significant part of the Sidney Shop’s work – at a minimum, 75 percent – is performed on equipment that is used in coal extraction and coal preparation activities at mines owned by Alpha subsidiaries. 35 FMSHRC at 3264. This finding is supported by the testimony of Maxxim’s highwall supervisor, Keith Canterbury, who testified that “75% of the time [at the facility] . . . is spent on working on equipment that’s going to be used in an Alpha Natural Resources coal mine.” Tr. 21. Another portion of the Sidney Shop’s work is performed for non-Alpha coal mines. As a result, the Judge’s finding that a significant part of the Sidney Shop’s work is mining-related is amply supported by substantial evidence. On this basis, we reject Maxxim’s attempt to distinguish *JWR* from the instant case.

We further reject Maxxim’s reliance on other decisions that purportedly support its position that MSHA lacks jurisdiction over the Sidney Shop. Maxxim’s claim that the Judge’s finding of MSHA jurisdiction is improper under the Sixth Circuit’s decision in *Bush & Burchett v. Reich*, 117 F.3d 932 (6th Cir. 1997), is unpersuasive because that case is readily distinguishable. Maxxim cites *Bush & Burchett* for the proposition that roads that are shared with the public are not subject to MSHA jurisdiction. The Sixth Circuit held that a road used to connect a surface mine on one side of a river to a rail load-out facility on the other side was not a “mine” because the road was open to public use even though it was constructed for the benefit of the mine and the mine operator was a primary user of the road. 117 F.3d at 937. Maxxim contends that, in this situation, its other customers, which are not “mines” within the purview of MSHA, are utilizing the Maxxim facilities, and that the same logic should apply here. The *Bush & Burchett* decision, however, did not turn on the meaning of section 3(h)(1)(C)’s “used in or to be used in” the work of extracting minerals clause. Rather, the decision rested on the meaning of

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<sup>2</sup> The legislative history of the Mine Act emphasizes that “what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181 at 14 (1977).

section 3(h)(1)(B)'s statement that "mine" includes "private ways and roads appurtenant to [an extraction] area." *See id.* at 936-39.

Likewise, Maxxim's argument that MSHA jurisdiction is improper under the test articulated by the Commission in *Oliver M. Elam*, 4 FMSHRC 5 (1982), is unpersuasive because *Elam* is distinguishable from the present case under section 3(h)(1)(C). Maxxim argues that under *Elam*, the Commission must find that the "nature of the operation" is the same as that of "[an] . . . operator of [a] . . . coal mine," in order to find that the facility is engaged in the "work of preparing coal" within the meaning of section 3(h)(1)(C). 4 FMSHRC at 7. Maxxim then argues that the nature of the operations at the Sidney Shop does not remotely resemble mining operations.

However, Maxxim misses the point. *Elam* involved a commercial dock on the Ohio River where coal and other products were loaded onto barges. Unlike with *Elam*, the issue in the present case is whether the operation in question constitutes a facility "used in or to be used in" the coal extraction process. As we emphasized in *JWR*, *Elam* and its progeny "are inapplicable" in coal extraction cases. *JWR*, 22 FMSHRC at 26.

The same distinction holds true for Maxxim's claim that jurisdiction is improper under the Third Circuit's decision in *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388 (3d Cir. 1992). In *Lancashire*, the issue was whether the reclamation of structures (in that case, silos) resulting from "the work of preparing coal" triggered jurisdiction within the meaning of section 3(h)(1)(C). In finding no jurisdiction, the Court found dispositive the absence of the words "resulting from" before the words "the work of preparing coal." *Id.* at 392. As stated above however, the issue here is whether the Sidney Shop is a "mine" within the meaning of section 3(h)(1)(C)'s "used in or to be used in" clause in the context of the coal extraction process – as opposed to within the meaning of the "resulting from" clause.

Finally, Maxxim argues that the Mine Act and its standards do not fit this facility because of the nature of the work completed at the site. This argument, however, is unavailing because it overlooks the policy choice made by Congress, as reflected in the language of the Act. Maxxim references particular MSHA requirements in attempting to show that they are inappropriate for the repair shop, and that Occupational Safety and Health Act standards are more appropriate. Given that the language of section 3(h)(1)(C) clearly places the shop under MSHA jurisdiction, Congress has expressed its preference, and that preference is dispositive. *Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1203 n.10 (D.C. Cir. 2011) (otherwise legitimate safety concerns cannot override "a policy choice made by the Congress," as expressed in the plain language of the statute). Accordingly, we conclude that the plain language of the Act qualifies the facility as a "mine."

#### **B. MSHA Acted Within its Discretion in Exercising Jurisdiction Over the Facility.**

Maxxim additionally claims that MSHA's enforcement history has been inconsistent in two ways: (1) MSHA reasserted jurisdiction over the Sidney Shop only after it ceased to assert jurisdiction over its predecessor shop in West Virginia and (2) MSHA asserted jurisdiction over the Sidney Shop while not asserting jurisdiction over five other Maxxim shops.

There is some evidence to support the claim that the Sidney Shop is similarly situated to the predecessor West Virginia shop.<sup>3</sup> The Commission, however, has long rejected estoppel defenses against the federal government and has held that an inconsistent enforcement history by MSHA inspectors “does not prevent MSHA from proceeding under an application of the standard that it concludes is correct.” *Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug. 2012), citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *see also Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (“prior instances of inconsistent action by MSHA do not constitute a viable defense to liability”). Rather, operators are “expected to know the law and may not rely on the conduct of [inspectors] contrary to law.” *Emery Mining Corp. v. SOL*, 744 F.2d 1411, 1416 (10th Cir. 1984).

Moreover, the Commission held in *Shamokin Filler Co.*, 34 FMSHRC 1897 (Aug. 2012), *aff’d*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015), that MSHA’s conduct or communications related to a decision not to assert jurisdiction over specific facilities are irrelevant to whether a different facility is subject to jurisdiction. This is because “[i]t is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction.” *Id.* at 1907. Therefore, the fact that MSHA chose not to inspect Maxxim’s facility in the past does not preclude MSHA from doing so in the future.

As to its other contention, Maxxim failed to submit evidence establishing that the Sidney Shop is similar to the other five Maxxim shops. Maxxim simply asserts that the Sidney shop and the five other shops are “similarly situated.” *See* Maxxim Br. at 6, 25. That assertion, however, is unsupported by the record.<sup>4</sup> As a result, Maxxim has failed to prove that MSHA’s enforcement

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<sup>3</sup> Maxxim supervisor Keith Canterbury testified on cross-examination that “75% of the jobs [he does at the Sidney Shop is] substantially similar to the work [he did] when [he] worked for [the West Virginia Shop].” Tr. 45. However, he also testified that the Sidney Shop is different, i.e., larger and better equipped, from the West Virginia Shop. *See* Maxxim Br. at 3, citing Tr. 34-35 (testimony that facility was “extensively remodeled,” which included the renovation of a warehouse into another working bay, making a total of two bays present on site, and that “hoists” and an “electrical infrastructure” were added, along with the addition of a “crane structure”).

<sup>4</sup> Maxxim’s failure to establish that the other five shops are similar to the Sidney Shop also undermines its equal protection claim because Maxxim cannot meet its burden of showing that there is no rational relationship between the purpose of the Act and the decision to treat the Sidney Shop differently from the other shops. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955) (placing on the challenging party the burden of proving that there is no rational relationship between the agency’s regulation and a legitimate governmental interest); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79-80 (1911).

history with regard to the Sidney Shop and the other facilities was inconsistent, let alone so divergent as to approach the degree required to show abuse of discretion. Accordingly, we conclude that MSHA acted within its discretion in exercising jurisdiction over the facility.

### **III.**

#### **Conclusion**

Based on the reasons above, we affirm the Judge's decisions finding that MSHA has jurisdiction over Maxxim's Sidney Shop.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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



## **COMMISSION ORDERS**





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

April 5, 2016

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

v.

EASTERN ASSOCIATED COAL, LLC

Docket No. WEVA 2014-2171  
A.C. No. 46-05295-354307

BEFORE: Jordan, Chairman; Young and Althen, Commissioners<sup>1</sup>

## **ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 10, 2014, the Commission received from Eastern Associated Coal (“Eastern Associated”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 26, 2014, and became a final order of the Commission on July 28, 2014. Eastern Associated asserts that its failure to timely contest the proposed assessment was due to an "undetermined clerical or mailing error." The Secretary does not oppose the request to reopen. However, he states that his decision not to do so in this case should not be construed as condoning the operator's inadequate or sloppy office procedures. The Secretary urges Eastern Associated to take proposed assessments seriously in the future.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

April 5, 2016

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

v.

EASTERN ASSOCIATED COAL, LLC

Docket No. WEVA 2016-0061  
A.C. No. 46-06448-389549

BEFORE: Jordan, Chairman; Young and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 6, 2015, the Commission received from Eastern Associated Coal (“Eastern Associated”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 17, 2015, and became a final order of the Commission on September 16, 2015. Eastern Associated asserts that it its failure to timely contest the proposed assessment was due to an "undetermined clerical or mailing error . . . [or a] a mistaken or otherwise inadvertent internal processing error." The Secretary does not oppose the request to reopen. However, he states that his decision not to do so in this case should not be construed as condoning the operator's inadequate office procedures. The Secretary urges Eastern Associated to take proposed assessments seriously in the future.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 7, 2016

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

v.

LEE MECHANICAL CONTRACTORS

Docket No. CENT 2015-522-M  
A.C. No. 23-00188-379541 HUW

Docket No. CENT 2015-618-M  
A.C. No. 23-00188-382032 HUW

BEFORE: Jordan, Chairman; Nakamura, and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 28, 2015, the Commission received from Lee Mechanical Contractors (“Lee”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 9, 2015, the Commission received a second motion to reopen from Lee.<sup>2</sup>

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

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

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

<sup>2</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2015-522-M and CENT 2015-618-M; both captioned Lee Mechanical Contractors, and involving similar procedural issues. 29 C.F.R. § 2700.12.

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for Docket No. CENT 2015-522-M was delivered on April 28, 2015, and became a final order of the Commission on May 28, 2015. Lee asserts that it timely contested the proposed assessment, but sent the contest paperwork to MSHA's St. Louis, Missouri payment processing center instead of the Arlington, Virginia Civil Penalty Compliance Office. Lee claims that it became aware of the problem when it received a delinquency notice from MSHA. The Secretary affirms that MSHA mailed a delinquency notice on July 13, 2015. Lee asserts that it has changed its office procedures to prevent mistaken address problems from occurring in the future.

MSHA records reflect that the proposed assessment for Docket No. CENT 2015-618-M was delivered on June 20, 2015, and became a final order on July 20, 2015. Lee asserts that it timely contested the proposed assessment, but sent the contest paperwork to MSHA's St. Louis, Missouri payment processing center instead of the Arlington, Virginia Civil Penalty Compliance Office. According to Lee, the penalty assessments for the citations involved in Docket Nos. CENT 2015-522-M and CENT 2015-618-M were received and addressed around the same time. Lee claims that it did not discover the error in Docket No. CENT 2015-618-M until after it submitted the motion to reopen for Docket No. CENT 2015-522-M and reviewed its citation history on MSHA's website.

The Secretary does not oppose the requests to reopen these cases, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 7, 2016

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

v.

UNITED STATES STEEL  
CORPORATION

Docket No. LAKE 2015-610-M  
A.C. No. 21-00820-377787

Docket No. LAKE 2015-611-M  
A.C. No. 21-03352-380093

BEFORE: Jordan, Chairman; Nakamura, and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 31, 2015, the Commission received from United States Steel Corporation (“U.S. Steel”) a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>2</sup>

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

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

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

<sup>2</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2015-610-M and LAKE 2015-611-M; both captioned United States Steel Corporation, and involving similar procedural issues. 29 C.F.R. § 2700.12.



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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for Docket No. LAKE 2015-610-M was delivered on April 6, 2015, and became a final order of the Commission on May 6, 2015. MSHA records indicate that the proposed assessment for Docket No. LAKE 2015-611-M was delivered on May 4, 2015, and became a final order of the Commission on June 3, 2015. MSHA issued delinquency notices for both dockets on July 20, 2015. U.S. Steel asserts that it timely contested the penalties, but sent the contests to MSHA's Payment Center in St. Louis, Missouri, instead of MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The operator has since retrained its personnel. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 7, 2016

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

v.

PINTO VALLEY MINING  
CORPORATION

Docket No. WEST 2015-790-M  
A.C. No. 04-01049-375473

BEFORE: Jordan, Chairman; Nakamura and Althen, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 28, 2015, the Commission received from Pinto Valley Mining Corporation (“Pinto Valley”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 9, 2015, and became a final order of the Commission on April 8, 2015. Pinto Valley asserts that the penalty assessments for the citations involved in this case were lost somewhere between the mail run and the

Administration Building's mail room. Pinto Valley claims that, as a result of this clerical error, the penalty assessments never reached Pinto Valley's Safety Coordinator. Pinto Valley further states that the citations at issue are part of a group of 60 citations that were issued in the same inspection, and the majority of these citations were grouped into a different case number. The Secretary notes that a delinquency notice was mailed to the operator on May 26, 2015, and the case was referred to the U.S. Department of Treasury for collection on July 23, 2015, because no response was received from Pinto Valley. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA's delinquency notice amounted to more than 30 days. While Pinto Valley explained its failure to timely contest the proposed assessment, it failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is normally grounds for denial. In this case, however, the operator has no history of filing motions to reopen. Additionally, the Secretary does not oppose reopening, but states that he will oppose future motions to reopen penalty assessments that are not contested in a timely manner.

Having reviewed Pinto Valley's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 7, 2016

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

v.

FLSMIDTH, INC.

Docket No. WEST 2015-863-M  
A.C. No. 05-004822-381975 G2X

BEFORE: Jordan, Chairman; Nakamura, and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 21, 2015, the Commission received from FLSmidth, Inc. (“FLSmidth”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on May 23, 2015, and became a

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

final order of the Commission on June 22, 2015. FLSmidth asserts that it erroneously sent both the remittance for the uncontested citations and the notice of contest for the cases it sought to contest to MSHA's St. Louis, Missouri payment and processing office. FLSmidth claims that it discovered the mistake after receiving a delinquency letter from MSHA. The Secretary confirms that MSHA received a check dated June 10, 2015, in the amount of the uncontested citations, and that it mailed a delinquency letter to FLSmidth on August 7, 2015. FLSmidth states that it paid the balance of the penalties in order to avoid being considered delinquent, but still wishes to contest the citations. The Secretary confirms that MSHA received a second check from FLSmidth dated August 20, 2015. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

/s/ William I. Althen  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 7, 2016

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

v.

BARRICK TURQUOISE RIDGE, INC.

Docket No. WEST 2015-898-M  
A.C. No. 26-02286-383506

BEFORE: Jordan, Chairman; Nakamura, and Althen, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 9, 2015, the Commission received from Barrick Turquoise Ridge, Inc. (“Barrick”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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<sup>1</sup> This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 15, 2015, and became a final order of the Commission on July 15, 2015. Barrick asserts that safety and health group employees who were unfamiliar with the office's contest process failed to submit a contest form to MSHA. According to Barrick, these employees did not submit the contest form because they mistakenly assumed that Barrick's accounting office would send a contest form to MSHA, along with a check with payment for the citations that Barrick did not wish to contest. Barrick states that the safety staff did not understand that the accounting office's usual practice was only to send payments to MSHA, and not contest forms. Barrick further asserts that its timely partial payment reflects Barrick's intent to contest the penalty, and that as a result this case should not be in default even though a contest form was not filed within the thirty-day deadline.

The Secretary confirms that MSHA received a check dated July 13, 2015 in the amount of \$5,309. The Secretary also confirms that MSHA mailed a delinquency letter to Barrick on August 31, 2015. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

A timely partial payment is not sufficient to indicate the operator's intent to contest a citation and avoid a default. Having reviewed Barrick's request and the Secretary's response, however, we find that the actions of the safety and health group constitute a mistake that justifies relief. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 20, 2016

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

v.

KENTUCKY FUEL CORPORATION

Docket No. KENT 2014-489  
A.C. No. 15-19475-345392

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 13, 2014, the Commission received from Kentucky Fuel Corporation (“Kentucky Fuel”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment of \$39,256 was delivered on March 19, 2014, and became a final order of the Commission on April 18, 2014. Kentucky Fuel asserted that it failed to timely contest the proposed assessment due to a change in personnel responsible for handling MSHA matters. In this regard, the operator asserts that the new safety director who was responsible for handling MSHA matters was not familiar with the process for contesting proposed assessments.

The Secretary opposed the request to reopen, noting that the operator has an extensive prior history of delinquent payments of penalties. The Secretary argues that this record indicates that the operator has not acted in good faith.

In regards to good faith, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981).

The Commission has also specifically addressed situations where an operator has failed to respond to an argument by the Secretary that the operator's extensive history of outstanding penalties demonstrates bad faith. The Commission has found that the operator's failure to respond to an allegation of bad faith by the Secretary may support a conclusion that the operator has not met its burden of establishing entitlement to extraordinary relief. *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132-1133 (June 2011).

Kentucky Fuel's history regarding the payment of penalties is abysmal. According to the Secretary's un rebutted Opposition to the Motion to Reopen, when the motion was filed, this mine had fifteen outstanding penalties totaling \$54,294 (not including the penalty assessment at issue here), and the operator had total outstanding penalties of \$351,696 for its thirteen active and inactive mines, spanning 140 cases from 2010-2014. The operator's record indicates that it has repeatedly disregarded final penalty assessments. As stated above, the Secretary argues that this delinquency record of the mine, and of the operator, in the years preceding the request to reopen, indicates that the operator has not acted in good faith. The operator failed to respond to this argument by the Secretary.

This case, in which the operator had a total delinquency of over \$350,000, bears similarities to *Oak Grove*, in which the operator had a total delinquency of more than \$750,000. Under *Oak Grove*, 33 FMSHRC at 1132-33, the operator has not met its burden of establishing good faith and an entitlement to extraordinary relief.

Here, the extremely large delinquency of the operator, which had accumulated in the years preceding the request to reopen, should have informed the operator of the need to be more attentive to proposed assessments from MSHA. We also note that this proposed assessment included thirteen orders under section 104(d) for unwarrantable failure to comply with mandatory health or safety standards, and the proposed penalty for these orders was \$33,463 out of the total \$39,256 proposed assessment. Therefore, the operator should have taken precautions, due to the serious violations and high penalties at issue, to timely contest the proposed assessment.

Finally, the Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). It is the operator's responsibility to properly train all personnel who handle proposed assessments. Each proposed assessment sets forth the deadline for contesting proposed assessments. Here, it appears from Kentucky Fuel's motion that the safety director was only trained after the fact – that is, he was told about procedures for contesting penalties only after the deadline for contesting the penalty assessments at issue had passed. Mot. at 1. Moreover, although he is identified in the motion as the operator's "new" safety director, the Secretary points out that he was the safety director at least two months prior to the date of the proposed penalties. See Sec's Opp. At 3-4. In addition, the operator argues unconvincingly that the fact that the safety director had an address different from that of the mine, along with the "change in personnel," should excuse the late filing. Mot. at 2. As the Secretary states, the assessment was delivered by certified mail to the safety director at the address of record shown on the legal identity report. Based on the above, we conclude that the operator's failure to contest the proposed assessment resulted from an inadequate or unreliable internal processing system.

Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Kentucky Fuel's motion.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 20, 2016

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

v.

C.R. MEYER & SONS COMPANY, INC.

Docket No. WEST 2014-482-M  
A.C. No. 04-02542-323448

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 4, 2014, the Commission received from C.R. Meyer & Sons Company, Inc. (“C.R. Meyer”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on June 5, 2013. MSHA received payment from C.R. Meyer by check dated June 11, 2013. C.R. Meyer asserts that its accounting department, which received the proposed penalty assessment, inadvertently paid the penalty. C.R. Meyer asserts that it intended to contest the proposed assessment, and would have done so if its counsel had received a copy of the proposed assessment. In this regard, C.R. Meyer

had filed a contest to the underlying citation in this matter on May 22, 2013. The Secretary opposes the request to reopen.

When reviewing an operator's motion to reopen a proposed assessment, we consider whether the operator has contested the citation underlying the proposed assessment. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346-47 (Nov. 2013). As stated above, C.R. Meyer had contested the underlying citation. Furthermore, we also note that the counsel for the operator has demonstrated a diligent effort to keep track of the citation and the proposed assessment through his correspondence with MSHA and with attorneys representing the Secretary of Labor. In this regard, operator's counsel was informed by an attorney representing the Secretary of Labor that he should communicate with her rather than with MSHA. Furthermore, operator's counsel, who received the citation, believed that he would also receive a copy of the proposed assessment and was unaware that the operator's accounting department had received and paid the proposed assessment. Lastly, operator's counsel, after learning about the proposed assessment on February 19, 2014, promptly filed a motion to reopen this matter, received by the Commission on March 4, 2014. Therefore, it is clear that the payment by the operator was the result of a mistake.



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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 20, 2016

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

v.

ACI TYGART VALLEY

Docket No. WEVA 2014-2151  
A.C. No. 46-09192-355122

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 01 et seq. (2012) (“Mine Act”). On September 5, 2014, the Commission received from ACI Tygart Valley (“ACI”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on July 5, 2014, and became a final order of the Commission on August 4, 2014. ACI asserts that it had mailed a contest of the proposed assessment within the required time period. The Secretary notes that MSHA has no record of receipt of a contest of the proposed assessment. The Secretary does not oppose the

request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 28, 2016

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

v.

BLUE DIAMOND COAL COMPANY, et  
al.<sup>1</sup>

Docket Nos.	KENT 2016-3
	KENT 2016-4
	KENT 2016-5
	KENT 2016-6
	LAKE 2016-9-M
	WEST 2016-6-M
	CENT 2015-625-M
	CENT 2016-7-M
	LAKE 2016-7-M
	VA 2016-7
	WEST 2015-967
	LAKE 2016-35

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

## **ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). Between September 15 and October 14, 2015, the Commission received motions from the above-captioned operators seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

In each of these cases, the operators claim that they mailed timely notices of contest to the Arlington office of the Mine Safety and Health Administration (“MSHA”). The Secretary initially did not oppose reopening because of problems concerning mail delivery following the relocation of MSHA’s headquarters on July 15, 2015. However, on October 14, 2015, MSHA received a large volume of mail that had not been forwarded to MSHA’s new address. Included in this mail were the notices of contest for the above-captioned cases.

Having discovered that the operators had timely contested the proposed penalties, MSHA maintains that the contests were immediately processed and docketed in separate civil penalty proceedings. Based on these circumstances, the Secretary requests that the above-captioned dockets be dismissed as moot.

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers KENT 2016-3, KENT 2016-4, KENT 2016-5, KENT 2016-6, LAKE 2016-9-M, WEST 2016-6-M, CENT 2015-625-M, CENT 2016-7-M, LAKE 2016-7-M, VA 2016-7, WEST 2015-967, and LAKE 2016-35 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant operator’s names, A.C. numbers, and associated docket numbers have been listed in Appendix A, attached to this order.

Having reviewed the requests to reopen and the Secretary's response, we conclude that the proposed penalty assessments did not become final orders of the Commission because the operators timely contested the proposed assessments. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty, . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, the operators notified the Secretary of the contests. This obviates any need to invoke Rule 60(b) of the Federal Rules of Civil Procedure. Accordingly, the operators' motions to reopen are moot, and these dockets are dismissed.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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**Exhibit 1**

<b>Operator</b>	<b>Docket Number</b>	<b>A.C. Number</b>
Blue Diamond Coal Company	KENT 2016-3	15-19598-384070
Blue Diamond Coal Company	KENT 2016-4	15-17478-384056
Blue Diamond Coal Company	KENT 2016-5	15-17497-384057
Blue Diamond Coal Company	KENT 2016-6	15-17497-384768
Callender Construction Company, Inc.	LAKE 2016-9-M	11-00214-385554
Campbell Redi-Mix	WEST 2016-6-M	02-03022-386154
Gates Construction Inc.	CENT 2015-625-M	32-01050-382708
Mears Sand & Gravel, LLC	CENT 2016-7-M	16-00883-382655
Mel Flannery Trucking	LAKE 2016-7-M	47-03029-384752
RDM Enterprises, Inc.	VA 2016-7	44-06929-385047-S889
Signal Peak Energy, LLC	WEST 2015-967	24-01950-384634
Triad Underground Mining, LLC	LAKE 2016-35	12-02423-384766



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 28, 2016

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

v.

ALLSTATE MATERIALS, LLC, et al.<sup>1</sup>

Docket Nos. SE 2015-455-M  
WEVA 2015-1014  
VA 2016-18  
SE 2016-24-M  
CENT 2016-28-M  
KENT 2016-2  
WEVA 2015-996  
WEVA 2015-997

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

## ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). Between September 2 and October 26, 2015, the Commission received motions from the above-captioned operators seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

---

<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2015-455-M, WEVA 2015-1014, VA 2016-18, SE 2016-24-M, CENT 2016-28-M, KENT 2016-2, WEVA 2015-996, and WEVA 2015-997 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant operators’ names, A.C. numbers, and associated docket numbers have been listed in Appendix A, attached to this order.

In all of these cases, the operators claim that they mailed timely notices of contest to the Arlington office of the Mine Safety and Health Administration (“MSHA”) at the address listed on the proposed assessment. The operators further contend that the contests were either lost in the mail or returned as undeliverable. The Secretary does not oppose reopening because of problems concerning mail delivery following the relocation of MSHA’s headquarters on July 15, 2015. In particular, MSHA maintains that the U.S. Postal Service has not consistently forwarded all of its mail to its new address.<sup>2</sup>

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<sup>2</sup> Notice of the change in MSHA’s address was published in the Federal Register on September 2, 2015, nearly three months after MSHA moved its headquarters. 80 Fed. Reg. 52984-01. Additionally, we note that MSHA’s mailing address listed on the Notice of Contest Rights and Instructions included with proposed assessments and the Commission’s website were not up-to-date during the relevant time period. Insofar as the operators may have been confused by these documents, we find that their failure to timely contest the proposed penalties is excusable.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

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

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Arlington, VA 22202-5450

**Exhibit 1**

<b>Operator</b>	<b>Docket Number</b>	<b>A.C. Number</b>
Allstate Materials, LLC	SE 2015-455-M	01-03406-387911
Eastern Associated Coal, LLC	WEVA 2015-1014	46-01456-384741
Hills Coal Company, Inc.	VA 2016-18	44-03472-389324
Livingston Aggregate, LLC	SE 2016-24-M	01-03359-387668
Ozark Southern Stone	CENT 2016-28-M	03-01936-386157
Pine Branch Mining, LLC	KENT 2016-2	15-16883-383468
Raw Coal Mining Company	WEVA 2015-996	46-06265-383951
Sally Ann Coal Company	WEVA 2015-997	46-06843-383326

# **ADMINISTRATIVE LAW JUDGE DECISIONS**





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
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April 4, 2016

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

v.

WARRIOR INVESTMENTS CO., INC.,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. SE 2015-174  
A.C. No. 01-03419-370628

Mine: Maxine-Pratt Mine

## DECISION

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456, for Petitioner

J.D. Terry, Esq., Warrior Investments Co., Inc., 218 Highway 195, Jasper, AL 35503, for Respondent

Before: Judge Barbour

This civil penalty case arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), as amended, 30 U.S.C. § 815(d). The Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) seeks the assessment of civil penalties for two alleged violations of section 316(b) of the Act, 30 U.S.C. § 876(b), which requires each underground coal mine operator to develop and adopt an emergency response plan subject to review and approval by the Secretary.<sup>1</sup> The Secretary alleges that Warrior Investments Company, Inc. (“Warrior” or “the company”) failed in two separate instances to comply with a provision of its approved emergency response plan requiring an inline beacon reader to be located at the intersection of the rescue chamber lifeline and the primary escapeway lifeline. The Secretary charges that the alleged violations were significant and substantial contributions to a

---

<sup>1</sup> At hearing, the Secretary moved to amend the citations to allege that the operator violated section 316(b) more broadly, rather than section 316(b)(2)(c). The court granted the motion without objection from the company. Tr. 20-21.

mine safety hazard (“S&S”<sup>2</sup>), reasonably likely to cause eight miners to suffer lost work days or restricted duty, and the result of Warrior’s moderate negligence. The alleged violations occurred at an underground bituminous coal mine owned and operated by Warrior near Jasper, Alabama.

The Secretary filed the subject petition requesting the Commission to assess proposed civil penalties totaling \$2,206 for the two alleged violations. The Commission’s Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if the alleged violations could be settled. After the parties were unable to reach a settlement, the violations were tried on December 15, 2015, in Birmingham, Alabama. At the end of the hearing, the parties agreed to forego briefing and instead offered closing arguments on the record. Tr. 239.

## **I. STIPULATIONS**

1. At all times relevant to this matter, [Warrior] was the operator of the mine as defined by [section 3(d)] of the Mine Act, 30 U.S.C. § 803(d).
2. [T]he mine is a mine as that term is defined in Section 3(a) to the Mine Act, 30 U.S.C. § 803(a).
3. [A]t all material times involved in this matter, the products of the subject mine entered commerce, or the operations thereof[] affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. [T]he citations were issued to [Warrior] on the dates set forth therein.
5. [Warrior] operations at the mine are subject to the jurisdiction of the . . . Federal Mine Safety and Health Review Commission, and its designated administrative law judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
6. [I]nspector Todd Smith was [acting] in his official capacity and as an authorized representative of the Secretary when he issued the citations.

---

<sup>2</sup> An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). 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 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5<sup>th</sup> Cir. 1988) (approving the *Mathies* criteria).

7. [T]he total proposed penalty for the above-referenced docket will not affect [Warrior's] ability to remain in business.
8. [T]he proposed assessment form, Form 1000-179[,] accurately sets forth [Warrior's] size and . . . controller tonnage, the total number of assessed violations for the 15 months preceding the month of the citations, and the total number of repeat violations for the 15 months preceding the month of the citations.

Tr. 11-13.

## **II. BACKGROUND**

Every active underground coal mine in the nation has an emergency response plan ("ERP") developed by the mine operator and approved by MSHA's district manager, setting forth tracking and communication requirements to help locate and recover miners in the event of an emergency situation. Tr. 26. Each plan is tailored to the specific conditions and resources of the individual mine. Tr. 26. The company's Maxine-Pratt mine submitted its ERP for approval on July 6, 2014, and received approval on July 31, 2014. Tr. 44.

Relevant portions of the ERP in place at the mine during the month of November 2014 require that inline beacon readers be installed inby the portal (at the entrance of the mine), on both the intake and return<sup>3</sup> sides of each working section, at the "number 2 belt drive," and at intervals of a maximum of 2,000 feet; that a beacon reader be installed at the intersection of the rescue chamber lifeline and the primary escapeway lifeline; and that the tracking system be examined weekly by a designated, competent person. GX-2 at 2-3. The Secretary's mandatory safety standards for the nation's underground coal mines also require that a rescue chamber be located within 1,000 feet of each working face (where coal is actively being mined). 30 C.F.R. § 75.1506(c)(1).

The witnesses offered useful definitions and descriptions of the terms mentioned above. The primary escapeway, which also functions as the intake side of each section, provides the likeliest means of safe exit from a working section out of the mine in case of an emergency or accident. Tr. 64, 210. (There is also a secondary escapeway located along the belt line that miners may use in an emergency if the primary escapeway is rendered unsafe. Tr. 210.) The primary escapeway lifeline, which may be a rope or metal line, hangs from the roof of the mine and runs along the entire length of each escapeway, indicating the proper route for safely exiting the mine. Tr. 65. Beacon readers hanging from the lifelines detect miners who pass within a certain radius of the readers.<sup>4</sup> Tr. 49. The company typically places beacon readers every 1,800

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<sup>3</sup> The intake side of a section delivers fresh air or ventilation inby from outside of the mine, while the return side contains air or ventilation that has passed through the working faces of the mine. Tr. 210.

<sup>4</sup> The ERP states that the beacon reader reads a distance of both 150 feet and 450 feet. The witnesses in this matter believed that one of those measurements was incorrectly listed, but neither witness knew which of the two was correct. Tr. 113, 228-29; GX-2 at 2.

feet, or sometimes closer together, throughout the mine.<sup>5</sup> Tr. 206. The beacon readers are capable of identifying specific miners by the identification tags they carry with them. Tr. 49; GX-2 at 2. The readers then transmit a signal by wire outside of the mine indicating that a miner has passed within their radius of detection. Tr. 56-57.

A refuge chamber, also known as a refuge alternative, is a physical box with 96 hours worth of emergency supplies and “breathable air under a pressurized system.” Tr. 69, 128. It provides refuge to stranded miners if an accident or emergency occurs and miners are unable to reach the surface. Tr. 69-70. Each chamber at this mine can accommodate up to 25 people. Tr. 128. The refuge chamber lifeline guides miners from the primary escapeway to the refuge chamber if they are unable to complete the trip out of the mine using the primary escapeway. Tr. 71.

In the event of an emergency, the first responders will initially check to see the last recorded location of any missing miner by a beacon reader and then focus their search and recovery efforts on the area within that beacon reader’s radius. Tr. 59, 67. Beacon readers, by requirement, are concentrated along the areas where first responders expect to find trapped miners in an emergency, including at each working section. Tr. 62-63, 81.

During the month of November 2014, Warrior was mining coal in two sections of the mine, which the company referred to as section 15 West and section 35 West. Tr. 190. There were eight people at a time working on each of the two sections during that time period. Tr. 191. The company ran three eight-hour shifts each day. Tr. 118, 194. Todd Smith, who had approximately three and a half years of experience as an MSHA Inspector, and further experience as a member of a federal mine emergency rescue team, cited Warrior for the two alleged violations at issue during a quarterly inspection in November 2014. Tr. 22, 37. Citation No. 8530016 was issued on November 5, 2014, during an inspection of the 15 West section of the mine, while Citation No. 8530019 was issued on November 21, 2014, during an inspection of the 35 West section. Tr. 72, 91. The citations were issued pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a).

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<sup>5</sup> The cables connecting each beacon reader to a power supply are either 1,580 or 1,850 feet long. Testimony was inconsistent on this point. Tr. 204-06. The company typically places the beacon readers at the end of each cable, and then runs a subsequent cable nearby with another beacon reader at the end of it. This allows the company to comply with the ERP requirement that the readers be at most 2,000 feet apart, without having to cut the cables short. Tr. 205. However, the company also places a beacon reader at certain belt drives, and since a belt drive can be less than 1,800 feet from the closest beacon reader, the company occasionally cuts the cable short to attach a new beacon reader at the belt drive. Tr. 206-07.

### III. THE CITATIONS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 U.S.C. §</u>
8530016	11/5/2014	876(b)
8530019	11/21/2014	876(b)

Both citations state:

Management failed to follow the approved Emergency Response Plan, page 2 paragraph 5, which states that, “An inline beacon reader will be located at the intersection where the rescue chamber lifeline connects to the primary escapeway lifeline.” When inspected, the inline beacon reader was not installed at the intersection by the . . . section refuge alternative.

GX-3; GX-4. Citation No. 8530016 then concludes, “The line was coiled up in the intersection without the reader.” GX-3 at 1. Citation No. 8530019 instead concludes, “The line had been run by the refuge alternative and into the adjacent entry toward the face, but the inline beacon reader had not been installed.” GX-4 at 1. The citations were abated by installing the missing beacon readers at the refuge alternatives. GX-3 at 2; GX-4 at 2.

Inspector Smith cited the company immediately after noticing the first missing beacon reader on November 5, 2014. Tr. 72. He was concerned about miners, unable to exit the mine, seeking refuge in the chamber after an emergency and first responders not recognizing they are there due to the absence of a beacon reader at that location. Tr. 74, 77. Instead, a rescue team would search for the missing miners near the last beacon reader that detected them, which could be a considerable distance away. Tr. 83. While the chambers did have other means of communication to the outside, Smith feared that miners could be too injured to take advantage of them or that an accident could hamper those lines of communication. Tr. 75-76, 89.

Smith designated the violation as S&S because he believed it would, in the event of an emergency, be reasonably likely to delay an injured miner’s rescue and recovery, thereby exacerbating injuries caused by the emergency itself. Tr. 78. Those injuries could include “burns, smoke inhalation from a fire, [or] broken bones from a fall.” Tr. 78. Smith also noted that the low height of the mine, which averaged about 42 inches, would already delay recovery efforts since a rescue team would have to crawl or “duck walk” through the mine to get around. Tr. 40, 78. He believed that eight persons would be affected by this hazard, since there are typically eight people working on the section. Tr. 79.

During cross-examination, Smith was asked whether a delay would be significant since, in the event of an emergency, MSHA would anyway dictate the timetable for rescue efforts and prohibit the operator from sending someone into the mine to rescue a missing miner until MSHA arrived.<sup>6</sup> Tr. 143, 151. Smith responded that the agency has not been doing that lately, and that MSHA’s response could vary depending on the mine’s conditions at the time. Tr. 151-52. Smith was also asked whether there was another beacon reader further inby in close proximity that would pick up a miner near the refuge chamber during an emergency. He responded that only the

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<sup>6</sup> The company’s witness, Frank McClanahan, later reiterated this belief during his testimony. Tr. 211.

very same line with the missing beacon reader at the refuge chamber could have carried another beacon reader further inby. Tr. 155. But, as stated on the face of the citation, the line was coiled up right at the intersection where the refuge chamber was and not extended further, so there could not have been another beacon reader in the same entry further inby. Tr. 154-56; GX-3 at 1.

Smith designated the company's negligence as moderate. GX-3 at 1. He believed that the condition had existed for approximately three shifts, occurring over one full day. Tr. 79, 134. He calculated that timeline based on the distance of the refuge chamber from the working face of the section.<sup>7</sup> Tr. 79. Although Josh Holbrook, who was the day shift mine manager at the time, told Smith that the company did not know that the beacon reader was missing, the area had undergone pre-shift examinations during all three of the prior shifts, so Smith believed that Warrior should have been aware of the condition. Tr. 87-88. Smith speculated that the pre-shift examiners might not have been properly trained to recognize the missing beacon reader, but he could not think of any reason why they would not have received that training. Tr. 88-89.

Smith issued the second citation 16 days later on November 21, after noticing the exact same issue with a missing beacon reader near a refuge chamber in the 35 West section of the mine, which was a "good distance" from the area of the first citation Tr. 90-91. Smith designated the violation S&S and a result of moderate negligence, and the analysis for both designations was nearly identical to the analysis for the first citation. GX-4 at 1. The primary differences were that Smith believed the condition had existed for three and a half to four shifts and that the company had failed to correct this problem after being cited for the exact same condition 16 days earlier, despite moving this chamber after the first citation. Tr. 97-98. Additionally, the wire that was supposed to carry the missing beacon reader was not coiled up at the intersection, but instead continued further into the adjacent entry. GX-4 at 1.

Frank McClanahan, the chief electrician and superintendent of the mine, testified to the conditions of the mine during the relevant timeframe in this matter. Tr. 183-84. The Maxine-Pratt mine is a drift-mine located on the side of a hill, above the water table, and according to McClanahan, the mine has never had any methane detected on a sample taken by MSHA. Tr. 185-87. Nor has there ever been methane detected in the two mines below the Maxine-Pratt mine, one of which is entirely flooded with water. Tr. 188. McClanahan also stated that there has never been an ignition, fire, or explosion at the mine. Tr. 188. There is a maximum of about 285 feet of overburden (overlying rock or soil) above the coal seam at the mine. Tr. 187.

McClanahan did not dispute that the beacon readers were missing in the cited areas and that their absence constituted a violation of the mine's ERP. Tr. 208. However, McClanahan questioned the severity of the violations. Tr. 208. He believed that the inline beacon reader on the intake side of each section would have detected any miner near the refuge chambers. Tr. 209.

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<sup>7</sup> The mine is required to keep the refuge chamber within 1,000 feet of the working face. Because active mining pushes the working face further away from the chamber, the company typically moves the chamber closer to the face whenever the distance between the two approaches 1,000 feet. Since the distance between the face and the chamber at the time of the citation was approximately the same distance that the company would have advanced in the course of active mining during three shifts, Smith concluded that the chamber had been moved roughly three shifts prior, and had persisted without a beacon reader for at least those three shifts. Tr. 79-80.

He testified that each chamber had been moved to the working section face roughly three shifts prior to each citation, and that the company mined approximately 150 feet during those three shifts. Tr. 202, 208-09. Therefore, the chambers would have been roughly 150 feet away from the working face when cited. Tr. 209. He also believed that there were two beacon readers on each working section which would have detected a miner within a 150 foot range. Tr. 209. McClanahan did not personally verify that those readers were there at the time, but he knew that they were supposed to be there and that nobody at the mine had told him that they were missing. Tr. 207-08.

McClanahan then detailed a number of redundant safety measures at the mine that, in his opinion, could have decreased the likelihood of a serious injury. These included multiple means of communication to the outside within the refuge chamber, as well as in the primary and secondary escapeways. Tr. 213-14. McClanahan also believed that in the event of an emergency there would be multiple man trip rides available out of the mine and that miners would most likely take advantage of a tether line that they could collectively fasten to each other so that they could all exit the mine together without anyone going missing. Tr. 214, 217.

#### **IV. LEGAL ANALYSIS**

##### **1. The Fact of the Violation, Its Gravity, and Its Significant and Substantial Nature**

Warrior concedes the fact of the violation for both citations, as both Smith and McClanahan agreed that beacon readers were not in place at the refuge chamber lifeline intersections as required by the mine's ERP. Tr. 208, 239. The company instead disputes the negligence, gravity, and S&S findings.

The court agrees with the Secretary that both violations were S&S. When dealing with a violation of an emergency safety requirement, the court conducts the *Mathies* analysis in the context of an anticipated emergency. *See Cumberland Coal Res., LP v. Sec'y of Labor*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (providing that "assuming the existence of an emergency" when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*); *Spartan Mining Company, Inc.*, 35 FMSHRC 3505, 3509 (Dec. 2013). Thus, Warriors' argument that "no methane gas [has been] detected [and that there has] never been a fire, . . . an ignition, . . . [or] an explosion . . . for the whole life of [the] mine" has little bearing on the S&S analysis once the court assumes the existence of the type of serious emergency for which the requirement of a beacon reader outside of the refuge chamber becomes relevant. Tr. 247. Assuming such an emergency, the court finds that both violations contributed to the hazard of a delay in rescue efforts for miners trapped in or around the refuge chambers, that this hazard would be reasonably likely to exacerbate injuries sustained during the emergency, and that the exacerbation of such injuries, ranging from burns to smoke inhalation or broken bones, would be reasonably serious.

Warrior offers evidence of a number of redundant safety measures in place at the mine, including alternate communication systems and other functioning beacon readers in the area, in order to argue that the hazard contributed to by the violation was not reasonably likely to lead to serious injuries. Tr. 245, 250. However, the Commission has held that "additional safety measures do not prevent a finding of S&S," *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014), and has even "rejected as irrelevant evidence regarding the presence of safety

measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). The court similarly rejects the relevancy of Warrior’s evidence on this point. The court also rejects Warrior’s argument that delays caused by the missing beacon readers would be relatively insignificant given that MSHA would be dictating the timetable for rescue in any event. Tr. 250. No matter when rescue efforts began, the missing beacon readers would still be reasonably likely to cause further delays if first responders began their search in the wrong areas.

As the Commission has noted, the gravity penalty criteria and a finding of S&S are not synonymous, but may be based on the same evidence. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (explaining “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.”) The court finds the violations to be serious, based on the types of injuries that could result from an emergency situation and worsen with a delayed response. Tr. 78. The court also finds that eight persons were affected by each violation, as that was the number of individuals working on each shift who may have had to seek refuge in the chambers, and this number contributes to the violations’ seriousness. Tr. 79.

## 2. The Company’s Negligence

Smith found that Warrior was moderately negligent<sup>8</sup> in both citations. GX-3; GX-4. Since it is undisputed that both cited conditions had existed for at least three shifts without being addressed during pre-shift examinations and that the second citation occurred 16 days after the company was cited for the same condition in a different section of the mine, the court finds negligence on Warrior’s part for both citations. Tr. 79, 90-91, 134, 208-09. However, the court would reduce the level of negligence based on the fact that the conditions had each existed for roughly one day. Given that the mine’s ERP requires examinations of the tracking and communication systems once every seven days by a designated competent person, the court does not view the one day oversight as especially negligent. GX-2 at 3.

Further, while redundant safety measures may be irrelevant in the S&S context, they do mitigate Warrior’s negligence. The company’s duty of care to identify missing beacon readers each and every day would be considerably higher if it did not already have numerous operational tracking and communication systems in place that could serve a similar function to the missing reader. In both cases, communication systems inside the refuge chamber and in the primary and secondary escapeways would generally allow miners seeking refuge (or miners aware of others seeking refuge) to notify those outside of their location. Tr. 213-14. In the situation covered by the second citation, the court finds it reasonable to infer the existence of an additional beacon

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<sup>8</sup> The Secretary’s Part 100 regulations define “moderate negligence” to mean that “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3. However, the Commission has clarified that “when Commission Judges consider ‘whether the operator was negligent’ in assessing a civil penalty in accordance with section 110(i), they need not defer to the definitions of ‘negligence’ established by the Secretary in his Part 100 regulations.” *Wade Sand & Gravel Company*, 37 FMSHRC 1874, 1879 n.5 (Sept. 2015).



reader further in by that would have picked up the location of a miner seeking refuge at the chamber. The court further infers that the refuge chamber was roughly 150 feet away from an inline beacon reader near the working face. This inference is consistent with McLanahan's testimony on the distance from the refuge chamber to the working face (Tr. 207-09) and the lack of a citation for any other missing beacon readers near the face, where they would typically be found. Tr. 81, 126. As long as the chamber was sufficiently close to the section face, Warrior's failure to identify the lack of what would have been a redundant safety measure was partially mitigated.

The Secretary argues that Warrior's negligence should perhaps be elevated above the level designated on the citations in light of McLanahan's testimony at hearing. Tr. 241. McLanahan stated that the company typically places beacon readers roughly 1,800 feet apart from each other at the mine, which allows Warrior to make use of the full length of the 1,850 feet cables to which the beacon readers are attached, rather than cut them short. Tr. 206-07. The Secretary suggests that this practice indicates that Warrior may have even been aware of the missing beacon readers and condoned the violations in order to save resources and avoid cutting its cables short. Tr. 241. However, McLanahan also testified that the company did shorten its cables when it needed to comply with an ERP provision requiring a beacon reader at a belt drive. Tr. 206-07. Presumably, it would have done the same thing at the intersections of the refuge chamber lifelines and the primary escapeway lifelines had it been aware of the violations. Therefore, the court does not find that this testimony elevates Warrior's negligence.

## **V. OTHER CIVIL PENALTY CRITERIA**

The parties stipulated that the penalty assessed will not affect Warrior's ability to remain in business. Tr. 12-13. The parties also stipulated that the proposed assessment form submitted by the Secretary accurately sets forth Warrior's size and violation history during the previous 15 months. Tr. 13. The form indicates that the mine and Warrior, as a controlling entity, are moderately large. GX-7. The form also indicates that Warrior has a low to moderate violation history, and that it had not violated the specific provision of the Act at issue in this matter in the preceding 15 month period. GX-7, GX-8.

## **VI. PENALTY**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 U.S.C. §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8530016	11/5/2014	876(b)	\$1,235.00	\$835.00
8530019	11/21/2014	876(b)	\$971.00	\$671.00

The court has found that the violations were serious and S&S, that an injury was reasonably likely, and that the violations were due to the company's low negligence. The Secretary proposed a penalty of \$1,235.00 for Citation No. 8530016 and a penalty of \$971.00 for Citation No. 8530019, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$835.00 is appropriate for Citation No. 8530016 and that a penalty of \$671.00 is appropriate for Citation No. 8530019. The court has departed from the proposed penalties because it has found the negligence in both citations to be lower than the Secretary alleged.

## **ORDER**

In view of the conclusions and findings set forth above, within 30 days of the date of this decision, Citation Nos. 8530016 and 8530019 **SHALL BE MODIFIED** to change the level of negligence from “moderate” to “low,” and the company **SHALL PAY** a civil penalty in the amount of \$1,506.00. Upon payment of the penalty, this proceeding **IS DISMISSED**.<sup>9</sup>

/s/ David F. Barbour

David F. Barbour

Administrative Law Judge

### Distribution:

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J.D. Terry, Esq., Warrior Investments Co., Inc., 218 Highway 195, Jasper, AL 35503

/rd

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<sup>9</sup> 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  
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April 5, 2016

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

v.

STONE PLUS, INC.,  
Respondent.

## CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2013-0263-M  
A.C. No. 42-02587-303318

Docket No. WEST 2013-0440-M  
A.C. No. 42-02587-308740

Mine: Portable #1

## DECISION AND ORDER

Appearances: Brian Kaufman, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, CO, for the Petitioner;

Keen Ellsworth, Esq., Ellsworth & Associates, Ltd., Las Vegas, NV, for the Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves one section 104(d)(1) citation and twelve 104(d)(1) orders, 30 U.S.C. § 814(d)(1), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Stone Plus, Inc. at its Portable #1 mine. The parties presented testimony on March 4th and 5th, 2014, and June 3rd and 4th, 2014, in Salt Lake City, UT.

Stone Plus is a small, three-tiered quarry with a screening plant and crusher. The operator uses a front-end loader<sup>1</sup> to transport raw and finished product -- a high quality rock used primarily for landscaping. Before Stone Plus began operating in August, 2012, it had contracted with various companies to perform the same services it intended to do for itself.<sup>2</sup>

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<sup>1</sup> A front-end loader is a self-propelled piece of mobile equipment. (Tr. 106:20-23)

<sup>2</sup> Susan Martin, a contracting company, confirmed that it removed all of its equipment from the property the first week of August, 2012. (Ex. R3; Tr. 810:2-18)

Inspectors Steven Polgar<sup>3</sup> and Mike Tromble<sup>4</sup> were on site for four days in August, 2012, to perform a hazardous condition complaint inspection<sup>5</sup> and a regular inspection. (Tr. 25:3 – 26:10; Tr. 34:17-25) When they arrived at the mine site there was no one on the property, and no machines were running. (Tr. 36:1-7)

Three months prior, in May, 2012, Polgar and Tromble had been at the Stone Plus site for another hazardous condition complaint inspection. (Tr. 27:9-18; Tr. 614:17 - 20) At that time, Stone Plus was operating without a mine identification number. (Tr. 615:18 – 616:11) As part of that interaction, Fred Sanchez, of MSHA's Educational Field Services division, assisted Stone Plus's owner, Neil Bradshaw,<sup>6</sup> to set up a Part 46 training plan. (Tr. 800:3-7; Tr. 682:1-9) During the May inspection, Tromble, Polgar, and Bradshaw discussed the screening plant, berms, guards, mobile equipment braking systems, workplace examinations, pre-shift examinations on mobile equipment, load-out areas, overtravel protection, Rules To Live By Standards, and unwarrantable failure enhanced enforcement. (Ex. S-4; Ex. S-5; Tr. 683:3 – 693:24; Tr. 800:18 – 801:1) Bradshaw was also given a checklist outlining certain MSHA requirements. (Ex. S-12C)

The August 2012 hazardous condition complaint alleged that: 1) the screening plant was missing guards; 2) there were missing berms on the ramps and pads; 3) there were no fire extinguishers at the mine; 4) the brakes on the Caterpillar 950C loader had failed; 5) there was too much dust at the mine; 6) no dust masks were provided at the mine; 7) there was no first aid kit; and, 8) safety training was inadequate. (Ex S-6; Tr. 29:8-22) Polgar found evidence to substantiate allegations 1, 2, and 4. (Tr. 30:3-17)

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<sup>3</sup> At the time of the hearing, Polgar had about sixteen years of experience with front-end loaders, crushers, and screening plants and had been an MSHA mine inspector for approximately two years. (Tr. 17:13-16; Tr. 23:14 – 24:3) Before joining MSHA, Polgar first worked for four years at Willow Creek Sand and Gravel as a truck driver, dozer operator, skid-steel loader, general laborer, and as a crusher operator, and then performed the same tasks for Lafarge Materials for four years. (Tr. 17:23 – 9:18) He then worked for Geneva Rock Products for seven and half years. (Tr. 19:20 – 21:13)

<sup>4</sup> Tromble started his mining career in the early 90s. He worked as a heavy equipment mechanic and as a blasting and explosives miner. (Tr. 614:2-9) At the time of the hearing, Tromble had worked as an inspector for MSHA since June, 2008, and had been conducting hazardous accident inspections since October, 2010. (Tr. 611:8 – 612:17)

<sup>5</sup> A hazardous condition complaint is (in this case) a complaint from an undisclosed party alleging a hazardous condition at a mine site. *See* Program Information Bulletin No. P 10-16, September 2, 2010, *available at* <http://arlweb.msha.gov/regs/complian/PIB/2010/pib10-16.asp>.

<sup>6</sup> Neil Bradshaw is the owner and operator of Stone Plus. Most of the time, he was the only person working at the mine site. (Tr. 809:19-21)

In summary, and for the following reasons, I conclude that:

- For Citation No. 8593603, and Order No. 8593604, Stone Plus violated Section 56.9300(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of \$2,000.00 for each violation.
- For Order No. 8593607, Stone Plus violated Section 56.9300(b), injury was unlikely, the injury could reasonably be expected to be permanently disabling, the violation was not significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593609, Stone Plus violated Section 56.9300(a), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593611, Stone Plus violated Section 56.9301, injury was reasonably likely, the injury could reasonably be expected to be permanently disabling injury, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593613, Stone Plus violated Section 56.14101(a)(1), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of \$4,000.00.
- For Order No. 8593614, Stone Plus violated Section 56.14130(i), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593617, Stone Plus violated Section 56.14100(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593605, Stone Plus violated Section 56.14112(b), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593606, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593608, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation

was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.

- For Order No. 8593610, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- For Order No. 8593616, Stone Plus violated Section 56.18002(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of \$2,000.00.
- Total Penalty Assessment: \$28,000.00.

## Preliminary Matters

### Jurisdiction

The Respondent argued that MSHA lacked jurisdiction over the mine site because the mine was temporarily closed in accordance with 30 C.F.R. § 56.1000. (Resp. Br. at 2) However, as the Secretary correctly pointed out, Stone Plus failed to file a closure notice with MSHA as required by Section 56.1000. (Tr. 113:9-13; Tr. 660:14-17) Therefore, MSHA was not on notice that the mine was closed or not in operation, and thus retained jurisdiction over the mine site.

Stone Plus also argued that MSHA did not have jurisdiction over the site because it was not in production. (Resp. Br. at 2) Irrespective of this argument, the Respondent repeatedly admitted that it was setting up the screening plant and the crusher for mining, and as such, MSHA had jurisdiction over the mine.<sup>7</sup> (Tr. 812:13 – 813:9; Tr. 815:3; Tr. 872: 11-12; Tr. 877: 11-12; Tr. 918:4-8)

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

(A) an area of land from which minerals are extracted [...] and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, *equipment, machines*, tools, or other property [...] *used in, or to be used in, or resulting from, the work of extracting such minerals* [...]

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

The statute’s plain meaning gives MSHA authority over areas where mining equipment is being set up, i.e. equipment “to be used in” the work of extracting minerals, because the area is considered a mine for purposes of jurisdiction. *Id.*; See *Donovan v. Carolina Stalite Co.*, 734

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<sup>7</sup> In fact, as explained below, I found the plant was actually running, not just setting up.

F.2d 1547, 1553-54 (D.C. Cir. 1984); *Royal Cement Co., Inc.*, 31 FMSHRC 1459, 1462 (Dec. 2009)(ALJ Manning); *Recon Refractory & Constr., Inc.*, 34 FMSHRC 1722, 1728 (July 2012)(ALJ Paez) (“Therefore, so long as the activities are in preparation of future mining activities, those activities fall within MSHA jurisdiction.”); *Khani Co., Inc.*, 32 FMSHRC 1339, 1342 (Sept. 2010)(ALJ Moran) (MSHA had jurisdiction to inspect a closed mine because the company “was preparing to resume operations.”); *The Pit*, 16 FMSHRC 2008, 2010 (Sept. 1994)(ALJ Hodgdon) (The Mine Act is “intended to protect employees from injury whether they are setting up equipment or engaged in production.”); S.Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S.Code Cong. & Ad. News 1977, 3401, 3414.

The Respondent admitted it was setting up its mining equipment for production.<sup>8</sup> Therefore, I find that MSHA had jurisdiction over Stone Plus at the time the citation and orders were written.

### **Inability to Pay Fine**

The Respondent argued that the Secretary’s proposed penalties should be reduced because of Stone Plus’s inability to pay. (Resp. Br. at 15)

In setting civil penalties, Commission judges are required to consider whether the fines will impede the mine’s ability to continue in business. 30 U.S.C. § 820(i). Operators bear the burden of proof when arguing for penalty reductions on this basis. *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (Apr. 1994); *Georges Collieries*, 24 FMSHRC 572, 575 (June 2002)(ALJ Barbour). The damage alleged by operators must be supported by specific evidence. *Broken Hill Mining*, 19 FMSHRC 673, 677 (Apr. 1997). General information, such as tax returns, may be inadequate to prove an inability to pay since these do not directly relate to the effects of proposed penalties. See *Spurlock*, 16 FMSHRC at 700.

Stone Plus’s 2011 and 2012 tax returns (as well as the operator’s personal tax returns for those years) were referenced in its post-hearing brief as evidence supporting its argument. However, the returns were not admitted into evidence at the hearing, and Stone Plus provided no testimony whatsoever regarding its inability to pay or what impact the fines would have on the mine’s ability to continue business. Therefore, the Respondent failed to meet its burden of proving that it is unable to pay the proposed penalties.

### **Credibility Determination**

An ALJ’s credibility determination is “entitled to great deference,” *Am. Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 796 F.3d 18, 31 (D.C. Cir. 2015) (citing *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1107 (D.C.Cir.1998)) and “entitled to great

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<sup>8</sup> The inspectors were originally dispatched to the site to perform a hazardous condition complaint inspection, which contained eight specific complaints. (Tr. 25:3 – 26:10; Ex. S-6) As such, it can be inferred that the mine was in production long enough for a miner to complain about the hazards it cited.

weight.” *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). This is because the ALJ “has an opportunity to hear the testimony and view the witnesses [,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

I find that Bradshaw’s testimony at the hearing was generally not credible.<sup>9</sup> This is based on the record as a whole, my careful observation of the witness during his testimony, and his demeanor at the hearing. Additionally, there were several inconsistencies between his testimony at the hearing and his deposition, and between his testimony and the testimonies of other witnesses.

For example, Bradshaw claimed that he was just setting up the crusher and the screening plant on August 11, 2012. (Tr. 918:12-21) However, he admitted that he demonstrated the functionality of the crusher and screening plant for someone interested in buying the crusher. (Tr. 913:15 – 914:1; Tr. 918:4-8) Indeed, he admitted that he ran six to eight tons of material through the crusher for the demonstration and ran more than four bucket-loads through the screening plant.<sup>10</sup> (Tr. 919:2 – 920:16) It is clear that he was not just “setting up” the mine.

Additionally, at the time of the inspection, Bradshaw attempted to deceive the inspector when performing a pull-through test<sup>11</sup> on the front-end loader. He put his foot on the clutch, which prevented power from being transferred to the driveline and tried to create the impression that the brakes were functioning properly. (Tr. 46:21 – 47:25) Bradshaw denied this deceit by claiming he thought there were two service brakes. (Tr. 859:15-17; Tr. 861:1-3) However, anyone who has operated trucks knows the difference between the clutch, the drive pedal, and the brake pedal, especially someone like Bradshaw who has operated front-end loaders for approximately fifty years. (Tr. 48:21 – 49:3; Tr. 937:18-24)

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<sup>9</sup> The findings of fact here and below 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 account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness’s testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness’s testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean 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 have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

<sup>10</sup> It was obvious to the inspectors that production had been occurring from just looking at the mine site. (Tr. 76:25 – 77:9)

<sup>11</sup> A pull-through test is designed to test the service brakes of a vehicle.



Further, despite Bradshaw's testimony that no mining or work occurred after August 11, 2012, (Tr. 811:13-20) the front-end loader was moved from where it had been the first inspection day to a different location by the last inspection day. (Ex. S- 9G; Ex. S-14; Tr. 100:9-12; Tr. 145:3-10; Tr. 275:25 – 276:4; Tr. 297:20-25; Tr. 496:6-13; Tr. 700:19 – 701:3) Clearly, a miner was at the site after August 11, 2012, and had at least moved equipment.

Finally, during the testimony at the hearing, Bradshaw claimed that there were plywood guards covering the rollers on the screening plant on August 11, 2012, when he was using the plant, but that the guards were removed at the end of the day. (Tr. 927:25 -928:20) However, during Bradshaw's deposition, he testified that the plywood found at the site was never on the plant, was merely placed on the ground near the plant, and that he used only some of the plywood around the bottom of the plant to prevent rocks from going under it. (Tr. 932:19 – 933:23; Tr. 936:6-10)

## **Basic Legal Principles**

### **Significant and Substantial**

The citation and orders in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

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

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

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).<sup>12</sup>

### Negligence

“Negligence” is not defined in the Mine Act. The Commission, has, however,

recognized that “[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). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

*Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702. (Aug. 2015); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). “Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly

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<sup>12</sup> It must be noted that the 4<sup>th</sup> and the 7<sup>th</sup> Circuits have changed the Commission’s precedent under *Mathies* by placing the emphasis and bulk of the analysis on the second element of the test. *See Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7<sup>th</sup> Cir. 2014); *See Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148 (4<sup>th</sup> Cir. 2016). This Respondent, however, is not located in either of those Circuits, and thus, my analysis is under the traditional *Mathies* test.

‘mitigating’ circumstances. Instead, the Judge may consider the totality of the circumstances holistically.” *Brody Mining, LLC*, 37 FMSHRC at 1702.

Part 100 regulations “apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.” *Id.* at 1701-02 (citing *Jim Walter Res. Inc.*, 36 FMSHRC at 1975 n.4; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff’d* 5 FMSHRC 287 (Mar. 1983) (“[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.”)).

Although the Secretary’s part 100 regulations are not binding on the Commission, the Secretary’s definitions of negligence in those provisions are illustrative. According to the Secretary, 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.* “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.*

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

### **Gravity**

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

## Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. 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) (“*R&P*”); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

*See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). 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. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

(1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree 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 had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (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).

*Manalapan Mining Co.*, 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813; *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 1988) 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. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. “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.” *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

## Penalty

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

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

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC at 713 (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

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

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

### **Citation No. 8593603**

Inspector Polgar issued Citation No. 8593603 to Stone Plus at its Portable #1 mine on August 14, 2012. It alleges a violation of 30 C.F.R. § 56.9300(a). The regulation states: “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The citation narrative alleges:

The roadway accessing the crusher/screening plant located on the third tier/bench was not provided with berms or guardrails as required where a drop off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The drop off from the third bench to the second bench was 7 ½ feet (measured) on average. The third bench was 65 feet (approx.) wide and 180 feet (approx.) in length. This area is used on a constant basis during operation for the purpose of feeding the screening plant. The primary equipment utilizing this area was a Cat 950 FEL (s/n 81J10961) and measured 30” from the ground to mid axle height. The crusher was not in operation the day of inspection but had been previously operating as evidenced by product stockpiles beneath the screening plant discharge conveyors. Should a miner over travel the roadway and overturn his equipment, serious if not fatal blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the volatile condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory safety standard. This standard 56.9300a was cited 1 time in two years at mine 4202587 (1 to operator, 0 to contractor).

Ex. S-14

## Violation

Citation No. 8593603 was issued as part of the hazardous condition complaint inspection. The citation alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a high level of negligence. (Ex. S-14) Polgar issued the citation because there were no berms or guardrails on the third tier of the mine, which he considered a roadway. (Tr. 141:1-6; Tr. 366:8-21; Tr. 375:16-18)

The Respondent argued that it did not violate 30 C.F.R. § 56.9300(a) because the area in question was not a “roadway,” there was no drop-off from the third tier, vehicles did not travel near the edge of the tier, and as such, a berm was not required. (Resp. Br. at 2–4) The Secretary argued that Stone Plus was required to have berms on the tier because the third tier was used as a roadway, and there was a drop-off high enough to cause a vehicle to overturn. (Sec’y Br. at 26-27)

Section 56.9300(a) mandates that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” When determining whether an area is a “roadway,” the Commission has looked to the nature of its use. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 846-47 (May 1982). In *Capitol Aggregates*, the Commission found that a ramp was a roadway when used by machinery to drive back and forth over it. *Id.* Additionally, the Commission has found that “an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012) (citations omitted); *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981); *See Peabody Midwest Mining, LLC*, 762 F.3d 611, 615 (7<sup>th</sup> Cir. 2014).

However, “there may be a point at which a roadway is so wide that berms are unnecessary,” unless the evidence shows vehicles traveled near the bench’s edge. *Good Constr.*, 21 FMSHRC 201, 202 (Feb. 1999)(ALJ Manning); *Peabody Coal Co.*, 6 FMSHRC 2530, 2542 (Nov. 1984) (no vehicle was shown to operate within 60 feet of an edge); *See Arch of Wyo., LLC*, 32 FMSHRC 568, 575 (May 2010)(ALJ Manning); *Peabody Coal Co.*, 12 FMSHRC 109, 115–16 (Jan. 1990)(ALJ Lasher).

Here, the third tier was approximately 65 feet wide, 180 feet in length, and had a drop-off of 7.5 feet. (Ex. S-14A; Tr. 390:22 – 391:1; Tr. 141:23 – 142:4) Polgar determined that the 65 foot wide tier was a roadway that required a berm<sup>13</sup> because the area was used for travel by vehicles and equipment. (Tr. 367:2-12; Tr. 386:24 – 387:6; Tr. 391:2-7; Tr. 395:9-15; Tr. 398:11-14) I agree with this determination.

Polgar testified that the front-end loader had to travel the entire length of the tier to access the screening plant and the crusher because there was only one entrance and exit from the east

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<sup>13</sup> When required, berms must be maintained at mid-axle height to the largest piece of equipment, which was the front-end loader. Its mid-axle height was 30 inches. (Tr. 142:10-21)

side of the tier.<sup>14</sup> (Tr. 145:17 – 147:2) Once there, the front-end loader transported product from the crusher to the screening plant, which was located on the edge of the third tier and had a conveyor that discharged over the edge. (Tr. 144:6-14) Then, to load trucks with finished product, the front-end loader would have to travel the entire length of the bench to get down to the second tier where the stockpiles were located. (Tr. 145:17 – 146:1) The photographic evidence presented at the hearing showed front-end loader tracks on the edge of the third tier. (Ex. S-8B, 8D, 8E; Tr. 274:9-13) Polgar testified that if one of the wheels of the front-end loader were to drive off the edge of the bank, it would be enough to cause the loader to overturn (Tr. 147:7-12; Tr. 148:10-12), because the ground was unconsolidated and could give if a vehicle drove too close to the edge. (Tr. 148:5-12)

Bradshaw admitted that on August 11, 2012, he and his son hauled the crusher and the screening plant up the side access road from the bottom of the pit to the third tier using a Volvo tractor semi-truck. (Tr. 811:6-10; Tr. 812:13 – 813:9; Tr. 880:23 – 881:22; Tr. 882:5-11) Once on the third tier, Bradshaw drove across the tier until he found the spot where he wanted to place the crusher. He did the same with the screening plant, and maneuvered the machines into the proper locations. (Tr. 813:22-23; Tr. 883:2 – 884:5) Bradshaw also used the front-end loader to push material off the edge of the third tier and to move product into different piles on the third tier. (Tr. 893:7-15; Tr. 911:6-25)

Bradshaw claimed the tracks were made by the contractor, Susan Martin, and also argued that the tier was not meant to be a roadway. (Tr. 850:19 – 851:3) However, for purposes of determining whether an area is a roadway, it does not matter whose vehicle traveled on it, or that the area was not designed to be a roadway originally. (Tr. 777:20-23) The evidence is clear that the third tier was used as a roadway by Bradshaw, not only to transport and maneuver his equipment into place, but also during the course of normal mining operations. Additionally, the photographic evidence and testimony of Inspector Polgar confirms that the edge comprised loose, unconsolidated material. If a vehicle overtraveled the edge, it could overturn and fall 7.5 feet to the tier below. For these reasons, I conclude that Stone Plus violated Section 56.9300(a).

### **Negligence**

Polgar designated the citation as high negligence because it was an open and obvious condition, and Tromble had informed Bradshaw of the berm/guardrail requirement three months prior, during the May inspection. (Tr. 148:13-20; Tr. 723:25 – 724:4) Bradshaw knew he needed to install berms or guardrails because he was instructed to do so.

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<sup>14</sup> There were east and west access roads, but the screening plant on the third tier blocked access to the west road. (Tr. 146:4-10)



Stone Plus argued that it was only on site for one day, did not intentionally<sup>15</sup> violate any rules, thought it was in compliance with the rules, and put a berm on the edge as soon as it was instructed to do so. (Resp. Br. at 1-3) However, mitigation is something an operator does affirmatively with the intent to protect miners. (Tr. 459:1-13) This includes actions taken by the operator to prevent or correct hazardous conditions. The Respondent's arguments do not constitute mitigation.

A reasonably prudent person familiar with the mining industry would have installed berms or guardrails here. Based on the above, it is clear that Stone Plus knew of the violative condition, and was highly negligent.

### **Gravity**

Without a berm to prevent overtravel, anyone operating a vehicle or machinery on this roadway would be exposed to the hazard of rolling over the edge. (Tr. 122:20 – 123:4) Being ejected or suffering head trauma could easily cause a fatality.<sup>16</sup> (Tr. 147:13-20) The citation was marked as one person affected because the front-end loader only carries one person in the cab at a time. (Tr. 147:24 – 148:2) Since this mine was operated solely by Bradshaw, and possibly one other miner, the single person designation was appropriate.

### **Significant and Substantial<sup>17</sup>**

The first and fourth prongs of the *Mathies* test have been met. The lack of a berm on the third tier created a discrete safety hazard that a piece of mobile equipment might overturn and cause injuries to a miner. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

If a vehicle wheel were to go over the edge of the tier, it could be enough to cause it to overturn, especially considering that the ground was unconsolidated and could give way if a vehicle drove too close to the edge. (Tr. 147:7-12; Tr. 148:5-12) There is a reasonable likelihood of serious injury to a miner by dropping approximately 7.5 feet in an overturned vehicle.

Further, assuming continuing normal mining operations, the frequency of travel increases the probability of an injury occurring. (Tr. 126:3-7) Bradshaw admitted that in addition to his

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<sup>15</sup> Section 110(a) of the Mine Act, 30 U.S.C. § 820(a), imposes strict liability on operators who are found in violation of the Act. *See Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). “Imposing strict liability under the Mine Act is not optional – it is mandatory.” *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014).

<sup>16</sup> All of the potential injuries were exacerbated by the lack of seat belt in the cab of the front-end loader, which led to the issuance of another citation. (Tr. 147:21-23; Ex. S-11)

<sup>17</sup> At the hearing, Polgar testified that his reasoning for the S&S designation were the same as the violation for Order No. 8593604. (Tr. 147:13 -148:12)

traveling across the tier, he allowed people to come onto the mine site to borrow the front-end loader, and landscaping companies were given access to load material from stock piles. (Tr. 901:11-18; Tr. 906:14-25) This would require traveling across the tiers and into the mine pit. The Secretary has proved by a preponderance of the evidence that the S&S designation was warranted.

### **Unwarrantable Failure<sup>18</sup>**

There was no evidence that a berm ever existed on the third tier. The tier was approximately 180 feet in length. (Tr. 128:12-17; Tr. 149:16-18) It was obvious that there was no berm. (Tr. 150:7-19) This violation was covered in the hazardous condition complaint of August 13, 2012. It existed at least since then. (Tr. 149:4-11) It can also be inferred that the violation existed longer because Bradshaw admitted that he did not have time to build any berms on the mine property and had been operating since at least August 11, 2012. (Tr. 131:8-14; Tr. 151:3-13) The violating condition was extensive and was present for an extended period of time. There was a high degree of danger. It was reasonably likely that if the front-end loader or other vehicle overtraveled the edge, it would overturn and possibly cause an ejection or head trauma fatality. (Tr. 150:21-25) Polgar testified that Bradshaw was aware of the requirements of the standard because he had been cited before. (Tr. 150:1-5) Additionally, at the time the citation was written, Bradshaw acknowledged knowing about the requirement that berms were required. When responding to a question why berms were not in place, he responded that he did not have time to build them. (Tr. 151:3-13) It is clear Bradshaw's failure to install berms was intentional. The record does not show that Bradshaw did anything to abate the violating condition before the citation was issued.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. The violation constituted an unwarrantable failure to comply with the regulation.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. Therefore, I assess a penalty of \$2,000.00, as suggested by the Secretary.

### **Order No. 8593604**

Inspector Polgar issued Order No. 8593604 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(a). The regulation states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in

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<sup>18</sup> Inspector Polgar testified that the unwarrantable failure factors he relied upon to make the determination were the same as for Order No. 8593604. (Tr. 148:25 – 149:3)

equipment.” 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The order alleges:

The second tier/bench of the mine was not provided with berms or guardrails as required where a drop off exists of sufficient depth or grade to cause a vehicle to overturn or endanger persons in equipment. The second bench is used daily during production as a roadway by vehicles and equipment accessing the crusher/screening plant as well as to haul away finished product. The drop off from the second bench to the bottom level was 7 ½ feet to 8 feet (measured). The second bench was 225 feet (approx) long and 100 feet (approx.) wide. Should a miner overtravel the roadway/bench and overturn his vehicle/equipment, serious if not fatal blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.9300a was cited 2 times in two years at mine 4202587 (2 to the operator, 0 to a contractor).

Ex. S-13

### **Violation**

Order No. 8593604 was issued as part of the hazardous condition complaint inspection. It alleges that injury was reasonably likely; the injury could reasonably be expected to be fatal; the violation was significant and substantial; one person could be affected; and, the negligence level was high. (Ex. S-13) Bradshaw admitted that the second tier did not have a berm. (Tr. 826:3-6)

As above, I must determine whether the second tier was a roadway with a significant grade to cause a vehicle to overturn or endanger persons in equipment. Polgar concluded that the entirety of tier two needed a berm because it was a roadway. (Tr. 386:24 – 387:6) As previously mentioned, once the finished product was piled onto the second tier, the loader would have to travel the length of the tier in order to load the product for sale to a customer. (Tr. 115:25 – 116:24) When the front-end loader accessed the pile, it would move the material to another pile so production could continue, or it would load a truck with the material.<sup>19</sup> (Tr. 117:5-10)

The edge of the drop-off consisted of loose, unconsolidated material, so the front-end loader would not have to drive completely over the edge for it to overturn. (Tr. 121:4-25) Polgar testified that it is more dangerous to drive at an angle or parallel to the edge than straight onto an embankment. *Id.* The drop-off point from the second bench to the bottom level was approximately 7.5 feet to 8 feet, which according to Polgar was enough to cause a front-end loader to overturn. (Tr. 119:22 – 120:5; Tr. 123:21 – 124:2) The second tier was 225 feet long

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<sup>19</sup> This also assumes that the truck was not oversized and did not need to use the dump site, which was also cited.

and 100 feet wide; a blue trailer was parked in the middle of it. (Tr. 115:9-16; Tr. 122:1-9; Tr. 398:17-18; Ex. S13-E)

Bradshaw claimed that he did not use the second tier, but at the hearing he testified that he used his pickup truck to tow a blue trailer onto the second tier. (Tr. 889:19 – 890:7) After dropping off the trailer, he returned to the access road. (Tr. 890:8-11) There were also numerous tire tracks from the front-end loader and from a smaller vehicle on the second tier bench and by the pile of finished product, indicating that, contrary to Bradshaw's denial, vehicles had indeed traveled on the tier.<sup>20</sup> (Tr. 124:3-19; Tr. 276:19 – 277:3; Tr. 302:1-19; Ex. S-8F, 8H, 8G, 9J)

It follows that, in the case of an injury or fire near the crusher or screening plant, someone would have to drive across the third tier, down the side road, and across the second tier to reach the blue trailer where a first aid kit and fire extinguisher were kept. Despite Bradshaw's claim that he did not consider the second tier a roadway (much like the citation for the third tier above), it is clear that Bradshaw used the second tier as a roadway, not only to transport and maneuver the blue trailer into place, but also during the course of normal mining operations. (Tr. 826:8 – 827:7) The evidence photos and testimony of Inspector Polgar depict the edge as loose, unconsolidated material. If a vehicle overtraveled the edge, it could easily overturn and fall approximately 7.5 feet to 8 feet to the tier below. I conclude that Stone Plus violated Section 56.9300(a).

### **Negligence**

Polgar designated order as involving high negligence because Bradshaw knew or should have known about the violative condition, and there were no mitigating factors. (Tr. 129:9-16) He further stated that it was "inconceivable" that somebody could be on this property and not know that a 200 foot berm was missing. *Id.*

At the time Polgar wrote the order, it was his understanding that Bradshaw was on site every day during the set-up of the plant, to perform maintenance, during production, and to make sales, and should have known of the violating condition. (Tr. 134:15-18) More importantly, when discussing the issuance of the order, Bradshaw told Polgar that there were no berms on the tiers because he did not have time to build them. (Tr. 131:8-14)

It is clear that Bradshaw chose not to install berms. A reasonably prudent person familiar with the mining industry would have installed berms or taken some other compliant measure. The order was properly classified as high negligence.

### **Gravity**

Potential injuries here involve head trauma and possible ejection from the cab of the front-end loader, if it were to overtravel and overturn. Fatalities or serious bodily injuries are reasonably likely to result. (Tr. 139:17-23) Polgar alleged the violation affected one person

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<sup>20</sup> Polgar could tell material had been removed from the pile because it was no longer a symmetrical cone at the top. (Tr. 124:20 – 125:5)

because a front-end loader is designed to be operated by a single person. (Tr. 127:22 – 128:11) I agree that one person would be affected.

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The unbermed/unguarded second tier created a discrete safety hazard that a piece of mobile equipment would overturn which could result in serious injuries. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Polgar issued the citation because he felt it was an obvious violation of a mandatory health and safety standard. (Tr. 122:20 – 123:4) The lack of a berm posed a danger to anyone traveling on the tier (roadway). Miners would be exposed to the hazard of falling over the edge. (*Id.*; Tr. 126:3-7) Polgar designated the violation as reasonably likely to cause fatal injuries because the area had been used by the front-end loader and smaller vehicles. (Tr. 125:8-17)

The Secretary proved by a preponderance of the evidence that the S&S designation was warranted here.

### **Unwarrantable Failure**

Missing berms were part of the hazardous condition complaint, and there was no evidence on site that berms had ever existed. (Tre. 128:12-17) I find that berms were missing since at least August 11, 2012. The violating condition was obvious and extensive because there was no berm anywhere on the 225-foot-long tier. (Tr. 1238-14; Tr. 133:1-8) The degree of danger was high because of the likelihood of a fatality or serious injury if a vehicle or piece of equipment were to overturn. (Tr. 133:9-17) Bradshaw was the primary loader operator and often the sole employee working at the mine. (Tr. 132:22-25) He and Polgar had discussed the berming requirement as part of the May inspection. Bradshaw told Polgar that there were no berms on the tiers because he did not have time to build them. I find that Bradshaw knew of the berming requirement and intentionally disregarded it. Bradshaw made no effort to abate the violating condition prior to the citation. (Tr. 132:18-21)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. I conclude that this was an unwarrantable failure to comply with the regulation.

### **Penalty**

The Secretary assessed a \$2,000.00 penalty for this citation, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. This penalty will not affect the operator's ability to continue in business. The \$2,000.00 penalty the Secretary proposed is appropriate.

## Order No. 8593607

Inspector Polgar issued Order No. 8593607 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b). Section 56.9300 is a mandatory safety standard. The order alleges:

The boulder, used in lieu of a berm on the south side of the feed ramp was not maintained in a mid-axle height position of the largest piece of equipment that travels the roadway, as required where a drop off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The feed ramp was used by a Cat 950 FEL with a mid axle [*sic.*] height of 30” (Measured) and the boulder was 12 to 15 inches (approx) above the working level of the ramp. The ramp was 19 feet long, 11 ½ feet wide and 6 feet high (at the top, all measured). Should a vehicle overtravel the side of the ramp and overturn[, ] permanently disabling blunt force trauma injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the standard and the violative condition and allowed it to exist without correcting the hazard. The violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-15

### Violation

Order No. 8593607 was issued as part of the hazardous condition complaint inspection. It alleges that injury was unlikely, but that if an injury did occur, there was a reasonable likelihood that any resulting injuries would be serious. (Ex. S-15) The violation was not considered significant and substantial, one person was affected, and it was given a high negligence designation. *Id.*

Bradshaw opted to use boulders to create a barrier on the crusher feed ramp instead of constructing a solid material berm or guardrail. The barrier boulders were approximately 12 to 15 inches in height. The regulation requires that a berm or barrier be at least mid-axle height of the largest vehicle using the roadway. Mid-axle height for the front-end loader was 30 inches. One of the boulders had toppled over, and the barrier was less than mid-axel height in that area. (Tr. 153:12 – 154:3; Ex. S-8M, 8N, 8O, 8P) However, even without falling over, the boulder barrier would not have been mid-axel height. (Tr. 154:11-13; Tr. 156:12-13)

Bradshaw made an attempt, albeit inadequate, to put a berm in place on the feed ramp. (Tr. 423:8-11) The feed ramp is a roadway used by equipment at this mine. I conclude that Stone Plus violated Section 56.9300(b).

## **Negligence**

This order alleged high negligence because Bradshaw had been cited for a feeder ramp berm violation in May, 2012, at the same place. (Tr. 161:18 – 162:11; Tr. 166:13-17) Bradshaw knew of the standard. Not only had he been previously cited, he made an incomplete attempt to comply with the standard after the May violation. (Tr. 426:21 – 427:1)

Regarding mitigation, Bradshaw testified that the displaced boulder had shifted because the grizzly on the screening plant vibrated when operated, which caused the boulder to slide out of place. (Tr. 844:6-15) This does not constitute mitigation. Mitigation is something the operator does affirmatively with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. It is clear that the violating condition was the result of a deficient half-measure and was not mitigation.

A reasonably prudent person familiar with the mining industry would have installed and maintained adequate berms or barriers. The high negligence designation was warranted here because Bradshaw affirmatively created the violating condition.

## **Gravity**

If the front-end loader came into contact with the displaced boulder, the boulder could have fallen down the ramp and not prevented the loader from overtraveling the edge. (Tr. 158:8-15) Permanently disabling injuries are foreseeable. (Tr. 160:24 – 161:13) Further, when a miner approaches the feeder with the front-end loader, the bucket is typically raised, which changes the loader's center of gravity. (Tr. 159:3-18) If a front wheel were to go off the side while the loader was in this state of disequilibrium, the loader could overturn or the bucket could slam into the feeder. In either instance it could endanger the driver. *Id.* Polgar marked this citation as unlikely because when the operator feeds material into a hopper, he almost always drives in the same tracks, and it is unlikely that he would get off course. (Tr. 160:5-13) One person, the driver of the front-end loader, would be affected. (Tr. 161:14-17)

## **Unwarrantable Failure**

It is clear from the testimony at the hearing and the photographic evidence that the violation was obvious. (Tr. 163:13-17; Tr. 166:6-12) The length of time the violation existed is unknown. (Tr. 163:5-12) Additionally, since there were other boulders on the ramp, the violation was not extensive. This violation posed a high degree of danger of permanently disabling injury if the loader or other vehicle were to overturn. (Tr. 164:6-21) Bradshaw was on notice of this standard due to the previous citation in May. (Tr. 163:18-22) Rather than diligently try to comply with the standard and remedy the berm issue, Bradshaw attempted a quick and easy fix. His minimal effort demonstrated a lack of reasonable care. There is no other evidence that Bradshaw made any effort to effectively deal with the violating condition prior to the citation.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure to comply with the standard.

## **Penalty**

The Secretary assessed a penalty of \$2,000.00, the minimum under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent. The penalty will not affect the operator's ability to continue in business. Therefore, a penalty of \$2,000.00 is appropriate here.

## **Order No. 8593609**

Inspector Polgar issued Order No. 8593609 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The order alleges:

The roadway accessing the upper portion of the mine, above the feed area was not provided with berms of mid axle [*sic.*] height as required where a drop off exists of sufficient height to cause a vehicle to overturn or endanger persons in equipment. The roadway was at an approx. 15 to 20 percent grade and 25 feet (approx) wide. On the north side of the roadway was loose unconsolidated shot rock dropping into the energy trough from the previous shot below the road. Should a vehicle overtravel the edge of the roadway and overturn, permanently disabling blunt force trauma injuries would be expected to occur due to the irregular, unstable nature of the edge of the roadway. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.9300a was cited 3 times in two years at mine 420587 (3 to operator, 0 to contractor).

Ex. S-16

## **Violation**

Order No. 8593609 was issued as part of the hazardous condition complaint inspection. The order alleges that a permanently disabling injury was reasonably likely, the violation was significant and substantial, one person was affected, and there was a high degree of negligence. (Ex. S-16) The area where this violation occurred was a roadway on a hill above the crusher and screening plant. There was no berm or guardrail in place. (Tr. 167:23-25; Tr. 168:3-9; Ex. S-8T, S-16E) Polgar determined that it was a roadway because there were vehicle tracks, it appeared to have been maintained, and it was used to access the track hoe and the crusher. (Tr. 170:6-10; Tr. 171:11-19) I agree with this assessment.



Bradshaw argued that this roadway did not need a berm because he had constructed it with a slope such that if a vehicle overtraveled the edge, it would not overturn. (Tr. 820:20 – 821:3) However, even if that were true, the material on the edge was loose, unconsolidated, and made of shot material that would not support the weight of a front-end loader. (Tr. 168:3-9; Tr. 169:17-20) As such, equipment could overturn if it went beyond the edge. (Tr. 169:21 – 170:1) I conclude that Stone Plus violated Section 56.9300(a).

### **Negligence**

Polgar designated the order at the level of high negligence because Stone Plus was aware that berms were required, but did not build any. (Tr. 174:3-13) It is important to note that anyone entering the mine site had to use this roadway. (Tr. 176:8-16) The Respondent's negligence is further evidenced by the fact that Bradshaw attempted to slope the roadway to avoid having to build a suitable berm.

Stone Plus raised the following in mitigation: (1) It had been on site for one day and did not access the area in question; (2) There had been no prior citations; and, (3) It had acted in good faith in complying with MSHA standards. (Resp. Br. at 8) Mitigation is something the operator does affirmatively with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. These items do not amount to mitigation. I have also considered the fact that when the road was originally constructed, it was built with a gradual slope. However, due to the loose, unconsolidated nature of the roadway material at the edges, this attempt failed its purpose and was not enough to mitigate the Respondent's high negligence.

### **Gravity**

Polgar designated the order as reasonably likely to cause permanently disabling injuries because vehicles, including the front-end loader, accessed this roadway and were exposed to the hazard. (Tr. 171: 23 – 172:13) An injury could be permanently disabling, as opposed to resulting in a fatality, because there was not a sharp drop-off like the other elevated roadways. The possible injuries from overturning could be head injuries, back injuries, neck injuries, and injuries that result in broken bones. (Tr. 172:19-22) One person was potentially affected – the driver of the front-end loader. (Tr. 173:25 – 174:2)

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The unbermed upper roadway created a discrete safety hazard, i.e., an operator's ability to prevent a piece of mobile equipment from overturning was compromised, potentially resulting in injuries to the miner. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Anyone traveling on the roadway would be exposed to the hazard of falling over the edge. There was a reasonable likelihood that this would cause serious injuries. There was significant front-end loader and small vehicle traffic in the area. Additionally, the grade at the edge of the roadway was approximately 15 to 20 percent – fairly steep. (Tr. 170:14 – 171:3) A

vehicle with bad brakes (such as the front-end loader, as discussed below) would have difficulty stopping if it overtraveled the edge. The significant and substantial designation was warranted.

### **Unwarrantable Failure**

It was obvious that there was no berm on the upper roadway. (Tr. 175:13-19) The violation was extensive; there was no berm anywhere in the area. (Tr. 174:22-24) It is unclear how long the violating condition existed. (Tr. 174:17-21) The degree of danger was high because of the possibility of permanently disabling injuries. (Tr. 175:20 – 176:1) Bradshaw was one of possibly two employees working at the mine at any given time. (Tr. 175:8-12) Stone Plus had been cited for a berm violation in May, and was on notice that berms were required. (Tr. 174:25 – 175:7) Bradshaw showed a serious lack of care in failing to adequately deal with the need for a berm, particularly after being put on notice by the May violation. There is no evidence indicating Bradshaw made any effort to ameliorate the violation prior to the citation.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence, and that an unwarrantable failure existed.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. A penalty of \$2,000.00 is appropriate.

### **Order No. 8593611**

Inspector Polgar issued Order No. 8593611 to Stone Plus at its Portable #1 mine on August 15, 2012, alleging a violation of 30 C.F.R. § 56.9301 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.” 30 C.F.R. § 56.9301. Section 56.9301 is a mandatory safety standard. The order alleges:

The elevated dump site/load out area for loading product material into trucks was not provided with berms, bumper blocks or similar impeding devices even though there was a hazard of overtravel or overturning. The dump site was 5 ½ feet high (measured) and 60 feet (apprx.) in length and was accessed on an as needed basis to load trucks with the Cat 950 FEL (s/n 81J10961). Should a person operating equipment overtravel the edge of the dump site[,], serious blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and the requirements of the standard yet

made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-17

### **Violation**

Order No. 8593611 alleges that an injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, one person was affected, and the violation involved a high degree of negligence. (Ex. S-17) The standard requires a berm or device to impede a vehicle from overtraveling the edge of a dump site. (Tr. 184:13-18)

The violation area was a dump site, an elevated pad from which a front-end loader dumped material into large trucks. It was located on the west access road. (Tr. 180:12 – 181:2; Ex. S-8W, 8X, 8Y) An elevated dump site is commonly used with small front-end loaders that cannot reach over larger vehicles to load materials. (Tr. 183:19-25) The dump site was sixty feet long and 5.5 feet above the road -- high enough for a loader to overturn if it overtraveled. There were no berms or barriers to prevent overtravel. (Tr. 181:12-19; Tr. 183:1-7; Tr. 184:23 -185:3) A guardrail or barrier is required because it is common for a front-end loader to get close to the edge of the dump site while loading trucks. (Tr. 189:3-9)

Bradshaw argued that he never used the dump site and never loaded anything large enough to require use of the elevated site. (Tr. 854:16 – 855:19) However, during a previous inspection, Polgar saw the front-end loader parked on the access road to this dump site. (Tr. 181:20 – 182:2) He also testified that the dump site was very well maintained, (Tr. 191:16-23), and were it not being used, as Bradshaw claimed, it would not have been so well kept. Additionally, the dump site was not barricaded off to prevent miners from using it. (Ex. S-8W, 8X, 8Y) It is reasonable to infer from this that Bradshaw used the dump site in this condition and violated Section 56.9301.

### **Negligence**

To Polgar, this violation involved a high degree of negligence because the condition was open and obvious, and the person who would have used this load-out area most often as the primary loader operator was Bradshaw, the owner/operator. (Tr. 187:12-20; Tr. 191:11-15) A reasonably prudent person familiar with the mining industry would have known to install berms or guardrails at this site.

### **Gravity**

If a loader drove over the edge at this site, it could overturn. If a truck were being loaded at that moment, the loader could hit the truck, potentially causing injury to both the loader operator and the truck driver. (Tr. 186:2-18) Resulting injuries could be serious. (Tr. 186:19-22) At least one person would be affected. (Tr. 187:1-4)

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test are satisfied. The unprotected edge of the dump site created a discrete safety hazard that a loader operator might overtravel the edge and lose control of the vehicle, causing injury to himself or others. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Polgar believed this violation was significant and substantial, i.e., reasonably likely to result in permanently disabling injuries. People used the area as needed. The dump site was well-maintained despite there being no berm or guardrail to prevent overtravel. (Tr. 185:10-19) The front-end loader would have to come close to the edge while loading trucks. Tire tracks indicated that trucks had been loaded there. (Tr. 181:20 – 182:2; Tr. 183:11-15)

Typically, when a front-end loader climbs a loading ramp such as this, its bucket is full, making it top heavy and more likely to tip if it runs over the edge. (Tr. 187:21 – 188:17) The extra bucket weight also makes it more likely that the loader will tip forward into the truck it is loading. *Id.* It is reasonably likely that this could result in a serious injury. Additionally, considering the inadequate brakes and lack of a seat belt on the front-end loader (discussed below), the likelihood of serious injury is even greater. (Tr. 185:20 – 186:1)

The Secretary has proved by a preponderance of the evidence that the S&S designation was warranted.

### **Unwarrantable Failure**

The violation was obvious and extensive. There were no berms or other barriers, and the area was well maintained. (Tr. 190:20-191:23) Additionally, the dump site had existed for approximately three months. (Tr. 189:14-21) The instability of a front-end loader climbing the loading ramp with a full bucket raised to load into a truck intensifies the risk of incident and injury. The lack of any berm or barrier further exacerbates the risk of serious injury to the loader operator and possibly the driver of the truck being loaded. (Tr. 192:5-15) This was an open and obvious condition. Bradshaw knew that there was no berm or barrier at this dump site. (Tr. 192:16-21) Polgar had also spoken to Bradshaw about the berming requirements during the May inspection. Bradshaw acted with a serious lack of reasonable care. Other than having built the roadway with a gradual slope, there is no evidence indicating that Bradshaw made any effort to ameliorate the condition prior to the citation. (Tr. 191:8-10)

The Secretary has proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. A penalty of \$2,000.00 is appropriate.

## **Order No. 8593613**

Inspector Polgar issued Order No. 8593613 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14101(a)(1) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” 30 C.F.R. § 56.14101(a)(1). Section 56.14101 is a mandatory safety standard. The order alleges:

The service brakes on the CAT 950 FEL (s/n 81J1096) failed to hold the equipment with its typical load on the maximum grade it travels. Brake function was very weak and failed to hold the loader with an empty bucket. Poor grade performance combined with the lack of appropriate dump site restraints (citation # 8593611) and berms or guardrails (citation/order # 8593603, 8953604, 8593607, and 8593609), no seat belt in the loader (cit/order #8593614) and the presence of miner(s) working on foot in the crusher/screening plant area, make it reasonably likely that a fatal crushing/blunt force trauma injury would occur to the loader operator or miner(s) on foot should the CAT 950 need to stop and be unable to. Mine operator Neil Bradshaw engaged in conduct constituting more than ordinary negligence in that he was aware of service brake defects on the loader and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with mandatory standard.

Ex. S-10

### **Violation**

Order No. 8593613 was part of the hazardous condition complaint inspection. (Tr. 45:23 – 46:3; Tr. 76:1-7) The order alleges that a fatal injury was reasonably likely, that the violation was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-10) This violation relates to one of MSHA's Rules to Live By and was designated as an unwarrantable failure. (Tr. 70:14-19; Tr. 72:20-23)

The front-end loader is a self-propelled piece of mobile equipment used to feed the screening plant, to load customers' trucks with product material, to build berms, and, during the setup of the plant, to maintain the roads, and to clean the screening deck and crusher. (Tr. 60:2-8; Tr. 62:17-23; Tr. 63:4-8) Polgar testified that while inspecting the front-end loader, he heard an air leak coming from the brake valve. (Tr. 64:2-22)

Bradshaw suggested a pull-through test<sup>21</sup> to test the brakes. (Tr. 46:15-16) Bradshaw operated the loader controls from inside the cab while Polgar observed from the ground. Polgar noticed that instead of pressing the brake pedal and releasing the clutch with the transmission engaged, which would cause the engine to stall if the brakes were functioning properly, Bradshaw allowed the clutch to remain engaged so that the loader did not move forward. This tactic, if not detected by the inspector, would create the impression that the brakes were holding and were in good condition. (Tr. 46:21 – 47:25; Tr. 49:4-9; Tr. 50:16-22) Polgar had Bradshaw repeat the pull-through test. The brakes failed to hold even though the loader was empty.<sup>22</sup> (Tr. 49:17 – 50:6; Tr. 62:9-12) Bradshaw attempted to deceive Inspector Polgar. Stone Plus violated Section. 56.14101(a)(1).

### **Negligence**

Bradshaw had reason to know that the brakes on the front-end loader were not working correctly. He moved the loader from the feed ramp on the third tier bench, where it was on the first day of the inspection, to the lowest level of the pit near the south end stockpiles, by the last day of the inspection. (Tr. 51:9-20; Tr. 496:6-13; Tr. 700:19-23) He tried to deceive the inspector while performing the pull-through test. (Tr. 68:8 -69:6) Additionally, Polgar and Tromble spoke to Bradshaw at the previous inspection in May about mobile equipment safety. (Tr. 72:6-10) A reasonably prudent person familiar with the mining industry would have noticed and fixed the inadequate brakes. Stone Plus knew of the violating condition, and was highly negligent.

### **Gravity**

Polgar designated this citation as potentially fatal because a miner could be struck by the front-end loader if it was unable to stop due to inadequate brakes. (Tr. 57:16 – 58:1) Further, inadequate brakes could cause the loader to drive over the edge of a roadway. It could overturn, and eject or kill the driver. (Tr. 58:2-14) The order designated one person as being affected, the driver or a pedestrian. (Tr. 54:5-22) I agree.

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The inadequate brakes posed a discrete safety hazard to miners because a miner could have been run over by a front-end loader that was unable to stop. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

The violation was reasonably likely to result in a fatal injury. (Tr. 54:23 – 55:15) The front-end loader was used at the crushing and screening plant, and for cleanup and set up purposes. *Id.* During those times, the loader driver, or anyone on the ground in its vicinity, would be exposed to possible injury due to the inadequate brakes. *Id.* Polgar testified further that if a

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<sup>21</sup> A pull through test determines if the brakes are good enough to hold a vehicle when the vehicle is put in gear. (Tr. 46:6-13)

<sup>22</sup> The standard requires the vehicle to be fully loaded for the pull-through test to be considered valid.

miner had been operating the loader when he arrived on site for his inspection, he would have issued an imminent danger order. (Tr. 55:17 – 56:8) There was a reasonable likelihood that the faulty brakes would result in a serious injury.

The Secretary proved by a preponderance of the evidence that the significant and substantial designation was warranted.

### **Unwarrantable Failure**

It is unknown how long the brakes were in the state Polgar observed, however the problem was raised as part of the hazardous condition complaint of August 11, 2012. (Tr. 70:25 – 71:3) The violation was obvious to anyone operating the loader. (Tr. 71:7-23) It was also apparent to Inspector Polgar that air was leaking from the brake valve. Anyone operating the loader would have known that the brakes were not functioning properly. (Tr. 74:1-11) The violation poses a high degree of danger because operating a front-end loader with inadequate brakes and no seat belt on unprotected elevated roadways exposes the driver and others in the vicinity to a high degree of risk of injury or death. (Tr. 74:12-25) Bradshaw knew the brakes on the front-end loader were inadequate and intentionally attempted to deceive Inspector Polgar. (Tr. 75:1-7) Despite knowing that the brakes were inadequate, Bradshaw failed to tag the loader out of service or fix the problem. (Tr. 51:21 -22:10; Tr. 65:16-22 – 67:2) Bradshaw testified that he did not intend to deceive MSHA and thought there were two service brake pedals on the loader. However, anyone with 50 years of experience operating front-end loaders, like Bradshaw, would know that there were a clutch, a service brake, and a drive pedal and would know the difference between them. (Tr. 48:21 -49:3; Tr. 486:13-15; Tr. 859:15-17; Tr. 861:1-3; Tr. 937:18-24) Bradshaw acted with intentional misconduct. There was no effort to remedy the violation prior to the citation, but there was an effort to conceal it. (Tr. 73:18-20)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

### **Penalty**

The Secretary assessed the penalty for this citation at \$3,000.00. This is \$1,000 more than the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). As noted above, Stone Plus was highly negligent, and I found the violation was S&S. This penalty will not affect the operator's ability to continue in business. The Secretary increased the penalty amount due to Bradshaw's deceit and attempted concealment. The penalty is increased to \$4,000.00 due to the operator's deceitful actions.

### **Order No. 8593614**

Inspector Polgar issued Order No. 8593614 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14130(i). The regulation states that “[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure

proper performance.” 30 C.F.R. § 56.14130(i). Section 56.14130(i) is a mandatory safety standard. The order alleges:

The seat belt in the CAT 950 FEL (s/n 81J10961) was not maintained in a functional condition and had not been replaced when necessary to assure proper performance. Upon inspection the seat belt was missing both halves. The mine operator stated that the loader has never had a seat belt installed in it[,] but the year of manufacture (1977 according to serial number) and the presence of a ROPS with a 29 CFR 1926.100 1972 compliance label indicate[s] that a seat belt was provided by the manufacturer. Failure to provide and maintain a functional seat belt, poor brake performance (cit/order #8593613), lack of appropriate dump site restraints (citation # 8593611) and berms or guardrails (citation/order # 8593603, 8593604, 8593607, and 8593609) combine to create a situation where fatal crushing/blunt force trauma injuries would be expected should a miner operating the loader overtravel or overturn a roadway. Mine operator Neil Bradshaw engaged in conduct constituting more than ordinary negligence in that he should have discovered the obvious lack of a seat belt and corrected the hazardous condition instead of allowing it to continue for a period of two years without addressing it. This is an unwarrantable failure to comply with a mandatory safety standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-11

### **Violation**

Order No. 8593614 alleges that injury was reasonably likely, could reasonably result in fatal injuries, was significant and substantial, the negligence level was high, and one person was affected. *Id.* The loader was originally equipped with a seat belt from the manufacturer.<sup>23</sup> However, Polgar found that the seat belt was missing. (Tr. 78:6-12; Tr. 91:18 – 92:5) There were two attachment studs where the seat belt should have been mounted. (Tr. 78:17 – 79:8; Tr. 80:19 – 81:8) Stone Plus violated Section 56.14130(i).

### **Negligence**

Polgar designated the citation as high negligence because the operator had to know of the violation. Anyone driving the loader had to know the seat belt was missing. (Tr. 86:5-20) Bradshaw testified that the loader had not had a seat belt for approximately two years; it never had a seat belt. (Tr. 86:1-4; Tr. 937:25 – 938:15) A reasonably prudent person familiar with the

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<sup>23</sup> Equipment manufactured after 1969 was required to have a seat belt; this loader was manufactured in 1977. (Tr. 80:4-13)



mining industry would have noticed the missing seat belt and replaced it. I find that Stone Plus knew of the violative condition, and the high negligence rating was justified.

### **Gravity**

A driver can be ejected from the cab and severely injured without a working seat belt. (Tr. 57:6-13; 92:12 – 93:7) The inspector designated this violation as affecting one person because there was only one seat in the loader. (Tr. 85:5-9) I agree.

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The missing seat belt created the discrete safety hazard that a loader driver could be subjected to ejection and/or injury by blunt force trauma. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

It was reasonably likely that the missing seat belt could result in an injury. If the loader overtraveled one of the elevated roadways and overturned, the occupant could be ejected from the cab. (Tr. 84:14-20) The loader had no seat belt, inadequate brakes, and there were no berms on the tiers, dump site, or roadway. This very dangerous situation could reasonably result in a fatality. (Tr. 83:21 – 84:11) The Secretary proved by a preponderance of the evidence that the significant and substantial designation was warranted here.

### **Unwarrantable Failure**

The violation was extensive and obvious. The seat belt wasn't just broken; it was missing. (Tr. 87:7-10; Tr. 88:9-13) According to Bradshaw, the violating condition had existed approximately two years. The front-end loader never had a seat belt. (Tr. 86:1-4; Tr. 937:25 – 938:15) There was a high degree of danger because the protection that seat belts provide against ejection from the cab and possible blunt force trauma inside the cab, in the event of an accident is lost if the vehicle has no seat belt. (Tr. 88:14 – 89:1) It is implausible that a person who has operated front-end loaders for approximately fifty years (Bradshaw) could operate this loader without knowing the seat belt is missing. I find that Bradshaw knew the seat belt was missing for approximately two years and conclude that he acted with intentional misconduct by not replacing it. Bradshaw made no effort to remedy the violating condition prior to the issuance of the citation. (Tr. 87:22-25)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent and the violation was

S&S. This penalty will not affect the operator's ability to continue in business. A penalty of \$2,000.00 is appropriate.

### **Order No. 8593617**

Inspector Polgar issued Order No. 8593617 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14100(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). Section 56.14100(a) is a mandatory safety standard. The order alleges:

The mine operator failed to ensure that self propelled [*sic.*] mobile equipment was being inspected for safety defects prior to it being placed into operation. The nature of defects observed and the severity of those defects, as well as the operators own admission indicate that no safety defect exam what so ever [*sic.*] was being performed. The failure to ensure examinations are being conducted can lead to serious[,] if not fatal[,] injuries. Neil Bradshaw, mine operator, engaged in conduct constituting more than ordinary negligence in that he was aware of the requirement to conduct preoperational exams and he did not ensure they (exams) were being conducted. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. S-12

### **Violation**

Order No. 8593617 alleged that a fatal injury was reasonably likely, the violation was significant and substantial, the negligence level was high, and one person was affected. *Id.* Polgar issued the order because the operator failed to inspect the front-end loader prior to placing it into operation. (Tr. 93:16-19; Tr. 94:1-4) The operator is also required to make a record of any defects, take the equipment out of service until defects are corrected, and correct the defects in a timely manner. (Tr. 97:21 – 98:5)

Mine operators are required to perform a pre-shift exam of mobile equipment prior to each shift. The operator must inspect all safety equipment, i.e. brakes and seat belt, to ensure everything is functional and the equipment is safe to run. (Tr. 99:10-15) Due to the obvious nature of the seat belt issue (missing) and the defective brakes, it is obvious that no preoperational exam was done. (Tr. 101:16 – 102:1) Additionally, Bradshaw admitted that no preoperational exam was done. (Tr. 94:16 – 95:1) As an example, a preoperational exam should have been done before the front-end loader was moved from the upper tier to the lower tier of the mine. (Tr. 107:2-9) Stone Plus violated Section 56.14100(a).

## **Negligence**

It was Bradshaw's responsibility, as owner and operator of the mine and principal operator of the front-end loader, to perform preoperational exams. (Tr. 102:14-18; 107:10-20) Bradshaw knew that a preoperational exam was required. At the previous inspection in May, 2012, the inspectors and Bradshaw spoke about the preoperational exam requirement, and Bradshaw was given a safety checklist with pertinent standards that need to be followed. (Tr. 95:5-21) Bradshaw admitted in May that there no preoperational exams had been performed. It is evident that they were still not being performed when this inspection took place, months later. (Tr. 99:20-25; Tr. 101:6-11)

When Polgar asked Bradshaw to produce examination records during the August inspection, Bradshaw opened his briefcase. Polgar looked inside and saw the checklist that he had given Bradshaw in May on top of the other documents. Bradshaw was on notice and was aware of the preoperational exam requirement. (Tr. 107:25 – 108:20) Bradshaw also admitted he had no preoperational exam records. He told Inspector Polgar he knew he should be performing them. (Tr. 96:13-16; Tr. 98:7-13; S-6) Polgar assigned high negligence to this order because the owner was responsible for performing the preoperational exams, knew that they were required, yet failed to do them. (Tr. 100:18-25)

A reasonably prudent person familiar with the mining industry would have inspected the front-end loader before operating it. It is clear that Stone Plus was highly negligent in neglecting this duty to examine.

## **Gravity**

Here, the fatality designation related to the seat belt and brake defects on the front-end loader. (Tr. 103:14-16; Tr. 106:4-9) The driver or a miner on foot in the area would be the only person affected. (Tr. 97:4-11; Tr. 98:15-20; Tr. 106:10-13)

## **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The lack of preoperational exams created the discrete safety hazard of the missing seatbelt and inadequate brakes. These defects could result in injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Polgar considered the violation S&S and reasonably likely to result in fatal injuries. When assessing this violation, Polgar looked at the other related violations. He testified that the purpose of the preoperational exam is to ensure that equipment is checked for defects and is safe for miners to use. (Tr. 105:15-22) Here, the operator failed to do a preoperational exam which resulted in critical safety measures being overlooked. (Tr. 104:9-20) Polgar believed that if a preoperational exam had been performed, the brake issue and the missing seat belts would have been caught immediately. (Tr. 69:16 – 70:3; Tr. 104:24 – 105:2)

Bradshaw admitted that he had operated the equipment and produced commercial product. (Tr. 96:20-21; Ex. S-6) Additionally, there was evidence that the front-end loader had been used in various locations throughout the mine. For example, there were production piles on the ground, there were loader tracks in various areas of the mine, and the loader had been moved from where it was on the first day of inspection to where it was on the last day of inspection. (Tr. 100:1-12) Most importantly, despite the inadequate brakes and missing seat belt, the loader had never been taken out of service. (Tr. 105:23-25) I agree that there was a reasonable likelihood that this was a hazard that could result in an injury. The S&S designation was warranted.

### **Unwarrantable Failure**

The violation was obvious; it is something that should be done every shift, or every time a piece of equipment is to be placed into service. (Tr. 103:4-8) Also, the defects were extensive enough to be obvious. (Tr. 101:13-15) This violation existed since at least May, 2012. The seat belt and brake defects in the front-end loader posed a high degree of danger. (Tr. 103:9-13) It is the operator's responsibility to complete the preoperational exam. Bradshaw failed to do so and admitted that he knew he should have been performing the exams. (Tr. 103:22 – 104:5; Tr. 104:7-8) The MSHA checklist in his briefcase was further evidence that he knew of the preoperational exam requirement but ignored it. (Tr. 108:22 – 109:4) Bradshaw was on notice at least since May when he was given a copy of the MSHA checklist. (Tr. 102:2-10) I find that Bradshaw's omissions constituted intentional misconduct. Nothing was done to ameliorate the violation. (Tr. 102:11-13)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. This violation constituted an unwarrantable failure to comply with the standard.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). As noted above, Stone Plus was highly negligent and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of \$2,000.00, as proposed by the Secretary.

### **Order No. 8593605**

Inspector Polgar issued Order No. 8593605 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14112(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.” 30 C.F.R. § 56.14112(b). Section 56.14112(b) is a mandatory safety standard. The order alleges:

The tail pulley guard on the 26 inch wide east discharge belt of the Extec screen plant (s/n 5830) was not in place as required to prevent persons from contacting moving machine parts. The guard

had been removed and was located on the ground approx. 100 feet away from the tail pulley. The smooth drum tail pulley was 48 inches AGL and adjacent to a walkway/travelway. Should a miner come into contact with a rotating tail pulley serious amputation/dismemberment injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-18

### **Violation**

Order No. 8593605 was issued as part of the hazardous condition complaint inspection. (Tr. 405:1-5) The order alleges that an injury was reasonably likely, could reasonably result in permanently disabling injuries, the violation was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-18) Polgar testified that the standard for guarding moving machine parts requires that if the machine part is over seven feet above ground level (AGL), it is considered guarded “by location,” but here, the screening plant tail pulley was only 48 inches AGL. (Tr. 196:1-8) Therefore, the tail pulley should have been guarded if the machine was in use. In this case, the tail pulley guard had been removed to a location approximately 100 feet from the screening plant, and was on a completely different tier. (Tr. 193:24 – 194:22; Tr. 195:7-12)

Bradshaw testified that he never operated the screening plant without the tail pulley guard in place, but there is credible evidence to the contrary. (Tr. 831:5-9; Tr. 834:21-23) In addition to the hazardous condition complaint claim that the screening plant had been used, Bradshaw admitted he ran the machine for a couple of hours. (Tr. 210:21-24; Tr. 410:14 – 411:3) There was also physical evidence that Polgar relied on at the time he inspected the mine to determine the machine was operated, including the fact that there were discharge piles under the belts and rocks on the frame. (Tr. 411:5-16; Tr. 727:21-25)

There is an exception to the rule: a guard can be removed during testing or for adjustments if such actions cannot be performed without removing the guard. (Tr. 210:25 – 211:8) However, the evidence here shows that the equipment was not being tested or adjusted. There were rocks located near the adjustment mechanism that would have to be removed before any adjustment was done. (Tr. 211:9 – 212:16; Tr. 295:16 – 296:9; Ex. S-9A, 9F, 18D) Additionally, as a general rule, the tail pulley guard does not need to be removed to adjust the machine. (Tr. 212:22-25) The guard was removed, and the screening plant should have been locked out, tagged out, or blocked against motion. (Tr. 609:12 – 610:7; Tr. 547:15-20) I find that Stone Plus violated Section 56.14112(b).

## **Negligence**

Polgar rated the negligence involved in this violation as “high” because the pulley guard had been in place during the previous inspection, it had been subsequently removed, and the screening plant operated after its removal. (Tr. 204:20-25) Stone Plus was on notice of the guarding requirement because Polgar and Bradshaw discussed it at the previous inspection months before, and had even reviewed an MSHA power point presentation on the subject. (Tr. 208:3-11) Additionally, Bradshaw admitted that the tail pulley guard had been removed and excused it because it was only going to run for a couple of hours. (Tr. 352:8-13)

A reasonably prudent person familiar with the mining industry would have assured that the tail pulley on this equipment was properly guarded. It is clear that Stone Plus knew of the violative condition, failed to comply with the relevant standard, and was highly negligent.

## **Gravity**

This type of pulley could actually pull a miner into it. (Tr. 203:25 – 204:13) The resulting injuries could be very serious. *Id.* Polgar believed that the violation affected one person because under normal operating circumstances, only one person would be near the tail pulley at any time. (Tr. 204:14-19) I agree.

## **Significant and Substantial**

The first and fourth prongs of the *Mathies* test are satisfied. The lack of a tail pulley guard created a hazard that a miner could become entangled in the pulley assembly and suffer serious injury. The remaining question is whether there was a reasonable likelihood that the missing guard hazard would result in an injury.

The screening plant was adjacent to a walkway, which was narrow, not compacted, and sloped, increasing the likelihood that a person could slip and fall onto the moving, unguarded tail pulley. (Tr. 196:9-14; Tr. 277:12 – 278:3; Ex. 8-I) The emergency stop button for the conveyor belt was located four or five feet from the belt. (Tr. 197:6-9) A miner could slip and fall on his way to the stop button. A conveyor belt such as this could have considerable spillage near the tail pulley, which would require shoveling. If a miner needed a hand hold to stand up while shoveling, his hand would be mere inches from the uncovered pulley at best. He could easily inadvertently put his hand on the exposed tail pulley. (Tr. 199:2-19; Tr. 201:12 – 202:6)

The Secretary has shown that there was a reasonable likelihood that the missing guard hazard would result in an injury. The S&S designation was warranted.

## **Unwarrantable Failure**

Bradshaw admitted that the violation existed for a couple of hours -- the length of time the mine was producing. (Tr. 205:6-25) The violation was obvious. The guarding was missing, had been moved 100 feet away, and was on a different tier. (Tr. 209:6-11) The violation was extensive because there was no tail pulley on the machine and nothing had been done to

minimize the danger. The missing tail pulley guard posed a high degree of danger. Entanglement accidents are well known in the industry and are unfortunately extremely grievous. (Tr. 209:21 – 210:2) Bradshaw was the owner and operator of Stone Plus, and was on site during all phases of the mining cycle. He was aware of the missing guarding, (Tr. 208:25 – 209:5) but he ran the screener nonetheless. Moreover, the inspectors had told Bradshaw about the guarding requirements the previous May. Bradshaw acted with intentional misconduct. No effort was made to minimize the violation. (Tr. 208:20-24)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was significant and substantial. This penalty will not affect the operator's ability to continue in business. I assess a penalty of \$2,000.00 as proposed by the Secretary.

### **Order No. 8593606**

Inspector Polgar issued Order No. 8593606 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states 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). Section 56.14107(a) is a mandatory safety standard. The order alleges:

The return roller on the 36 inch wide overhead belt of the Extec screening plant (s/n 5830) was not guarded as required to prevent persons from contacting moving parts. The roller was located adjacent to a travelway used to access the controls of the screening plant. The roller was 51 inches (measured) AGL, with the frame of the plant directly below the roller (approx. 30 inches distance) being used as a tool/grease gun storage area. Should a miner come into contact with a rotating return roller entanglement/suffocation injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the guarding standards and the violative condition yet made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-19

## **Violation**

Order No. 8593606 alleges the injury was reasonably likely, could reasonably result in fatal injuries, was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-19) The standard states that moving machine parts shall be guarded. (Tr. 216:2-4) However, there was no evidence that there was a guard over the return roller at any time. (Tr. 220:7-13; Ex. S-8L, 9D, 9E, 9M) The return roller was less than seven feet off the ground and needed to be guarded. (Tr. 217:22 – 218:1)

Bradshaw told Polgar that the screening plant had been operated for only a couple of hours. However, the amount of material on the ground and in the production piles under the discharge conveyors was consistent with a longer period of operation. (Tr. 36:8-16) Polgar concluded that there had never been a guard over the return roller. (Tr. 222:3-10)

Bradshaw argued that he never operated the belt without guarding the roller, and that he used plywood as a guard, however, in light of the amount of material left around the equipment, his testimony on this point is not credible. (Tr. 835:17-25; Tr. 836:7-15) I agree with the Inspector that Stone Plus violated 56.14107(a).

## **Negligence**

Polgar assigned high negligence to this order because it was an open and obvious condition, and he had previously discussed the guarding requirements with Bradshaw. (Tr. 221:20 – 222:20) A reasonably prudent person familiar with the mining industry would have guarded the return roller here. Stone Plus knew of the violative condition and failed to do anything to comply with the guarding regulation. This constitutes high negligence.

## **Gravity**

Unguarded return rollers have caused fatalities before. (Tr. 220:14 - 221:2) If a loose article of clothing or a hand were to come into contact with a return roller, the rotary motion of the roller combined with the belt traveling over it could entangle a miner or his clothing. (Tr. 217:3-21) A miner's entangled clothing could cause suffocation or strangulation, or it could pull a part or all of his body into the machinery. (Tr. 217:3-21; Tr. 221:3-12) Polgar believed that one person would potentially be affected because the prospect of more than one person getting caught in the rollers is very remote. (Tr. 221:13-18)

## **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The lack of return roller guard created a discrete entanglement hazard which could result in serious injury. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

The unguarded return roller was located next to a travelway used to access the screening plant controls. (Tr. 218:2-5) It is also close to a tool/grease storage area. The photographic



evidence shows a grease gun and a bucket of tools below the unguarded return roller. (Tr. 218:25 – 219:8; Tr. 278: 25 – 279:6; Ex. S-8C, 8K, 9D) It is feasible that a miner could reach into the danger area to get the grease gun or tools -- only 30 inches from the return roller. (Tr. 219:9-21) And, if the machine were running, his hand could get caught in the unguarded return roller.

Polgar considered this violation reasonably likely to cause a fatality and S&S. Any miner reaching for the bucket of tools or the grease gun would be exposed to the unguarded roller. (Tr. 220:18 – 221:2) There is a reasonably likelihood that this could result in a serious injury. The S&S designation was warranted.

### **Unwarrantable Failure**

Polgar testified that the lack of guarding at the return roller was an obvious violation, particularly in light of the fact that there never had been a guard over the return roller. (Tr. 223:4-5; Tr. 220:7-13) This hazard poses a high degree of danger. An entanglement could result in serious injury or death. (Tr. 223:6-11) Bradshaw was on site daily, participating in every facet of mining operations. (Tr. 222:24 – 223:3) He knew the return roller should have been guarded since at least May, and was on site to know that there was no guarding in place. (Tr. 223:12-18) Bradshaw acted with intentional misconduct. No effort made to ameliorate the violation. (Tr. 222:21-23)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct, and that its failure to provide guarding for the return roller constituted an unwarrantable failure.

### **Penalty**

The Secretary assessed a \$2,000.00 penalty for this violation, the minimum penalty allowed under 30 U.S.C. § 820(a)(3)(A). This penalty amount will not affect the operator's ability to continue in business. I concur with the Secretary and assess a penalty of \$2,000.00.

### **Order No. 8593608**

Inspector Polgar issued Order No. 8593608 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states 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). Section 56.14107(a) is a mandatory safety standard. The order alleges:

The flywheel on the idle side of the Jaw crusher was not provided with a guard as required to prevent persons from contacting moving machine parts. The flywheel was 5 foot 9 inches above a travelway and approx. 48 inches in diameter. Should a miner come into contact with a rotating machine part, such as a flywheel, permanently disabling blunt force trauma/laceration injury would

be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.14107a was cited 1 time in two years at mine 4202587 (1 to the mine, 0 to a contractor).

Ex. S-20

### **Violation**

Order No. 8593608 alleges that an injury was reasonably likely; it could reasonably result in permanently disabling injuries; it was significant and substantial; the negligence level was high; and, one person was potentially affected. *Id.* The flywheel<sup>24</sup> on the jaw crusher was unguarded and situated five feet and nine inches above the ground. (Tr. 225:11-25; Ex. S-20E, 8Q, 9O, 9P) Bradshaw admitted that there was no guard in place and explained that a permanent guard was being made. (Tr. 848:1-7)

There were discharge material piles below the crusher, made by Bradshaw on August 11, 2012. (Tr. 433:23 -434:7; Tr. 910:16-21; Tr. 912:20-24) There is no question that the crusher had been operated with an unguarded flywheel. Thus, Stone Plus violated Section 56.14107(a).

### **Negligence**

The violation involved high negligence because in May, Polgar and Tromble spoke with Bradshaw about the flywheel on the jaw crusher specifically. (Tr. 234:5 -235:17) At that time, they measured the distance from the ground to the flywheel and determined that it needed to be guarded. *Id.* They also advised Bradshaw that if the machine was moved, which it was, the height above ground level would have to be measured again, and the flywheel would have to be guarded if it was below the minimum height. *Id.* Polgar and Tromble both informed Bradshaw of the guarding requirement. (Tr. 236:4-8) A reasonably prudent person familiar with the mining industry would have guarded the flywheel. It is clear that Stone Plus knew of the violative condition, failed to comply with the regulation, and was therefore highly negligent.

### **Gravity**

If a miner were to come in contact with the inside part of the flywheel, serious injuries such as amputations or blunt force trauma could occur. (Tr. 233:13-24) Lacerations were also likely if a miner even touched the outside of the moving flywheel. *Id.* Polgar believed one person would be potentially affected. (Tr. 233:25 – 234:4) I agree and find accordingly.

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<sup>24</sup> The purpose of the flywheel is to provide momentum or inertia for the jaw crusher. When the jaw crusher is in operation, the flywheel turns continuously. (Tr. 226:21-23; Tr. 232:6-9)

## **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been satisfied. The lack of flywheel guard created a discrete safety hazard of blunt force trauma. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

The flywheel was located directly above a well-worn path consisting of unconsolidated and rocky material. (Tr. 229:8-17; Ex. S-8R, 8S, 9Q) If a miner were to lose his footing walking near the unguarded flywheel, and reach for something to steady himself, a serious injury could occur. *Id.* If a miner were to trip, he could also hit his head on the flywheel. *Id.*

The citation alleged that it was reasonably likely that a permanently disabling injury would occur. This S&S requirement arises from the proximity of the flywheel to the travelway, the shortest path between the jaw crusher and the loader or the screening plant. (Tr. 232:11-24) This proximity increases the likelihood that miners would walk near the unguarded flywheel.

Bradshaw testified that he did not operate the crusher without the flywheel guard, (Tr. 847:7-9), but I give this assertion no credibility. The S&S designation was warranted.

## **Unwarrantable Failure**

Despite having the fact of the missing flywheel guard and its danger brought to his attention in May (Tr. 235:19-25; Tr. 236:1-2), Bradshaw did nothing to come into compliance. This violation was obvious. Moreover, there was a machine component called a “shiv” on the opposite side of the crusher, which looked essentially the same as the flywheel. It was guarded. (Tr. 236:18-22) An unguarded flywheel next to a travelway poses a high degree of danger. (Tr. 236:25 - 237:1) Bradshaw was at the previous inspection, was on site operating every day the plant was open, and was well aware of the violative condition. (Tr. 236:12-17; Tr. 237:4-7) Stone Plus engaged in intentional misconduct. There was no effort made to ameliorate the violation. (Tr. 236:9-11)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct which constituted an unwarrantable failure to comply with the regulation.

## **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). The penalty will not affect the operator’s ability to continue in business. The recommended \$2,000.00 penalty is affirmed.

## **Order No. 8593610**

Inspector Polgar issued Order No. 8593610 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states 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). Section 56.14107(a) is a mandatory safety standard. The order alleges:

The return rollers (2) on the 46 inch wide Jaw discharge conveyor were not guarded as required to prevent persons from contacting moving machine parts. The bottom roller was 29 inches (measured) AGL and adjacent to a travelway used on an as needed basis. The unguarded rollers were open and obvious upon inspection. Should a miner come into contact with an unguarded, rotating roller entanglement/suffocation injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the standards regarding return roller guards and made no attempt to correct the violative condition. The violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.14107a was cited 2 times in two years at mine 4202587 (2 to the operator, 0 to a contractor).

Ex. S-21

### **Violation**

Order No. 8593610 was part of the hazardous condition complaint inspection. (Tr. 243:10-17) The order alleges that an injury was reasonably likely; it could reasonably be fatal; the violation was significant and substantial; the negligence level was high; and, one person was potentially affected. (Ex. S-21) This order pertains to return rollers on the crusher (the jaw), whereas the order discussed above pertains to the return rollers on the screening plant. (Tr. 239:12-17) Here, there were two unguarded rollers,<sup>25</sup> and the roller cited in the order was the lower of the two, at 29 inches above ground level. (Tr. 239:18-21; Ex. S-8U, 8V) Polgar and Tromble believed the machine was beyond the set-up leveling stage and had already been used in production. (Tr. 251:20-23; Tr. 252:5-7; Ex. S-8U)

Bradshaw claimed that there were plywood guards covering the rollers on August 11, 2012, when he used the equipment, which were removed at the end of the day. (Tr. 927:25 - 928:20) However, during Bradshaw's deposition, he testified that the plywood in question had never been on the machine, it was located on the ground near the machine, and he only used some of the plywood around the bottom of the machine to prevent rocks from going under it. (Tr. 932:19 – 933:23; Tr. 936:6-10) Polgar agreed that the plywood was there only to keep rocks from rolling under the conveyor. (Tr. 241:24 – 242:4) Additionally, the plywood depicted in the photo exhibit (S-8U) does not satisfy the regulation requirement because it does not prevent a person from contacting the roller. (Tr. 241:13-23) I conclude that Stone Plus violated Section 56.14107(a).

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<sup>25</sup> Polgar testified that if there are two violations of the same standard on the same piece of equipment, MSHA doesn't issue those citations individually. (Tr. 240:5-8)

## **Negligence**

Order No. 8593610 was assigned high negligence because it was an open and obvious condition, Polgar and Bradshaw spoke extensively about guarding in the previous inspection in May, and Bradshaw was aware of the guarding requirements. (Tr. 246:22 – 247:3) Indeed, despite discussing the guarding requirements, Polgar found no evidence that the rollers had ever been guarded. (Tr. 247 5-15) There were no guard brackets on the machinery until the order was abated. *Id.*

A reasonably prudent person familiar with the mining industry would have guarded the return rollers here. Stone Plus knew of the violative condition and failed to install appropriate guarding. This constitutes high negligence.

## **Gravity**

Polgar testified about a likely scenario. It is reasonably likely that a miner's shovel being used to clean up the area near the unguarded return roller could get caught in the return roller. The miner could be pulled into contact with the roller, which Polgar testified, has happened before. (Tr. 245:22 – 246:3) Also, if a piece of clothing or a hand were to get caught in the roller, it could lead to serious entanglement or suffocation injuries. (Tr. 238:14-23; Tr. 243:22 – 244: 4) It is reasonable that one person could be affected, as alleged.

## **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The missing return roller guard posed a discrete safety hazard of entanglement and resulting injuries. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Crushers and screen decks spill a lot of material during operation, so a miner would frequently be in the area near the unguarded rollers to shovel the spillage. (Tr. 240:9-18) Additionally, the lower unguarded roller was about six feet from the jaw crusher controls. An operator would have to pass by the unguarded roller to get to them. (Tr. 240:23 – 241:1; Tr. 252:8-10) It is reasonably likely that a miner could come into contact with the roller while checking on the equipment, cleaning up spillage, operating the controls adjacent to the roller, or merely walking next to the equipment. (Tr. 244:9-23) Such a hazard is, in turn, reasonably likely to result in a serious injury. The S&S designation was warranted here.

## **Unwarrantable Failure**

Polgar found no evidence that the roller had ever been guarded. To abate the order, guarding brackets had to be welded onto the machine. (Tr. 247:5-15) The equipment had not changed since May. *Id.* The condition was extensive -- there were two rollers on the same conveyor belt, and neither of them had any guarding since at least May. (Tr. 249:4-7) This was an open and obvious condition that anyone could see. (Tr. 249:19 – 250:3) The violation created a high degree of danger. Accidents involving unguarded return rollers have resulted in fatalities in the past. Here, there danger was high. There were two exposed return rollers on a single

conveyor belt located next to a travelway. (Tr. 250:6-12) Like the previous unguarded roller citation, Bradshaw was on notice since the previous inspection in May. (Tr. 222:24 – 223: 18; Tr. 249:8-15) Bradshaw was regularly on site, participating in every facet of mining. He knew the rollers should have been guarded and were not. (Tr. 250:15-18) Bradshaw acted with intentional misconduct. No effort was made to ameliorate the violation. (Tr. 249:16-18)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct. The unwarrantable failure designation was justified.

### **Penalty**

The Secretary assessed the penalty for this citation at \$2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of \$2,000.00, as recommended.

### **Order No. 8593616**

Inspector Polgar issued Order No. 8593616 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.18002(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.” 30 C.F.R. § 18002(a). Section 56.18002(a) is a mandatory safety standard. The order alleges:

The mine operator failed to ensure that a daily work place exam was being conducted to correctly identify the hazards.. [*sic.*] The number of hazards observed and the severity of those hazards, as well as the operators own admission indicate that no exam what so ever [*sic.*] was being done. The failure to ensure workplace exams are being conducted can lead to serious[,] if not fatal[,] injuries. Neil Bradshaw, mine operator, engaged in conduct constituting more than ordinary negligence in that he was aware of the requirement to conduct daily work place exams and he did not ensure the exams were being conducted. This is an unwarrantable failure to comply with a mandatory safety standard. [...]

Ex. S-22

### **Violation**

The order alleges a reasonably likely injury; the injury could reasonably be fatal; the violation was significant and substantial; the negligence level was high; and, one person was potentially affected. *Id.* The mine operator is responsible for ensuring that an examination of each working area around the mine was completed on a daily basis. Given the number of

violations identified by Polgar and Tromble during their inspection, it was obvious to Polgar that workplace examinations were not being conducted. (Tr. 260:19-24) All of the violations discussed above could have been identified in an competent workplace examination. (Tr. 261:3-10)

Significantly, Bradshaw admitted he had not conducted workplace examinations. (Tr. 261:22 – 262:5; Ex. S-6Y) This is underscored by that fact that he did not have any workplace examination records. (Tr. 263:10-14) For context, Bradshaw admitted that during a three month period, he ran the crusher five to seven days total. However, even if he was merely setting up equipment, which I determined he was not, he still had to perform a workplace exam. (Tr. 524:6-8; Tr. 873:25 – 874:3) Stone Plus violated Section 56.18002(a).

### **Negligence**

During the May examination, Bradshaw was given an operations checklist, which apparently languished in his briefcase until Polgar's and Tromble's inspection. The requirement to perform preoperational examinations was on the list. (Tr. 264:10 – 265:8; Ex. S-8Z) Polgar assigned this order high negligence because he felt it was the operator's responsibility to ensure that workplace examinations are being done, Bradshaw acknowledged that he should have been performing the exams, yet he admitted he had never done a single one. (Tr. 267:11-21) A reasonably prudent person familiar with the mining industry would have known to conduct a workplace examination each shift. Stone Plus knew of its obligation to perform workplace exams yet failed to do them. This constitutes high negligence.

### **Gravity**

Polgar testified that this order's fatal designation was due in part to the other citations that were issued. He alleged that one person would be affected based on there rarely being more than one person working the equipment at the mine site. (Tr. 266:19 – 267:10)

### **Significant and Substantial**

The first and fourth prongs of the *Mathies* test have been met. The lack of preoperational examinations created a measure of danger to safety, which arose with each failure to conduct the exams. Failure to conduct a workplace exam increases the likelihood that an injury causing event will occur. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Polgar believed this violation was reasonably likely to cause fatal injuries and rated it as S&S, based on the other citations he issued. (Tr. 265:24 – 266:17) The failure to identify and correct potential hazards (such as those identified above), which could have been identified had examinations been conducted, resulted in a reasonable likelihood of serious injury. *Id.* Bradshaw was aware of the hazards daily while working at the mine site. *Id.* The S&S designation was warranted.

### **Unwarrantable Failure**

There is a one year document retention requirement under this standard. Bradshaw had no records of any exams performed. The violation existed for an extended period of time. (Tr. 267:25 – 268:10) The failure to conduct workplace exams was extensive and obvious. The failure to maintain records for such examinations is to be expected if the examinations are simply not being done. (Tr. 268:11-18; Tr. 270:12-13) There was a high degree of danger associated with Bradshaw's failure to conduct or document workplace examinations. All of the violations discussed above would have been found if an examination had been competently and honestly done. (Tr. 270:14-22) practices cited posed a high degree of danger. During the May inspection, Bradshaw was given the checklist discussed above. He was aware of the workplace examination requirement. (Tr. 268:22 – 269:4) Bradshaw wrote on the checklist that a workplace examination was required "on the days that we work." (Tr. 270:23 – 271:5; Ex. S-8Z) Bradshaw acted with intentional misconduct. There was no effort made to ameliorate the violation. (Tr. 269:6-8)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

### **Penalty**

The Secretary assessed the minimum penalty of \$2,000.00. As noted above, Stone Plus was highly negligent and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of \$2,000.00, as recommended by the Secretary. **WHEREFORE**, it is **ORDERED** that Stone Plus pay a penalty of \$28,000.00 within thirty (30) days of the filing of this decision.

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 6, 2016

OAK GROVE RESOURCES, LLC,  
Contestant,

v.

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

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

v.

OAK GROVE RESOURCES, LLC,  
Respondent.

CONTEST PROCEEDING

Docket No. SE 2009-261-R  
Citation No. 7696616; 1/8/2009

Mine: Oak Grove  
Mine ID: 01-00851

CIVIL PENALTY PROCEEDING

Docket No. SE 2009-487  
A.C. No. 01-00851-180940

Mine: Oak Grove

## **DECISION AND ORDER UPON REMAND**

Before: Judge Moran

This matter is before the Court upon remand from the Commission for the purpose of “assess[ing] an appropriate civil penalty.” *Oak Grove Resources, LLC*, 37 FMSHRC 2687, 2687 (Dec. 2015). Three Commissioners formed the majority, and two Commissioners dissented, on different grounds. As the Commission majority recounted in its December 9, 2015, Decision, this matter has a relatively long litigation history. Initially, this Court vacated the citation upon finding that the safeguard was not validly issued. The Commission reversed that determination, concluding that the safeguard was valid and remanding it to the Court. Upon such remand the Court found that the safeguard had been violated and that the violation was significant and substantial (“S&S”). This too was appealed, with the Commission affirming the finding of violation, but reversing the Court’s S&S determination and, as noted, sending it back for the assessment of the civil penalty.

In its Decision, the Commission majority, after noting the safeguard procedure — which begins with the issuance of a safeguard and, if there is thereafter a failure to comply with such safeguard, the issuance of a citation — then recounted the facts and procedural background. *Id.* at 2688-90.

Everything associated with this case began with the issuance of the notice to provide safeguard. Issued to Oak Grove on March 3, 1986, it was instituted upon finding that

[t]he No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No. 10 sections, respectively.

*Id.* at 2689 (quoting Gov't Ex. 2 (Safeguard No. 2604892)).

Having observed that practice, a locomotive pushing supply cars down a track entry, the safeguard notice proscribed it, stating:

This notice to provide safeguard requires **that cars on main haulage roads not be pushed** except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms.

*Id.* (emphasis added).

Accordingly, save the one exception, where it is “necessary to push cars from the side tracks located near the working section to the producing entries and rooms,” per the safeguard notice, cars at the Oak Grove mine were no longer to be pushed.

Unfortunately, on May 22, 2008, a car was being pushed and a fatal accident occurred at the mine

when a motorman was crushed between a derailed haulage car and the locomotive he had been operating. **The haulage car was being pushed** on the main haulage road. **The victim would not have been exposed to the pinch point between the locomotive and the haulage car if the car was being pulled instead of pushed on the main haul road.**

*Id.* (quoting Gov't Ex. 3 (Citation No. 7696616)) (emphasis added).

In the Commission majority's recounting of the facts it noted the following concerning the fatal accident:

Oak Grove was in the process of transporting the body of a shearing machine to the mine's longwall face. The 24-ton body was placed on a “shearer carrier,” **a haulage car** specifically designed for the task. Tandem locomotives led the shearer carrier, **while a second set of tandem locomotives pushed the shearer carrier down the main haulage road.**

Motor No. 8 led the procession. Connected to its rear by a coupling device was Motor No. 3, establishing a rigid connection. Motor No. 3 was then

connected to the shearer carrier by a one inch diameter, *flexible*, wire rope. The shearer carrier was in turn connected to Motor No. 4 by a solid drawbar. Finally, Motor No. 4 was connected to Motor No. 9 by a coupling device, establishing a rigid connection. The wire rope connection between Motor No. 3 and the shearer was the only connection that was not rigid.

As the lead motors ascended an incline in the mine floor, the shearer carrier derailed. **It was the fifth time the carrier had derailed during that trip.** The operator of Motor No. 3, miner Lee Graham, exited his motor and walked over to examine the derailed carrier. Graham was standing on the tracks, downhill from Motors No. 3 and No. 8, when the motors rolled down the grade, pinning him against the carrier and inflicting the fatal injuries.

*Id.* at 2688-89 (emphasis added) (footnotes omitted) (citation omitted).

Two footnotes, referencing additional facts, were noted by the Commission. They provided:

Motors No. 4 and No. 9, **the pushing motors, generated most of the force to move the carrier.** Tr. 99, 104. The wire rope connecting Motor No. 3 to the shearer carrier behind it “was [used to] help pull the equipment” Tr. 104. It was also used “to help guide the carrier, particularly around curves, and to prevent derailments by using tension.” Gov’t Ex. 4 at 4; see also Tr. 44. The rope was used to pull the carrier back into position on the rails following a derailment. Gov’t Ex. 4, at 6; Tr. 106-07.

....

The brakes had not been set on either of the lead motors. 33 FMSHRC at 850; Tr. 57-58; Gov’t Ex. 8. According to MSHA’s Report of Investigation, post-accident tests “revealed that the motors would not move if either the service brakes or the park brakes on either motor were engaged.” Gov’t Ex. 4, at 8.

*Id.* at 2688 n.2, 2689 n.3 (alteration in original) (emphasis added).

In its earlier decision, this Court expressed the facts somewhat differently, stating:

Oak Grove was attempting to transport the shearer body using two tandem locomotives: Motors No. 3 and No. 8, to *pull* the shearer carrier and Motors No. 4 and 9 to *push* the shearer carrier. Therefore in terms of their destination to the longwall, Motors No. 3 and 8, since they were pulling, were leading and Motors No. 4 and 9 were following the procession. Each pair of locomotives was connected to one another by a coupling. For the two coupled motors pulling the shearer body, No. 8 was in the lead, and connected to No. 3. The No. 3 itself was connected to the shearer body by a one inch diameter, flexible, wire rope. **Thus, unlike the relatively rigid connection between the motors, through a coupling, the connection for the pulling locomotives, utilizing a wire rope to the shearer carrier was anything but rigid.** Miner Graham was operating the No. 3 motor. In contrast to the wire rope arrangement connecting the pulling

motors to the shearer carrier, the [prohibited] pushing motors were connected to the shearer carrier by a *solid drawbar*.

To recap, if one were standing alongside the transporting effort at the time, such individual would have observed, beginning at the front, [permitted] pulling end, the No. 8 motor, which was connected to the No. 3 motor via a coupling and then the No. 3 motor connected to the shearer carrier by the wire rope. Next would be the shearer carrier itself and on the [prohibited] pushing end, a connection from it, by means of a solid drawbar, to the No. 4 motor. Finally, the No. 9 motor was connected to the No. 4 motor via a coupling in the same fashion as the link between the No. 3 and the No. 8. . . .

To understand how the fatality occurred, picture the procession moving towards its destination, as described, and reaching an upgrade. **Slack then developed in the wire rope connection and the consequence was a derailment of the shearer carrier. Examining the situation, the victim unwittingly placed himself in a dangerous position, standing in the middle of the track, between his locomotive and the derailed shearer carrier. It was then that the coupled motors, Nos. 3 and 8 either slid or rolled downhill with Mr. Graham becoming fatally pinned between those motors and the shearer carrier.**

*Oak Grove Res., LLC*, 33 FMSHRC 846, 847-48 (Mar. 2011) (ALJ) (emphasis added).

The point, which this Court regrets that it failed to adequately express, is that the victim would not have been pinned between the Nos. 3 and 8 motors had there been a rigid connection between those motors and the shearer carrier. Had there been a solid bar connecting the shearer carrier to the No. 3 motor, there would have only been pulling. Instead there was the prohibited pushing coming from the Nos. 4 and 9 motors, with the additional problem of the weak link, the non-rigid wire connection between the shearer carrier and the No. 3 motor.

#### **I. The Majority's Analysis of the Significant and Substantial Issue<sup>1</sup>**

As the Commission noted in its decision,

[a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div.*,

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<sup>1</sup> The majority's analysis and the dissent of Commissioner Cohen is recounted because the Court believes that a decision, issued by the Fourth Circuit in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), *after* the Commission majority's December 9, 2015, decision here, may impact the decision. While the Court fully understands and adheres to its duty to follow the majority's direction that it is to "assess an appropriate civil penalty," in light of the *Knox Creek* decision, it takes the opportunity to more completely explain its rationale for upholding its earlier, but now rejected, S&S determination.

*Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (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.

*Oak Grove Res.*, 37 FMSHRC at 2691-92 (citing *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)).

The majority then examined this Court's analysis of the S&S issue. Having agreed that there was a violation, the majority had no issue that the first element or "prong" of *Mathies* had been satisfied. *Id.* at 2692. However, it concluded that neither the second nor third prongs of the *Mathies* test were proved by the Secretary.

As to the second *Mathies* element, that "a discrete safety hazard - that is, a measure of danger to safety - was contributed to by the violation," the majority found that substantial evidence did not support the Court's finding that the second *Mathies* element was met. In this regard, they noted the Court's conclusion that the Secretary established three discrete hazards attendant to the practice of pushing cars. Those identified hazards were that, by the pushing the shearer carrier, that practice contributed to diminished visibility, the creation of a pinch point, and the lack of positive control. *Id.*

The Commission majority concluded that substantial evidence did not support a finding that the violation, that is pushing the shearer carrier, though in contravention of the notice to provide safeguard, contributed to diminished visibility, the creation of a pinch point, or lack of positive control.<sup>2</sup> *Id.* The majority then analyzed the identified hazards, beginning with decreased visibility. For this, the Commission expressed that the "record reflects that decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy, and was therefore in front of the pushing motors." *Id.* Lee Graham, the deceased miner, was operating the No. 3 Motor (the second car in the procession), and Oak Grove's assistant general mine foreman/day-shift foreman was riding on Motor No. 4 (the fourth

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<sup>2</sup> At least in terms of the S&S analysis, it seems fair to state that the majority viewed the events that resulted in the fatality and the failure to comply with the safeguard as coincidental, and therefore that the reasonable likelihood assessments were not tied to the safeguard violation.

car). Tr. 98-100.<sup>3</sup> Thus, the majority concluded that substantial evidence did not support a finding that the pushing violation contributed to the hazard of decreased visibility. 37 FMSHRC at 2693.

Regarding the second identified hazard, the creation of a pinch point, the majority similarly concluded that there was “not substantial evidence in the record to support the finding that pushing the cars contributed to the hazard of a pinch point.” *Id.* The majority states that “the inspector did not articulate how *pushing* the shearer carrier contributed to this specific hazard, as required by element two of *Mathies*.” *Id.* Instead, the inspector “testified that the use of a wire rope contributed to the hazard of a pinch point [and that the] pinch point was created by the use of wire rope to connect Motor No. 3 and the shearer carrier.” *Id.* To remedy the hazard, the inspector testified that the mine operator should “‘use a drawbar or tongue [as] the rigid connection between the shearer carrier and the motor and pull it[,]’ [and the majority noted that i]n fact, after the accident at the mine, a drawbar was attached in place of the wire rope, and Oak Grove then continued to move [that is to say, to pull] the shearer carrier to the longwall face.” *Id.* (first alteration in original) (citation omitted) (quoting Tr. 44).

Speaking to the third hazard, the loss of positive control, the majority stated that “[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car [and there was no] evidence that pushing caused the derailment.” *Id.* They noted that there was “no testimony regarding the likelihood of derailment when pushing a carrier as opposed to pulling the carrier [and that] the inspector never stated that the lack of control increased the probability of a derailment.”<sup>4</sup> *Id.* Rather, he testified that the

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<sup>3</sup> The majority notes, with implicit approval, the point made by counsel for Oak Grove contending that “the whole theory that you are sitting behind the supply cars and not being able to see up ahead doesn’t apply because you actually have somebody up ahead.” 37 FMSHRC at 2692 (quoting Oral Arg. Tr. 11).

<sup>4</sup> The majority did not agree with Commissioner Cohen’s view that the safeguard violation contributed to the hazard of a loss of positive control. From their perspective, Commissioner Cohen’s support “relies solely on one page of transcript testimony wherein the inspector stated that by pushing the cars, a miner cannot maintain good positive control of the loads.” 37 FMSHRC at 2693. The majority concluded that when the inspector made that statement he did so “in the context of his general explanation of the hazards addressed by the safeguard [and] he intertwined the hazard of poor visibility (which, [the majority] explained, did not apply in this case) with the loss of positive control.” *Id.* The majority noted that

[t]he inspector testified that “if you’re pushing a load and it derails, since your visibility is obstructed, a lot of times you don’t know that it’s derailed until you’ve pushed it on farther. You don’t have as good control . . . . If you’re pulling a load, you can see if it derails and you know to stop immediately. And the severity of the accident would be lessened.”

*Id.* (quoting Tr. 43). While the majority recognized that the Secretary contended that pushing the cars is more dangerous than pulling them, it added that part of the associated danger identified by  
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derailment occurred “because there was slack in the wire rope between the #3 motor and the shearer carrier.” Tr. 60. Noting that the Secretary conceded that material on the mine floor most likely caused the shearer carrier to derail, the majority concluded that substantial evidence did not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary, and therefore that the second *Mathies* prong was not met.<sup>5</sup> 37 FMSHRC at 2963-94.

The Commission majority also determined that the Secretary “failed to meet his burden in proving element three of *Mathies*,” because, apart from the death of the motor operator, the Secretary “did not provide evidence of the likelihood of injuries from any of the alleged hazards created by pushing cars in the context of continued normal mining operations.” *Id.* at 2694. In relying “entirely on the occurrence of the accident at issue, [the Secretary] produc[ed] no testimony demonstrating that hazards he identified (poor visibility, creation of pinchpoints, and lack of positive control), would have been reasonably likely to cause injury if normal mining operations had continued. *Id.*

As noted, two Commissioners dissented, one, Commissioner Young, on the basis that the safeguard was not violated, while the other, Commissioner Cohen, agreed with the majority that there was a violation of the safeguard, but he also reached the conclusion that the violation was S&S. Commissioner Cohen’s analysis began by noting that “[t]he Commission reviews a Judge’s factual determinations under the *Mathies* test in accordance with the substantial evidence test,” 37 FMSHRC at 2696 (Comm’r Cohen, concurring in part, dissenting in part), and that meeting that test means the presence of “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Id.* (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). Further, the Commission is not to second guess or substitute its view of the evidence, but rather “determine whether a . . . reasonable factfinder could have reached the conclusions actually reached by . . . the ALJ.” *Id.* (quoting *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998)). Applying that standard of review, Commissioner Cohen then applied it to the *Mathies* test. Speaking to the second element under *Mathies*, requiring a showing that the violation contributed to a safety hazard, the Commissioner expressed that “the record contains substantial evidence to support the Judge’s

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<sup>4</sup> (...continued)

the Secretary related to the need for visibility. Thus, they noted the Secretary’s statement that “*because the load was being pushed*, those who were propelling the load forward could not see the build-up.” *Id.* (quoting Oral Arg. Tr. 33) (emphasis added).

<sup>5</sup> The majority determined that the record evidence identified “an independent cause of the fatality: the park and service brakes were not set on Motors No. 3 or No. 8 at the time of the accident.” 37 FMSHRC at 2694.

decision” that the violation contributed to the three distinct hazards identified by the Secretary.<sup>6</sup> *Id.*

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<sup>6</sup> In support of his conclusion that substantial evidence supports the Court’s determination that pushing the motor decreased visibility, Commissioner Cohen stated:

Common sense dictates that a 24-ton shearer carrier would obstruct the vision of a motor operator who was pushing the load along a graded haul road. In fact, the inspector testified that when a miner uses a motor to push rather than to pull a load it is “harder to see the track and the traffic in front of you.” Tr. 43. Notably, the inspector was testifying about the visibility of the miner who was actively engaged in pushing the shearer-carrier in violation of the safeguard.

37 FMSHRC at 2696 (Comm’r Cohen, concurring in part, dissenting in part). Noting that “[t]he majority conclude[d] that it was not reasonable for the Judge to rely on the inspector’s testimony that pushing the carrier contributed to a visibility hazard,” he pointed out that

the majority independently determine[d] that complete visibility of the track and traffic was not necessary for the miners operating the motors pushing the load. Citing oral argument by Oak Grove’s counsel, the majority concluded that the position of the two miners in front of the load rendered the visibility requirements of the pushing motor operators superfluous.

*Id.* at 2696-97. This view “ignores the fact that when a load is being pushed, the power to move it comes from the pushing motors, while the two motors which Oak Grove placed in front of the load were used to guide the shearer carrier and to help prevent derailment of the carrier.” *Id.* at 2697. In contrast,

[w]hen a load is being pulled, the miner who operates the pulling motor can see what is in front of him and react immediately if there is a problem with the track or traffic in front of the motor. Tr. 43. However, with the configuration used by Oak Grove, the miner operating the front motor could see a problem ahead (just as he would if he were operating a pulling motor), but would have to also communicate with the miner operating the pushing motor so that the miner operating the pushing motor could take effective action to avoid the problem. The necessity of communicating as well as seeing thus contributes to a hazard.

37 FMSHRC at 2697 (Comm’r Cohen, concurring in part, dissenting in part).

Regarding the hazard of the creation of a pinch point, Commissioner Cohen stated that

the inspector did testify how pushing the load rather than pulling it contributed to the hazard of the creation of a pinch point. The inspector explained that when a load is pulled, there is a solid bar – a tongue or drawbar – between the motor and the car being pulled. However, with the configuration used by Oak

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Commissioner Cohen also spoke to the majority's view that the record does not support the judge's decision that it was reasonably likely that the hazards contributed to would result in a reasonably serious injury. *See* 37 FMSHRC at 2694. In this regard, he noted that "in reaching this conclusion, the majority restricted their analysis to the evidence relating to the derailment and the fatal accident which followed." 37 FMSHRC at 2698 (Comm'r Cohen, concurring in part, dissenting in part). However, "he observed that it is well established that a Judge's evaluation of the reasonable likelihood of injury should be made *assuming* continued normal mining operations."<sup>7</sup> *Id.*

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<sup>6</sup> (...continued)

Grove, instead of a bar there was a wire rope connecting the car with the load and the motor in front of it. The wire rope was a component of the pushing configuration; it was connected to a forward motor to supply tension to the carrier which would help to prevent the shearer carrier from derailing while the carrier was being pushed, but in turn it created the hazard of a pinch point.

*Id.*

Addressing the hazard of loss of positive control, the Commissioner noted that the Court concluded, relying upon the "inspector's testimony, that pushing heavy equipment decreases the amount of control the operator has over the load." *Id.* He noted that "the inspector testified that pushing a car provides less control as compared to pulling the car," and that the Commission has held that "[a]n inspector's judgment is an important element in a S&S determination." *Id.* (emphasis added) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984)). Noting that "the particular facts surrounding the violation include the configuration of the motors and shearer carrier which Oak Grove used to move the shearer," Commissioner Cohen concluded that "[t]he inspector's testimony about how the pushing of the shearer carrier with that configuration contributed to discrete hazards provides substantial evidence in the record supporting the Judge's finding as to Step 2 of *Mathies*." *Id.* at 2698.

<sup>7</sup> Citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985), the Commissioner noted that "[t]he evaluation is made in consideration of the length of time that the violative condition existed prior to the condition and time it would have existed if normal mining operations had continued." 37 FMSHRC at 2698 (Comm'r Cohen, concurring in part, dissenting in part). Applying that approach, the Commissioner expressed his view that

the record contains substantial evidence to support the conclusion that under continued normal mining operations it was reasonably likely that the hazards would contribute to a reasonably serious injury[, noting that] [i]t is undisputed that Oak Grove transports heavy equipment such as shearers, scoops, shields, and continuous miners on the haulage road a couple of times a year.

*Id.* at 2699. Expressing his view that

[t]he evidence supports the conclusion that a loss of visibility, or creation  
(continued...)

## II. The Fourth Circuit's Opinion in *Knox Creek*

As in this case, an established violation was involved in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016).<sup>8</sup> This Court mentions the Fourth Circuit's opinion because, as relevant here, that court held that the Commission should have applied the legal standard urged by the Secretary and, more particularly, because the decision addressed, in an extended the fashion, the application of the test for determining whether a violation is significant and substantial.

That court noted with approval the long-established *Mathies* S&S test. Addressing the second prong, the discrete safety hazard — a measure of danger contributed to by the violation — the Fourth Circuit stated that prong addresses the likelihood that a given violation may cause harm. *Id.* at 162. In order to contribute to a discrete safety hazard, a violation must be at least somewhat likely to result in harm. *Id.* The court explained further that “the second prong of *Mathies* requires proof that the violation in question contributes to a ‘discrete safety hazard,’ which implicitly requires a showing that the violation is at least somewhat likely to result in harm.” *Id.* at 163. This means that insignificant violations will not be S&S, as they will not be “somewhat likely to result in harm.” *Id.*

Consequently, in the Fourth Circuit's view, the second prong of the test primarily accounts for the Commission's concern with the *likelihood that a given violation may cause harm*. Likelihood is an assessment of probability. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely, somewhat probable, to result in harm.

Although, as explained above, the Fourth Circuit spoke to the showing needed to establish the second prong, its decision focused chiefly on the third prong of the S&S test — demonstrating a reasonable likelihood that the hazard contributed to by the violation will result in an injury to a miner. In *Knox Creek*, the administrative law judge below had held that the third prong was not established because the likelihood of a triggering arc or spark inside the electrical equipment enclosures had not been established by the Secretary. *Id.* at 154. In contrast, the Secretary asserted that the presence of arcing and sparking within the enclosure should be

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<sup>7</sup> (...continued)

of a pinch point, or a loss of control that occurs during the move of a 24-ton piece of equipment (or equivalent) on a graded haulage road would be reasonably likely to result in a reasonably serious injury[, and that] the third step under *Mathies* only requires a Judge to determine whether, if a discrete hazard occurs (regardless of likelihood), it is reasonably likely that a reasonably serious injury would result.

*Id.* (citing *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014)). For those reasons, the Commissioner “join[ed] the MSHA inspector and the Judge in concluding that the evidence supports such a conclusion,” as “[a] derailment is just one of the events that may occur as a result of a loss of control, creation of a pinch point, or diminished visibility.” *Id.*

<sup>8</sup> In fact, there were four established violations involved: three permissibility violations and one accumulations violation.

assumed. *Id.* The hazard for the permissibility violations was the ignition and escape of hot gas through an opening in the enclosure which was impermissibly large. *Id.* The Secretary asserted that the ignition and escape of hot gas through an opening in the enclosure, which was impermissibly large, should be presumed. *Id.* The Commission reversed the ALJ's S&S determinations and remanded for penalty determinations, and Knox Creek appealed the Commission's subsequent denial of Knox Creek's petition for discretionary review following the imposition of the new penalties.<sup>9</sup> *Id.* at 154-55.

The Fourth Circuit stated that the relevant hazard should be assumed<sup>10</sup> and it reminded that the third prong of *Mathies* is whether there is a reasonable likelihood the *hazard contributed to by the violation will cause injury*. *Id.* at 154. It is not about showing a reasonable likelihood that the violation itself will cause an injury.<sup>11</sup> Thus, one is to assume the existence of the relevant hazard when applying the third prong of *Mathies* and then assess whether it was reasonably likely that a reasonably serious injury would result. The third prong therefore measures the probability that a reasonably serious injury would result.

Emphasizing that point, the Fourth Circuit made it clear that the third and fourth prongs are primarily focused on the seriousness (i.e., gravity) of the expected harm. Thus, those prongs are only concerned with likelihood, in the sense of likelihood that the relevant hazard will result in a serious injury. The court held that

the relevant hazard may be assumed when analyzing *Mathies*' third prong. . . . The test under the third element is whether there is a reasonable likelihood that the *hazard contributed to by the violation . . . will cause injury*. The Secretary need not prove a reasonable likelihood that the *violation itself* will cause injury, as [the operator] argues.

*Id.* at 161. Thus, the court endorsed the Commission's approach of "assum[ing] the existence of the relevant hazard . . . and to consider only 'evidence regarding the likelihood of injury as a result of the hazard.'" *Id.* (quoting *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Accordingly, for the third prong of *Mathies*, one is to determine "only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious

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<sup>9</sup> The Fourth Circuit agreed that, in contradistinction to reviewing legal conclusions, the Commission cannot reweigh facts, but rather is to consider whether the findings of fact by the administrative law judge are supported by substantial evidence. *Knox Creek*, 811 F.3d at 156.

<sup>10</sup> In this regard it noted that the Commission itself has stated that the relevant hazard may be assumed when analyzing the third prong of *Mathies*. *Id.* at 161.

<sup>11</sup> The Fourth Circuit added that "the third *Mathies* prong . . . requires evidence that the hazard is reasonably likely to result in an injury-producing event. *Id.* at 163.

injury would result.”<sup>12</sup> *Id.* (quoting *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014)).

The Fourth Circuit noted that “the Commission [has] reasoned that a violation should be considered S&S when it is reasonably *likely* to result in *serious* harm[, and that t]he later-developed *Mathies* test, at its core, also reflects a dual concern for both likelihood and gravity.” *Id.* at 162 (citation omitted). Drawing a contrast, that court continued that it thought that

*Mathies*’ third and fourth prongs, which the Commission expected would “often be combined in a single showing,” are primarily concerned with *gravity*—the seriousness of the expected harm. To the extent that the third and fourth prongs are concerned with likelihood at all, they are concerned—by their very terms—with the likelihood that the relevant hazard will result in serious injury. *Requiring a showing at prong three that the violation itself is likely to result in harm would make prong two superfluous.*

*Id.* at 162 (second emphasis added) (citations omitted). Thus, the court emphasized that “the third and fourth prongs . . . are concerned . . . with the likelihood that the relevant hazard will result in serious injury.” *Id.*

Speaking to the third and fourth prongs of *Mathies*, that court expressed that those prongs focus on the likelihood that the relevant hazard will result in serious injury, adding that assuming the existence of the relevant hazard at prong three is further justified by policy considerations.<sup>13</sup> *Id.*

The Fourth Circuit rejected the argument that its construction would mean that any violation which *could* occur would be S&S; the third prong of *Mathies* “requires evidence that the hazard is reasonably likely to result in an injury-producing event.” *Id.* at 163.

On the subject of whether the S&S determination is to be based on the particular facts surrounding the violation and whether that is at odds with the Secretary’s method of assuming

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<sup>12</sup> In the present matter, no such prognostication, no crystal ball, is required, regarding the likelihood of an injury, nor the likelihood that the injury would be reasonably serious; miner Lee Graham died, and pushing the carrier inherently created a measure of danger to safety contributed to by that act.

<sup>13</sup> The court also stated that

the legislative history of the Mine Act suggests that Congress did not intend for the S&S determination to be a particularly burdensome threshold for the Secretary to meet. *See Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987) (concluding that the legislative history of the Mine Act “suggests that Congress intended all except ‘technical violations’ of mandatory standards to be considered significant and substantial”).

the hazard for prong three, the court's answer was that under prong two the Secretary must still establish that the violation contributes to a discrete safety hazard and, per prongs three and four, then establish that the hazard is reasonably likely to result in a serious injury. Accordingly, evidence of the likelihood of the hazard is not relevant at prong three. *Id.* at 164.

### **III. Application of the Fourth Circuit's Opinion in *Knox Creek* to the Case at Hand**

To summarize the *Knox Creek* opinion, the Fourth Circuit stated that to meet the second prong, that is, to show a contribution to a discrete safety hazard, *a violation must be at least somewhat likely to result in harm*. As noted above, it explained, "the second prong of *Mathies* requires proof that the violation in question contributes to a 'discrete safety hazard' which implicitly requires a showing that the violation is at least somewhat likely to result in harm." *Id.* at 163.

As for the analyzing the third prong, that court stated that the relevant hazard should be assumed. *Id.* at 164. In that regard, it stated that the analysis is about whether the hazard contributed to by the violation (here, pushing cars), will cause injury, and not that the violation itself will cause an injury. Importantly, the Fourth Circuit stated that both the third and fourth prongs are concerned with the likelihood that the relevant hazard will result in a serious injury. *Id.* at 162.

Apart from the *not inconsiderable reality of the events that transpired*,<sup>14</sup> MSHA Inspector Allen stated that the safeguard was based on criteria set forth in 30 C.F.R. § 75.1403-10(b), and that the "agency set forth that criteria because the agency recognized that *pushing materials on the main haulage roads is a hazard*."<sup>15</sup> Tr. 49 (emphasis added). Therefore, the

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<sup>14</sup> Nor can the shearer pushing be characterized as a one-off event. Addressing the frequency of the process of moving the shearer, Inspector Allen, when asked how often the shearer would be moved to another location, responded, "Well, every longwall move." Tr. 28. Indeed, during his investigation Allen spoke with then-safety director supervisor Tim Thompson about their practice. Thompson told Allen that the mine had been moving equipment this way for several years. Tr. 51.

<sup>15</sup> The pulling was not effective. Inspector Allen explained that the use of the wire rope violated the safeguard "[b]ecause you can't -- you're required to pull it *and you can't pull this with wire rope in the manner that they were using it*." Tr. 35 (emphasis added). Later, after the fatal accident, when the shearer was moved, Oak Grove used a solid, rigid connection between the No. 3 motor and the shearer carrier, not something flexible such as the wire rope. Tr. 38. Although the majority found otherwise, the inspector expressed that the practice employed by Oak Grove created a pinch point between that motor and the load that that was being carried. If they had been pulling the load, that pinch point would not have been present, as everything would have moved in tandem. Tr. 44.

inspector expressed that not only did the violation contribute to a discrete safety hazard, pushing materials was itself a hazard.<sup>16</sup>

**The *Mathies* test is, at its heart, a tool of prognostication. Forecasting is unnecessary when the violative conduct results in an actual injury.**

Particularly in light of the Fourth Circuit’s opinion, this Court would observe that, at its heart, the *Mathies* test is, in almost all instances, a tool of prognostication. As such, it is submitted that it is of no value in a case such as this. That is because there is no point or purpose to prognosticating in instances when the mine operator is in the process of engaging in the prohibited action, and a serious accident occurs while engaging in such violative conduct. Reality should not be supplanted by the predictive test *Mathies* provides. Beyond being “somewhat likely” to result in harm, here the violation, pushing, did result in harm. Oak Grove was engaging in activity expressly prohibited by the safeguard notice: pushing cars on a main haulage road. That prohibited activity, pushing cars, literally set in motion the events that resulted in the fatality.

With great respect for the majority’s determination, and in full compliance with the Commission’s remand direction, as set forth below, the Court should have been more expansive in explaining the basis for its finding that the violation was S&S. This was the Court’s failing because the decision should have emphasized that it was the failure to comply with the safeguard notice in the first place that spawned the events which resulted in miner Graham’s death.

However, it is noted that, while it should have been more expansive, the Court did address the subject, as it addressed Oak Grove’s citation to *Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754 (May 1992), for the proposition that the occurrence of an accident does not confirm that a condition is reasonably likely to result in an injury. As the Court then stated,

The problem with this argument is that it is a straw man. Of course the occurrence of an accident does not by itself confirm that a condition was reasonably likely to result in an injury. But, when an accident occurs, and such accident is connected to the cited condition, one then moves beyond the realm of reasonable likelihood. Instead, there is real world evidence of the occurrence and its connection. There is no need, when the accident in fact occurs, to get into the business of predicting the likelihood of its occurrence. To say the least, it would be a perverse outcome

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<sup>16</sup> During the process of the prohibited pushing, the inspector explained that just prior to the fatality as the moving crew was “traveling upgrade, the slack was produced in the wire rope between the #3 motor and the shearer car, shearer carrier. . . . And as that slack was produced, the shearer carrier derailed to the left . . .” Tr. 25-26. As Commissioner Cohen noted, an inspector’s judgment is an important consideration in determining whether a violation is S&S and is entitled to substantial weight. *Oak Grove*, 35 FMSHRC at 3426-27 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (stating that the Judge did not abuse his discretion in crediting the opinion of an experienced inspector)); see also *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Highland Mining Co.*, 37 FMSHRC 122 (Jan. 2015) (ALJ).

to claim that the case for establishing that a violation was S&S is stronger when the prediction is that it is reasonably likely to occur, but not as strong when it happens.

*Oak Grove Res., LLC*, 35 FMSHRC 3422, 3427 n.4 (Nov. 2013) (ALJ). An irony, can it be doubted that if, instead of a derailing and the fatality, an inspector had only observed the shearer being pushed, then issued the safeguard violation for that, that an S&S finding would have been sustained, upon the inspector explaining the hazards associated with pushing, even if such testimony were limited to loss of positive control, decreased visibility, and pinch points?

#### **IV. Assessment of an Appropriate Penalty**

Section 110(i) of the Mine Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). Judges are not required to give equal weight to each of the criteria, *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Court is not bound by the penalty proposed by the Secretary or by the Secretary's penalty point system. "[N]either the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984). Instead, the Court must consider the six penalty criteria in section 110(i) of the Mine Act based upon the evidence presented at the hearing.

As the Commission has stated, a judge's independent assessment of the civil penalty must be supported by substantial evidence. *Wade Sand & Gravel Co.*, 37 FMSHRC 1874 (Sept. 2015). Further, the Commission noted that

it is the Commission's final penalty assessment that ultimately governs . . . . The Commission possesses independent authority to assess penalties de novo pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). The Commission is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process. *E.g., 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;" also, "neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3"); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014).

*Id.* at 1876-77.

### **A. The Parties' Post-Remand Submissions Regarding the Civil Penalty**

The Secretary submitted a response following the Commission's December 9, 2015, Decision, which, if nothing else, was brief and to the point. Its entire substantive response to the post-remand issue of the assessment of the civil penalty stated: "The Secretary disagrees with the Commission's decision that the violation was not S&S. The Secretary maintains that the violation, which was issued subsequent to the miner's death, is significant and substantial and that the civil money penalty of \$55,000 is appropriate." Sec'y's Resp. 1. To be fair, the Secretary, in earlier briefs, had more fully addressed the civil penalty issue, albeit with the premise that the violation of the safeguard was S&S.

In connection with the December 2015 remand to the Court, Oak Grove also submitted a memorandum addressing the civil penalty issue. After noting that the burden of proof for the civil penalty assessment is on the Secretary, and that the Commission majority determined that the violation was not S&S, Oak Grove then recounted the majority's reasoning in support of its non-S&S finding. Mem. Addressing Civil Penalty on Remand 6-8 ("Oak Grove Mem."). In addition, Oak Grove remarked that as "[t]he remand did not include the negligence finding . . . it would seem that it need not be addressed again." *Id.* at 6 n.3 (citing *Oak Grove*, 35 FMSHRC at 3431). The Court does not agree.

Oak Grove then inserts an irrelevant factor regarding the negligence determination, stating that

[a]fter the original variance to the safeguard was voided, Oak Grove worked with the UMWA and the local MSHA office to develop an appropriate procedure and that procedure was in place. It was not simply that there were prior citations of the safeguard but the fact that all three parties recognized that moving the equipment carried through the mine was different than what the safeguard initially addressed, moving supplies through the mine.

*Id.* (citation omitted). Thus, Oak Grove tries to resurrect its earlier argument, attempting to undercut the safeguard notice.

Oak Grove then turned to the Part 100 penalty formula, remarking that, upon applying it, the Citation, as originally issued would have resulted in a penalty of \$17,301 (123 points). If only the likelihood were changed in application of the formula, the assessment would be \$705 (83 points). Oak Grove is not proposing such a penalty but would propose a penalty in the \$5,000-\$10,000 range. The condition, in a sense, is no longer tied to the accident and that should be taken into account in assessing the penalty.

*Id.* at 9.



## **B. The Court's Independent Analysis of the Penalty Criteria and Imposition of Civil Penalty**

Understanding and applying the majority's decision that the violation was not significant and substantial, the Court proceeds to apply the statutory criteria set forth in section 110(i). It is noted that S&S is not among the identified statutory penalty criteria. Where applicable, the Court's penalty determination takes into account the parties' earlier contentions regarding the penalty, save the S&S finding. Implicitly, the Court was directed to take a fresh look in order to assess an appropriate civil penalty.

### **1. Assessment of Negligence and Gravity Attendant to the Safeguard Violation**

Setting aside the Fourth Circuit's view of S&S, it is noted that although the majority has determined that, for S&S purposes, the diminished visibility, the creation of a pinch point, and the lack of positive control failed to establish prongs two and three of the *Mathies* test, but it still remains true that had the pulling requirement been adhered to, per the safeguard's instruction, there would not have been a pinch point. The pinch point hazard resulted in the fatality here. While miner Lee Graham's death did not occur simultaneously with the moment in time at which the pushing process was taking place, that hazardous practice resulted in the derailment and it was in the course of assessing that derailment that the number 3 and 8 motors moved, fatally pinning him. Inspector Allen concluded in his investigation that pushing the shearer carrier contributed to Mr. Graham's death. After all, it was the closely-connected hazardous pushing practice which precipitated the derailment.

Although the S&S component is no longer considered by the Court, the penalty analysis cannot ignore that the closely-connected and hazardous practice of pushing, expressly forbidden by the safeguard, was ongoing at the time of the derailment. The gravity cannot be described as anything other than what Inspector Allen marked on the citation — fatal and occurred. The victim would not have been exposed to any pinch point had a solid bar been employed between the number 3 motor and the shearer carrier.

For this, upon the Court's fresh look, as required by the remand, the Court also finds that high negligence<sup>17</sup> was involved, as Oak Grove should have known of the established violation of the safeguard and there were no mitigating circumstances.<sup>18</sup> As noted, the miner, Mr. Lee

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<sup>17</sup> The Commission's definition of high negligence requires that such a finding result from "an aggravated lack of care that is more than ordinary negligence." *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Accordingly, "a Commission Judge may find 'high negligence' in spite of mitigating circumstances." *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015).

<sup>18</sup> It is understandable that Oak Grove suggested that there was no need to re-examine the negligence involved. But, neither side, nor the Court, addressed the important negligence consideration that a supervisor, and a significant supervisor at that, was involved, and that there were no mitigating circumstances. Thus, the Court rejects the issuing inspector's view that

(continued...)

Graham, lost his life when he was crushed between the motor and the shearer carrier. Further, a supervisor, Chad Johnson, *the mine's assistant general mine foreman/dayshift foreman*, was involved in the fatal accident, as he was supervising the four motormen who were moving the shearer. Tr. 26. Here, Respondent was *pushing* a shearer carrier, which was transporting the shearer body to the longwall face, along a main haulage road. Supervisor Chad Johnson admitted this. Tr. 99. Thus, the Court in its independent reassessment of the penalty determines that high negligence applies.

## **2. Evaluation of the Other Statutory Penalty Criteria**

### **i. Size of the Business**

Exhibit A to the Secretary's Petition for Assessment of Civil Penalty lists the Oak Grove mine's annual tonnage as 1,035,232. Sec'y's Pet. for Assessment of Civil Penalty, Ex. A. In Part 100, the Secretary has designated mines that produce this tonnage of coal as large mines for the purpose of determining civil penalties, assigning that tonnage 14 out of a possible 15 points. 30 C.F.R. § 100.3, Table I. Part 100 designates the size of the controlling entity as large as well, assigning it 8 out of 10 possible penalty points. 30 C.F.R. § 100.3, Table II. Accordingly, Oak Grove is determined to be a large mine.

### **ii. History of Previous Violations**

The Secretary introduced Government Exhibit 1, which is Respondent's history of violations for the two years prior to the citation issued in this case. Tr. 15. Respondent objected to the admission of the exhibit to the extent that it contained citations and orders that predated the 15-month period prior to May 21, 2008. *Id.* The Court admitted the exhibit, but only for those violations that occurred in the 15-month period. *Id.* at 15-16.

The Court has reviewed and considered Respondent's history of violations.

### **iii. The Effect of the Penalty on the Operator's Ability to Continue in Business**

Respondent agreed, in stipulations submitted to the Court at the hearing, that the total proposed penalty would not affect its ability to continue in business. Stipulations, ¶ 6.

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<sup>18</sup> (...continued)

moderate negligence was involved, nor does it adopt the assertion that Oak Grove had no previous incidents following the issuance of the safeguard. That latter assertion is a distraction and it is potentially misleading. It is a distraction because the penalty analysis for this factor is directed at the event that occurred, not on whether there were or were not previous instances. It is misleading because all that is known is that there were no *cited* previous instances and no previous fatalities. Thus, the claim of no previous incidents is not presumed, nor is there a presumption that there were previous incidents. Thus, there is no finding either way on this question.

iv. **The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance**

Given the fatality, it is inappropriate to express any good faith attribution to Oak Grove, at least in terms of the penalty analysis.

**ORDER**

Accordingly, the violation of 30 C.F.R. § 75.1403-10(b), as identified in Citation No. 7696616, having been previously upheld by the Commission, for the reasons previously discussed applying the statutory penalty criteria, the Court finds that high negligence was involved, that the gravity is characterized as occurred and the severity as fatal, and that applying the other penalty criteria as set forth in section 110(i) of the Mine Act, a civil penalty of \$50,000.00 is imposed. Respondent is hereby **ORDERED** to pay the Secretary of Labor that sum within 30 days of the date of this decision.<sup>19</sup>

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

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<sup>19</sup> 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  
721 19TH STREET, SUITE 443  
DENVER, CO 80202-2536  
303-844-3577 FAX 303-844-5268

April 6, 2016

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

v.

THE SILVER QUEEN MINE, LLC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-448-M  
A.C. No. 02-03312-373291

Docket No. WEST 2015-574-M  
A.C. No. 02-03312-377914

Silver Queen Mine

**DECISION**

Appearances: John Lauer, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and D. Scott Horn, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for the Secretary;  
Trenton Davis, Clovis, California for The Silver Queen Mine, LLC.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against The Silver Queen Mine, LLC (“Silver Queen”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Henderson, Nevada. Silver Queen was represented by Trenton Davis, its agent. Davis cross-examined MSHA Inspector Miles D. Frandsen and introduced three exhibits, but did not offer any witnesses. The Secretary filed post-hearing briefs but Davis elected not to do so. I considered the arguments presented in the briefs but I have not summarized them in this decision except as necessary.

The Silver Queen Mine is a small underground silver mine in Mojave County, Arizona, that employed about four miners in late 2014 and early 2015. Sixteen section 104(a) citations were adjudicated at the hearing.

**I. DISCUSSION WITH FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**A. WEST 2015-448-M**

At the start of the hearing, Silver Queen moved to dismiss WEST 2015-448-M and vacate the ten citations contained in the docket. (Tr. 12). Silver Queen argued that the Secretary violated a provision in MSHA’s “Metal and Nonmetal General Inspection Procedures Handbook.” (Ex. R-1). Silver Queen maintained that under a section entitled “Regular

Inspection Procedures,” the Handbook limits the number of inspections that MSHA may make at a mine in any given year. *Id.* at 2. Silver Queen argued that it had already been subjected to the mandatory number of inspections for the year before Inspector Frandsen commenced the inspection that is the subject of this case. (Tr. 20).

I denied Silver Queen’s motion at the hearing. (Tr. 141). I relied on the language of section 103(a) of the Mine Act which states that “[i]n carrying out the requirements clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety *at least* four times a year[.]” 30 U.S.C. § 813(a) (emphasis added).<sup>1</sup> It is clear that the Mine Act and the Inspection Handbook mandate a *minimum* number of inspections and do not restrict the Secretary from completing more inspections than this statutory minimum. In addition, the Secretary argued that the record shows that the mine had not been subjected to more inspections than the statutory minimum. I relied on the language of the Mine Act in denying the motion and I note that there has been no showing that the Secretary abused his discretion by using his inspection authority to harass the mine.

In December 2014, MSHA Inspector Miles D. Frandsen<sup>2</sup> inspected the Silver Queen Mine and issued ten citations, as discussed below.

#### **1. Citation No. 8871120**

Safety Standard: 57.6306(g)

Gravity: Reasonably likely, S&S, fatal accident reasonably likely, 1 person affected

Negligence: High

Proposed Penalty: \$2,678

This citation alleges that the mine did not conduct a proper post-blast inspection following a blast that occurred on December 1, 2014. (Ex. P-A). During Inspector Frandsen’s inspection the following day, he noticed that two of the blasting holes had not detonated. The yellow blasting devices were clearly visible upon examination of the area. Section 57.6306(g) provides that “[w]ork shall not be resumed in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination.” 30 C.F.R. § 57.6303(g).

Frandsen testified that, while traveling to the mine portal, he had a discussion with miners coming out from underground who indicated to him that they had observed undetonated blasting holes from the blast the day before. (Tr. 146-147, 150). The operator told Frandsen that it had

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<sup>1</sup> Clause (3) requires MSHA inspectors to conduct inspections to determine whether an imminent danger exists at the mine and clause (4) requires inspectors to determine whether the mine is in compliance with safety and health standards or with any citation or order.

<sup>2</sup> Inspector Frandsen has been an inspector with MSHA for about eleven years. (Tr. 31). He is trained as an electrical inspector. Prior to his employment with MSHA he worked as a mechanic at various mines; acquired electrical papers; and was a maintenance supervisor and production supervisor. (Tr. 32-33).

conducted a post-blast examination. (Tr. 147, 151, 155). According to Frandsen, it is the practice in the mining industry to do the post-blast examination shortly after the blast. (Tr. 159). When Frandsen traveled underground he observed yellow shock tubes hanging out of the face. (Tr. 147). According to Frandsen, the shock tubes were extremely obvious and indicated that undetonated explosives had been left in the face from the day before. (Tr. 147, 160). There were no warning signs or barricades in the area and miners had been working underground after the post-blast examination. (Tr. 151, 160-161).

I find that Silver Queen violated the cited standard. Frandsen testified that mine employees told him that it a post-blast examination had been conducted following the blast on December 1, 2014. However, the post-blast examination clearly was not properly performed, as evidenced by the obvious yellow shock tubes that Frandsen observed in the face, which should have been addressed immediately following the post-blast examination. Frandsen testified that miners had been working underground in this small mine since the post-blast examination. Moreover, the miners whom Frandsen encountered while traveling to the portal entered the blast area in order to discover that the post-blast examination had failed to address the obvious hazard of undetonated explosives that remained in the face. Consequently, I find that a violation has been proven.

Frandsen determined that, given the presence of explosives and the obviousness of the shock tubes that were not detected, the mine's failure to conduct a proper post-blast examination was reasonably likely to lead to a fatal injury, and that the violation was significant and substantial ("S&S"). (Tr. 148). Moreover, he noted that an inadequate examination could result in poisonous post-blast gases not being detected. (Tr. 147).

I find that the violation was S&S.<sup>3</sup> I find that a discrete safety hazard existed in that the failure to conduct a proper post-blast examination exposed miners to the hazard of being in an area where they were unknowingly in close proximity to undetonated explosives. Moreover, the inspector noted that an inadequate examination like the one performed here could lead to miners being exposed to poisonous gases. I agree with Frandsen that, given the presence of explosives, the failure to conduct a proper examination was reasonably likely to lead to an injury and that injury was likely to be fatal. The fact that the shock tubes were so obvious, yet went unnoticed by the examiner, leads me to believe that serious injuries were likely at this mine for failure to

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<sup>3</sup> 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). 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). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

conduct competent examinations, assuming continued mining operations. Consequently, I find that the violation was S&S.

Frandsen testified that, given the obviousness of the yellow shock tubes and the fact that he previously issued a separate citation under the same standard to this mine, the mine was highly negligent. (Tr. 148-149).

I find that the violation was a result of Silver Queen's high negligence. I agree with the inspector's assessment that the obviousness of the shock tubes and the fact he had previously cited the mine for a violation of this same standard lend themselves to a finding of high negligence. Like any mandated examination under the Mine Act, post-blast examinations are fundamental in assuring a safe work environment for miners. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 198 (Feb. 1991). Silver Queen's blatant failure to properly conduct the post-blast examination denied the miners this fundamental assurance. Consequently, I uphold the Secretary's high negligence finding.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$1,500.00 is appropriate. I have reduced the penalty solely on the basis of Silver Queen's small size.

## **2. Citation No. 8871121**

Safety Standard: 57.6202(a)(5)

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Moderate

Proposed Penalty: \$162

This citation alleges that the Kawasaki Mule used to transport explosives did not have any placards or warning signs to identify the presence of explosive materials. (Ex. P-F). The vehicle was used to transport explosive materials the day of the inspection and is used almost daily for that purpose. Section 57.6202(a)(5) provides that "[v]ehicles containing explosive materials shall be . . . [p]osted with warning signs that indicate the contents and are visible from each approach." 30 C.F.R. § 57.6202(a)(5).

Frandsen testified that the cited vehicle, which was used by the mine to transport blasting caps, was not equipped with any warning signs. (Tr. 164-165). Frandsen took a photograph of the vehicle which shows no warning signs. (Tr. 164; Ex. P-H).

I find that Silver Queen violated the cited standard. The photograph taken by Frandsen, along with his testimony, confirms that there were no warning signs to indicate the contents of the vehicle. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 166). He based his assessment on the fact that only three persons worked at the mine, and the two individuals who

worked underground would have been the ones to drive the vehicle. (Tr. 166). A BLM road goes through the mine site and non-mine personnel were seen driving the road the day the inspector was there. (Tr. 166-167). On cross-examination Frandsen acknowledged that the box in the bed of the vehicle met the standard for being an approved container for hauling explosives. (Tr. 168).

I agree with the inspector's gravity assessment. Given the limited number of people who would be using the vehicle, it is unlikely that anyone would fail to remember that the vehicle is used to haul explosives. Moreover, protection would be provided by the explosives transport box, which Frandsen testified was to code. Consequently, I affirm the inspector's gravity determinations.

Frandsen testified that the mine operator was moderately negligent. He based his determination on a conversation he had with mine personnel. Miners told him that they previously had a magnetic warning cone on the roll bars of the vehicle, but it had fallen off. (Tr. 167). I find that Silver Queen was moderately negligent.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$162.00 is appropriate.

### **3. Citation No. 8871122**

Safety Standard: 57.14132(b)(1)

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: High

Proposed Penalty: \$540

This citation alleges that the Chevy flat-bed truck had an obstructed view to the rear. The truck was not equipped with any sort of reverse-activated signal alarm and spotters were not used when the vehicle was moved in reverse. (Ex. P-J). A 55 gallon barrel of oil and a diesel fuel tank obstructed the rear view. The truck was regularly used at the mine. Section 57.14132(b)(1) provides that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have . . . [a]n automatic reverse-activated signal alarm; . . . [a] wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; [a] discriminating backup alarm that covers the area of obstructed view; or . . . [a]n observer to signal when it is safe to back up." 30 C.F.R. § 57.14132(b)(1).

Frandsen testified that miners told him that, before backing up the vehicle, they walk around the vehicle. (Tr. 170, 172-173). The miners then get into the vehicle and back it up without the use of a spotter. (Tr. 170-173). There was no backup alarm present on this vehicle, nor a wheel bell. (Tr. 170, 172). Frandsen testified that, although he did not climb into the vehicle and look out the rear view mirror, there were multiple objects in the back of the truck that restricted the view to the rear, including a barrel, fuel tank, and rack. (Tr. 173; Ex. P-L). According to Frandsen, miners told him that the items in the back of the vehicle are always present. (Tr. 172).



I find that Silver Queen violated the cited standard. The rear view from the cab of the truck was obstructed. The photograph the inspector took of the condition clearly shows a number of items which obstructed the view of an individual backing up the vehicle. The vehicle was not equipped with any kind of backup alarm or wheel bell. Moreover, the mine was not using a spotter. Consequently, I find that the Secretary has proven a violation of the cited standard.

Frandsen testified that an injury was unlikely as a result of the cited condition because the vehicle operator walks around the vehicle before getting in to back up. (Tr. 171). He explained that if the truck backed over a miner, any injuries would likely be fatal, however. *Id.*

I agree with the inspector's gravity assessment. Although walking around the vehicle before entering it may alert the vehicle operator to persons or objects that are in the area at that moment, it does not alert or prevent persons from entering the area before the operator actually begins backing up the vehicle. In this instance, I find that an injury was unlikely to be sustained. Nevertheless, I agree with the inspector that, if a miner were struck and run over or pinned against something, the injuries would likely be fatal.

Frandsen testified that the operator was highly negligent. He based his determination on a conversation he had with Ken Graham, the mine manager, in which Graham provided no mitigating circumstances and told Frandsen that he never made the miners aware that they needed to have a spotter. (Tr. 65).

I agree that Silver Queen was highly negligent. The fact that Graham, the mine manager, did not make his employees aware of the need for a spotter is especially troublesome. As discussed above, an accident stemming from the failure to provide a spotter could result in a fatal injury. Management's failure to alert miners that they the need to comply with the standard is inexcusable. Consequently, I find that the inspector's high negligence designation is appropriate.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$540.00 is appropriate.

#### **4. Citation No. 8871123**

Safety Standard: 57.4102

Gravity: Unlikely, not S&S, lost workdays/restrict duty possible, 1 person affected

Negligence: High

Proposed Penalty: \$162

This citation alleges that there were excessive amounts of oil and fuel spillage on the Chevy flatbed truck. (Ex. P-M). The bed, frame, back window and part of the truck body were splashed and covered with oil and spilled diesel fuel. Section 57.4102 provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." 30 C.F.R. § 57.4102.

Frandsen testified that he observed oil and fuel spillage on the flatbed truck. (Tr. 177). According to Frandsen, oil and fuel from the oil barrel and fuel tank in the back of the truck

covered the truck bed, the frame, and had splashed on the truck cab and back window. (Tr. 177-178). He explained that the condition had existed for some time and had not been cleaned up. (Tr. 177, 181-182). Graham told Frandsen that sometimes the oil hose falls down and leaks. (Tr. 177).

I find that Silver Queen violated the cited standard. Fuel and oil were observed covering much of the back of the truck. I credit Frandsen's testimony that the condition had existed for some time. Graham's statement that the hose sometimes falls and leaks confirms the extent of the condition. It would take time for the spillage from a leaking hose to cover the truck to the extent described by Frandsen. Nothing had been done to clean up the oil and fuel. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it would result in lost work days or restricted duty. (Tr. 179). Frandsen explained that, although the welder in the back of the truck presented an ignition source, there was a lot of dirt that had blown onto the back of the truck and mixed with the oil and fuel. (Tr. 178-179). Moreover, there was at least one fire extinguisher present. (Tr. 181). As a result, he thought that an injury was unlikely. (Tr. 179). However, in the event there was an ignition, he testified that individuals would suffer smoke inhalation and burns while fighting the fire. (Tr. 179).

I agree with the inspector's gravity assessment. The presence of the fire extinguisher and the dirt that had mixed with the combustible materials mitigated the hazard to some extent. I credit the inspector's conclusion that, despite the presence of the welder/ignition source, an ignition and injury was unlikely. However, in the event of an ignition, burns and smoke inhalation were reasonably likely to be sustained, both of which are injuries that are likely to result in lost workdays or restricted duty.

Given the obviousness of the condition, and the mine manager's acknowledgement that the hose sometimes fell and leaked, Frandsen determined that the mine was highly negligent. (Tr. 180). He explained that Graham's acknowledgement amounted to a concession that the mine knew there was a problem, but had done nothing to remedy it. (Tr. 180).

I find that Silver Queen was highly negligent. As Frandsen explained, the condition was obvious and extensive, covering much of the rear of the truck. Graham's statement indicated a lack of understanding on the part of management as to the proper standard of care. Here, Graham's concession that a problem existed, combined with the fact that the accumulation was obvious and had existed for some time, lends itself to a finding of high negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$162.00 is appropriate.

## **5. Citation No. 8871124**

Safety Standard: 57.12032

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Moderate

Proposed Penalty: \$162

This citation alleges that the cover plate for the variable-frequency drive (“VFD”) control to the ventilation fan was missing. (Ex. P-R). This control is at the mine portal and was in a junction box that did not have a cover plate. Power cables and exposed connections were inside the box, which subjected miners to the potential of electrocution, shocks, and burns. Section 57.12032 provides that “[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs.” 30 C.F.R. § 57.12032.

Frandsen testified that he observed no cover on the electrical box for the soft start controls. (Tr. 185-186; Ex. P-T). He could see the three 480 volt leads to the right of the soft start. (Tr. 186). According to Frandsen, he was told by Graham that the cover had been left off because the box needed to be ventilated. (Tr. 187).

I find that Silver Queen violated the cited standard. The cover plate for the soft start was not on the box. (Ex. P-T). Graham’s explanation to Frandsen as to why the plate was not on the box makes it clear that the plate had not been removed for testing or repairs. Consequently, I find that a violation of the cited standard existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 186-187). He explained that mine employees told him that, once the soft start was set, one would not have to work on it very often. (Tr. 186). However, if any injury were sustained, given that the wires were 480 volts, it would result in a fatal electrocution. (Tr. 187).

I find that the inspector’s gravity designations are appropriate. I credit the inspector’s testimony that the cited condition would cause a fatal injury if a miner were to come in contact with the wires. I agree that an injury was unlikely to be sustained.

Frandsen testified that Graham told him the cover had been left off the box because an electrician told him that the box needed to be ventilated. (Tr. 187). However, Frandsen stated that the condition was obvious and the ventilation issue could have been addressed without leaving the cover off of the electrical box. (Tr. 187-188). Based on his observations, he designated the violation as being a result of Silver Queen’s moderate negligence. (Tr. 187). Given that the violation was a result of the operator’s attempt to comply with the recommendation of an electrician, I find that the operator was moderately negligent.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$162.00 is appropriate.

## **6. Citation No. 8871125**

Safety Standard: 57.13011

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Low

Proposed Penalty: \$100

This citation alleges that the old water heater that was underground was not equipped with an automatic pressure-relief valve. (Ex. P-V). The unit was pressurized by air to push water to the drills and hoses at the face. Miners were exposed to potential fatal injuries from the tank if the air pressure became too great. Section 57.13011 provides in part that “[a]ir receiver tanks shall be equipped with one or more automatic pressure-relief valves.” 30 C.F.R. § 57.13011.

Frandsen testified that he observed a water tank without an automatic-pressure relief valve. (Tr. 191-192). The water tank was pressurized with air, which would push the water to the heading where the mine was drilling and blasting. (Tr. 192). Frandsen explained that, although this was a water tank, it is considered an air receiver tank under the standard because the water is pressurized with air and the air is used to push the water. (Tr. 196).

I find that Silver Queen violated the cited standard. I accept the inspector’s explanation as to why this water tank is considered an “air receiver” tank under the cited standard. *See Lhoist North America of Virginia*, 36 FMSHRC 2413, 2421-2424 (Sept. 2014) (ALJ) (upholding a violation of 57.13011 that involved an ANFO tank that was pressurized with air that pushed ANFO through the tank and into hoses). The water tank was not equipped with an automatic pressure-relief valve. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 194-195). He explained that the mine told him the water tank was rated for 150 psi of pressure and had a regulator on it that was set at 50 psi. (Tr. 194, 197). Further, on cross-examination he testified that the miners told him that the compressor which pressurized the tank could only go to 120 psi. (Tr. 198). As a result, he opined that an injury was unlikely. (Tr. 194). However, if the tank were over-pressurized and exploded, he believed that it would result in fatal injuries. (Tr. 193, 195).

I find that the inspector’s gravity designations are appropriate. Given that the pressure ratings for both the regulator and outside compressor were less than that of the tank, it was unlikely that the lack of an automatic pressure relief valve would result in the tank exploding. Nevertheless, if the tank did explode, I agree with the inspector that the injuries were likely to be very serious. Consequently, I affirm the gravity designations.

Frandsen determined that Silver Queen exhibited low negligence. He based his determination on the fact that an automatic pressure relief valve was found in the area (Ex. P-Y) and a statement made by Graham that he did not know why the relief valve they found was not on the tank. (Tr. 193-196).

I find that the violation was the result of Silver Queen's low negligence. It is unclear why exactly a relief valve was not attached to the tank. Graham's statement to Frandsen indicates that the mine was aware of its responsibility to equip the tank with an automatic pressure relief valve. Graham was apparently unaware that the tank was not equipped with one. The tank was equipped with a regulator set at 50 psi. For these reasons, I find that Silver Queen only exhibited low negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

**7. Citation No. 8871126**

Safety Standard: 57.8528

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Low

Proposed Penalty: \$100

This citation alleges that the old East Drift had been removed from ventilation but Silver Queen only placed a small berm across the entry and hung a warning sign with brattice material. (Ex. P-AA). The drift was neither barricaded nor sealed. Miners could easily travel past the berm and be exposed to air containing insufficient oxygen or poisonous gases. Section 57.8528 provides that "[u]nventilated areas shall be sealed, or barricaded and posted against entry." 30 C.F.R. § 57.8528.

Frandsen testified that he observed an unventilated drift that had been removed from service and had not been barricaded or sealed. (Tr. 201, 203). A curtain, which had openings on both sides, had writing on it that said "Keep out. No vent." (Tr. 203, 207; Ex. P-CC). A two to three foot berm existed but, according to Frandsen, did not prevent passage. (Tr. 203, 207). Frandsen explained that "barricaded" means "obstructed to prevent a passage of persons, vehicles, or flying materials." (Tr. 201). Here, neither the berm nor the curtain functioned as a barricade because they would not prevent passage. (Tr. 203). On cross-examination Frandsen explained that, in his years of experience, it was not reasonable to expect that miners would not go back in the drift simply because of the steps taken by the mine operator in this instance. (Tr. 207-208).

I find that Silver Queen violated the cited standard. The abandoned drift was not being ventilated. Although the writing on the curtain stating "Keep out . . . No vent" satisfies the standard's requirement that the unventilated drift be posted against entry, the mine had not sealed or barricaded the area. Clearly, the drift was not sealed. (Ex. P-CC). The Secretary's regulations define "barricaded" as "obstructed to prevent the passage of persons, vehicles, or flying materials."<sup>4</sup> 30 C.F.R. § 57.2. I agree with the inspector that the two to three foot berm and loose

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<sup>4</sup> At hearing, Respondent's representative referenced a section of MSHA's Program Policy Manual which deals with "Barricades and Warning Signs." (Tr. 205-206). However, that particular section of the Program Policy Manual is aimed at providing interpretive guidance on sections 56.20011 and 57.20011, neither of which is at issue here.

hanging curtain did not prevent the passage of persons into the unventilated area. I credit his testimony explaining that, in his experience, miners go places they should not be. The standard and accompanying definition of “barricaded” direct that the barricade *prevent* passage of persons. Here, although the berm and curtain may suggest that miners not enter the area, they cannot be said to *prevent* passage of persons. *See Newmont USA Limited*, 34 FMSHRC 146, 161 (Jan. 2012) (ALJ) (holding that a rope strung from rib to rib was incapable of preventing the passage of persons, vehicles or flying materials). A miner could easily step over the berm and walk around the curtain. Consequently, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 202). He determined that there was a sign in place which directed against entry and, as a result, it was unlikely that an injury would be sustained. (Tr. 202). Nevertheless, if a miner were to enter that area he could suffocate due to poisonous gases. (Tr. 202).

I find that the inspector’s gravity designations are appropriate. Although the curtain and berm may not have prevented miners from entering the area, they likely would have dissuaded miners from doing so. Accordingly, it is unlikely miners would go past the curtain and berm into the unventilated area. However, if they did go into the unventilated area, they would likely suffocate due to the lack of oxygen or the presence of poisonous gases. Consequently, I uphold the inspector’s gravity findings.

Frandsen designated the violation as being the result of Silver Queen’s low negligence. He based his designation on Graham telling him that he considered the sign and berms adequate to meet the standard. (Tr. 203). I agree that the violation was caused by Silver Queen’s low negligence. I credit the inspector’s testimony that the operator was mistakenly under the impression that the steps it had taken satisfied the standard. Consequently, I affirm the low negligence designation.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

#### **8. Citation No. 8871127**

Safety Standard: 57.11053(c)

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Low

Proposed Penalty: \$100

This citation alleges that an escape plan was not posted underground, at the portal or where the check in/check out board is located. (Ex. P-EE). If miners were to become confused during an emergency, they could travel into dead ends rather than out to the portal. Section 57.11053(c) provides that every mine shall develop “[a]n escape plan for each working area in the mine to include instructions showing how each working area should be evacuated.” 30 C.F.R. § 57.11053(c). The safety standard goes on to require that each “plan shall be posted at appropriate shaft stations and elsewhere in working areas where persons congregate.” *Id.*

Frandsen testified that the mine did not have escapeway maps or an escapeway plan anywhere underground. (Tr. 211-212). He explained that, although there was only one way in and out of this mine, miners congregated in areas underground, such as near the mine phone, first aid station and work area, and the escape maps and plans were required to be posted in those areas. (Tr. 214-215).

I find that Silver Queen violated the standard. No escape plan was posted anywhere underground. The standard requires that the plan be posted in working areas where miners congregate. The inspector testified that a person could walk out of the mine in five to ten minutes under normal circumstances. (Tr. 36). Although this particular mine may have been small and uncomplicated when compared to other mines, miners could still get confused during an emergency. I credit the inspector's testimony on this point. Consequently, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely because the mine was not complicated and there was only one way in and out, if an injury were to occur it was reasonably likely to be fatal. (Tr. 212-213). He explained that if miners are caught underground and are unable to locate the escape plan, they could be exposed to poisonous gases and other hazards in the event of a mine fire. (Tr. 213). Frandsen has fought several mine fires and explained that it is very easy to get disoriented and confused in an emergency. (Tr. 213). I credit this testimony.

I find that the inspector's gravity designations are appropriate. This is a small underground mine with only a few miners. The mine's layout is, as Frandsen testified, uncomplicated. I agree that it is unlikely that Silver Queen's failure to post the escape plan underground would lead to an injury. Still, if a miner became disoriented and confused during an emergency, such as a mine fire, the lack of an escape plan underground could certainly contribute to a fatal injury as described by the inspector. Consequently, I affirm his gravity determinations.

Frandsen determined that the operator exhibited low negligence. (Tr. 214). Frandsen testified that Graham told him that, because there was only one way in and out of the mine, he did not think they needed to have a plan underground. (Tr. 214). Graham explained to Frandsen that the escape plan is posted on the surface in an area where miners congregate. (Tr. 214).

Given the lack of complexity of this mine, I find that the operator's belief that it did not need to maintain a copy underground is understandable. Consequently, I agree with the inspector that the violation was caused by Silver Queen's low negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

## 9. Citation No. 8871134

Safety Standard: 57.12018

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Moderate

Proposed Penalty: \$162

This citation alleges that two 480 volt knife-blade disconnects and two start/stop buttons at the portal were not labeled. (Ex. P-HH). The disconnects and buttons control separate fans, one on the surface and one underground. Employees were exposed to a fatal injury because they could accidentally deactivate and lock out the wrong circuit when working on equipment or during an emergency. Section 57.12018 provides that “[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location.” 30 C.F.R. § 57.12018.

Frandsen testified that the labels on the electrical disconnect and start/stop buttons for the underground and surface fans had faded and were no longer legible. (Tr. 219). He explained that the disconnects and start/stop buttons are principal power switches. (Tr. 221). He further explained that he could not easily identify what these components controlled since he could not see either the underground or surface fans from the switches. (Tr. 221). It was not obvious where the cables went. (Tr. 222). He explained that, if you have to start tracing the cables to see what they control, then identification cannot be made readily by location, and there is a violation of the standard. (Tr. 222).

I find that Silver Queen violated the cited standard. Given that these switches controlled the underground and surface fans, I find that they were principal power switches. *See FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (ALJ) (affirming a violation of 30 C.F.R. § 57.12–18, the predecessor standard to the one at issue, where a switch which controlled a fan was not labeled). I credit the inspector’s testimony that the labels were not legible and that he could not readily identify what the various electrical components controlled. Consequently, I find that a violation of the standard existed.

Frandsen testified that an injury was unlikely because the few miners that worked at the mine were familiar with the switches. (Tr. 220). He explained that, in the event one of the wrong disconnects or switches was locked out, a miner could get fatally electrocuted. (Tr. 220).

I find that the inspector’s gravity designations are appropriate. Although the miners may have been aware of what components controlled which equipment, a serious injury could certainly occur if a miner worked on a piece of equipment that he mistakenly thought was locked out. *See FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (ALJ).

Frandsen determined that the operator exhibited moderate negligence. (Tr. 221). He testified that labels were present, but had been allowed to fade to the point where they were illegible. (Tr. 222).



I find that the violation was the result of Silver Queen's low negligence. Silver Queen had taken steps to satisfy the standard in the past, as evidenced by the presence of labels. It is understandable that a small mine like this one, where only a few individuals would ever be regularly working with these electrical disconnects and buttons, could fail to notice labels slowly fading over time. The few miners who used these components were so familiar with them that Frandsen found it unlikely that they would fail to properly identify the correct component when they needed to use it or lock it out. The Secretary did not meet his burden of proof.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

**10. Citation No. 8871135**

Safety Standard: 41.12

Gravity: No likelihood, not S&S, no lost workdays, no person affected

Negligence: Moderate

Proposed Penalty: \$100

This citation alleges that changes to the mine's legal identification had not been filed by the operator. The mine's phone number changed about one year before the inspection. (Ex. P-LL). Section 41.12 provides, in part, that the "operator of a coal or other mine shall, in writing, notify the appropriate district manager" within 30 days of any changes in the information required by section 41.11. 30 C.F.R. § 41.12.

Frandsen testified that he attempted to call the mine multiple times at the phone number on file with MSHA, but that the number did not work. (Tr. 226). According to Frandsen, Graham later told him that the number had been changed and he thought he had filed the documentation with MSHA. (Tr. 225-226).

I find that Silver Queen violated the cited standard. Section 41.12, in conjunction with section 41.11, requires that operators notify MSHA of the mine's telephone number and, within 30 days of a change in the telephone number, notify MSHA of the new telephone number. 30 C.F.R. §§ 41.11-41.12. Here, the telephone number on file with MSHA was incorrect and Frandsen was unable to get in touch with mine personnel when needed. No testimony was offered by the operator regarding the timing of the phone number change. Under section 41.12, it is the mine's responsibility to ensure that the correct information is on file and it must bear the consequences of its failure to do so. *See The Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994). I credit Frandsen's testimony that Graham did not verify that he had filed the necessary paperwork to change the mine's telephone number. I find that a violation has been proven.

Frandsen determined that, given that this was a paperwork violation, there was no likelihood of an injury, and any injury would not result in lost workdays or restricted duty. (Tr. 225). I agree with Frandsen's assessment.

Frandsen, relying upon Graham's statement that he thought he had changed the phone number, determined that the mine was moderately negligent. (Tr. 225-226). I find that the

Secretary did not meet his burden of proof and I conclude that Silver Queen's negligence was low with respect to this violation.

Based on the findings and the penalty factors discussed below, I find that a penalty of \$50.00 is appropriate due to the fact that it is a low negligence paperwork violation.

## **B. WEST 2015-574-M**

In February 2015, MSHA Inspector Frandsen inspected the Silver Queen Mine and issued six citations, as discussed below.

### **1. Citation No. 8871177**

Safety Standard: 57.14100(a)

Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected

Negligence: Low

Proposed Penalty: \$100

This citation alleges that the operator of a mucker failed to do a proper pre-operational inspection prior to operating a mucker (loader). (Ex. G-1). It is clear that the mucker operator failed to check the fire suppression system because one of the nozzles was missing, which was readily obvious. Section 57.14100(a) provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 57.14100(a).

Frandsen testified that he observed a nozzle missing from part of the fire suppression system on a mucker. (Tr. 41, 43). Frandsen has conducted pre-operational inspections on similar equipment many times. (Tr. 41). According to Frandsen, the fire suppression system consisted of two pieces of copper tubing, one on each side of the mucker engine, that were used to deliver a chemical fire suppression agent to each side of the engine in the event of an equipment fire. (Tr. 41-43). Frandsen saw that one of the copper tubes had a red nozzle at the end, while the other did not. (Tr. 41; Ex. G-3 pp. 2-3). The purpose of the nozzles is to spread out the chemical agent into a fan-shaped spray to put out fires. (Tr. 45). Without a nozzle, the chemical agent would not spray where it is supposed to and, instead, would just shoot out and hit the rib. (Tr. 42). Frandsen explained that the missing nozzle was obvious and should have been found during the pre-operational inspection of the mucker. (Tr. 41-42). The fire suppression system is a safety feature of the mucker, needs to work in the event of a fire, and should be checked during the pre-operational inspection of the mucker. (Tr. 42-43). Although Frandsen testified that a miner told him that he performed a pre-operational inspection before using the mucker that day, Frandsen found no record noting the missing nozzle. (Tr. 43, 53). Frandsen opined that the condition had existed for some time because the end of the tubing had a lot of scale on it, was not clean, and no one could find the missing nozzle in the area. (Tr. 54-55).

I find that Silver Queen violated the cited standard. It was obvious that there was no nozzle on the end of the copper tubing on one side of the mucker engine. I credit Frandsen's testimony and find that the nozzle is a safety feature of the fire suppression system and needs to

be inspected during the pre-operational inspection of the mucker. Without the nozzle, the fire suppression system is rendered useless on that side of the engine. I credit Frandsen's testimony that the nozzle had been missing for some time, as evidenced by the rust and scale on the end of the tubing. Given the obviousness of the condition, I find that the equipment operator did not conduct an adequate inspection. Consequently, I affirm the fact of violation.<sup>5</sup>

Frandsen testified that, although an injury was unlikely due to the presence of a fire extinguisher on the mucker and the properly functioning fire suppression system on the other side of the engine, if an injury were sustained it was reasonably likely to be fatal. (Tr. 45-46, 52). Frandsen explained that he has fought several underground mine fires and, in the event of a fire on the mucker, smoke would either pour over the miner who was operating the mucker and/or the fire would be between the miner and the portal. (Tr. 46). Frandsen acknowledged that the mine is small, requiring only a 5-10 minute walk to exit, has a ventilation system, and the miners wear self-rescuers. (Tr. 52-53).

I find that the inspector's gravity designations are appropriate. I defer to the inspector's testimony that it was unlikely that the conditions created by the violation would contribute to an injury. However, as discussed above, there is only one way in and out of the mine. As a result, if a fire were to occur on the mucker, a miner would be in a difficult situation. I credit Frandsen's testimony that, depending on the location of the mucker at the time of a fire, a miner could either be trapped in by the fire or would have to deal with smoke pouring over him. Given these findings, and acknowledging the seriousness of hazards associated with underground mine fires, I find that the violation was very serious.

In his brief, the Secretary argues that the court should find that the violation was "S&S" despite the testimony of the inspector to the contrary. (Sec'y Br. 12-14). The Secretary argues that decisions of the Commission make clear that, with respect to violations relating to equipment used in an emergency, the existence of the emergency should be assumed for purposes of the S&S analysis. As a consequence, the court should assume that the mucker caught fire and the lack of a nozzle on one side of the fire suppression system created an emergency situation. The Secretary also maintains Commission case law provides that the presence of the fire extinguisher on the mucker should not be considered. The Secretary states that the inspector's testimony supports an S&S finding given this Commission case law.

I decline to modify the citation to an S&S violation on narrow grounds specific to the situation in this case. The Secretary did not raise this issue at the hearing. (Tr. 40-48). Silver Queen was represented by an inexperienced company representative. Inspector Frandsen specifically testified that an injury was unlikely as a result of this violation. (Tr. 45). Thus, until the Secretary filed his post-hearing brief, the Secretary's position was that the violation was not S&S. The Secretary's request to modify the citation is, in effect, a motion to amend the

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<sup>5</sup> At hearing, the operator's representative moved to vacate this citation, arguing that "[t]here was no chance of any fatal accident occurring. The mine had abundant ventilation, a very short walk outside, miner had a self-rescuer, chances of fatality would be nil." (Tr. 52). Respondent's arguments are directed at the question of gravity, which is addressed in this decision. Respondent's motion to vacate the citation is **DENIED**.

pleadings. I recognize that Rule 15(b)(2) of the Federal Rules of Civil Procedure provides that a “party may move – at any time, even after judgement – to amend pleadings to conform them to the evidence and to raise an unpleaded issue.” However, that provision assumes that the issue was “tried by the parties’ express or implied consent.” Fed. R. Civ. P. 15(b)(2). The S&S issue was not tried by the parties and there was no consent to do so in this *pro-se* case. The Secretary’s motion to amend the citation is **DENIED**.

Frandsen determined that Silver Queen exhibited low negligence based on statements made to him by the mine that the fire suppression system was usually checked during service every couple of weeks. (Tr. 47). According to mine personnel, the missing nozzle had been present during the service check two weeks prior. (Tr. 44, 46-47). The equipment operator who was in charge of conducting the pre-operational inspection of the mucker only had two weeks of experience. (Tr. 44).

I find that the violation was the result of Silver Queen’s low negligence. It is clear that the subject inspection was inadequate. I find that the fact that the mine checks the fire suppression system every few weeks, that the nozzle had been present during the last service check, and given the limited experience of the mucker operator who conducted the subject pre-operational inspection, there is evidence to justify the inspector’s low negligence determination.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

## **2. Citation No. 8871178**

Safety Standard: 57.15004

Gravity: Reasonably likely, S&S, permanently disabling accident reasonably likely, 2 persons affected

Negligence: Moderate

Proposed Penalty: \$285

This citation alleges that two miners working underground were not wearing eye protection and no eye protection was available underground. (Ex. G-3). The miners had installed three rock bolts that were pressurized to about 2,700 psi using jack leg drills. Section 57.15004 provides that “[a]ll persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of the mine or plant where a hazard exists which could cause injury to unprotected eyes.” 30 C.F.R. § 57.15004.

Frandsen testified that he observed two miners whose faces were covered with mud. (Tr. 58). The miners told Frandsen that they had been drilling and installing Swellex rock bolts, which, when pressurized, expand to lock the layers of rock. (Tr. 58-59). Frandsen testified that the miners did not have eye protection with them, there was no eye protection underground, and the miners could not produce eye protection when asked. (Tr. 58-59, 63, 64). Frandsen explained that a miner using the drill would be exposed to oil mist, mud, rock dust, chips, chunks and cuttings blowing back out of the drill hole with the water. (Tr. 60, 63). This particular drill, a jack leg drill, required the miners to use a lot of pressure to get the hole started. (Tr. 61). As a

result, the miners' faces would be right at the jack when starting the hole, which is the most dangerous time. (Tr. 61-62). In order to pressurize the rock bolts and cause them to swell, 2700 psi was required, which presented an additional hazard in case a hose or other component used to pressurize the bolts breaks. (Tr. 62).

I find that Silver Queen violated the cited standard. Miners using the jack leg drill were exposed to flying mud and rock which were blown back out of the drill hole. Both rock and mud present a hazard when projected toward an individual's unprotected eyes. Here, the two miners' faces were covered in mud and they told the inspector they had been drilling and installing pressurized rock bolts. Neither miner had eye protection on, nor could either produce any eye protection when asked to do so. Consequently, I find that a violation has been proven.

Frandsen testified that, because the miners did not have eye protection and could not produce any when asked, he concluded that not wearing eye protection was a common practice at the mine. (Tr. 65). If the mine continued this practice, it was reasonably likely to result in an eye injury, such as the loss of sight, given all of the flying rock, dust, dirt and oil. (Tr. 66). Further, when drilling, the miners' faces were very close to where the rock, mud, water, and dust projectiles were flying. If they were struck in the eye, they would lose eyesight, which is a permanently disabling injury. (Tr. 63). Based on his observations, he designated the citation as S&S. (Tr. 66).

I find that the violation was S&S. I find that a discrete safety hazard existed in that the failure to use eye protection while drilling and installing rock bolts exposed the miners' eyes to flying rock, dust, dirt and oil. Any of these substances, when projected at the eye, has the potential to cause permanent damage to one's vision. I credit Frandsen's testimony regarding the miners' inability to produce any eye protection and find that it was apparently a common practice at the mine to not use eye protection. Moreover, given that miners using this kind of drill would be required to have their faces close to where the projectiles were flying back out of the drill hole, I find that that an injury was reasonably likely to occur. Clearly the loss of sight is a serious, and potentially life altering, injury. Consequently, I find that the violation was S&S.

Frandsen determined that the mine was moderately negligent. (Tr. 65). Miners told Frandsen that there should be some glasses in the office. (Tr. 63). Frandsen explained that Graham told him that the mine had glasses and that the miners knew they were supposed to use them. (Tr. 65).

I find that the mine was moderately negligent. It was mine management's job to ensure that the miners were using eye protection when needed. Although Graham, the mine manager, told Frandsen that the mine had eye protection and the miners knew they were supposed to use it, the miners did not do so, nor could they produce any when asked by the inspector. Frandsen explained that miners "hate" wearing eye protection because of the need to constantly clean the glasses. (Tr. 64). I credit the inspector's testimony on this issue and defer to his finding of moderate negligence.

In his brief, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen's high negligence. (Sec'y Br. 18-19). The Secretary relies on MSHA's

penalty regulations in making this argument. 30 C.F.R. § 100.3(d) Table X. I am not bound by the Secretary's Part 100 regulations and I decline to follow the classifications that MSHA uses in defining the levels of negligence.<sup>6</sup> Moreover, counsel for the Secretary asked the inspector "could you have designated this as a higher level of negligence?" (Tr. 65). The inspector replied, in part, "No. They had some mitigating evidence." *Id.* Thus, the Secretary tried to raise this issue at hearing but the inspector did not agree. For the reasons set forth above and set forth with respect to the Secretary's motion to amend Citation No. 8871177, the Secretary's motion to amend this citation is **DENIED**.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$550.00 is appropriate. I raised the penalty above that proposed by the Secretary because of the serious nature of the violation.

### 3. Citation No. 8871179

Safety Standard: 57.18006

Gravity: Reasonably likely, S&S, permanently disabling injury, 1 person affected

Negligence: Moderate

Proposed Penalty: \$263

The citation alleges that the operator had not ensured that a new miner was using PPE or following safe work practices. (Ex. G-5). This miner had about two weeks of underground experience and had helped install rock bolts without safety glasses. He was also the miner who operated the mucker, discussed above, without performing a competent pre-operational check. Section 57.18006 provides that "[n]ew employees shall be indoctrinated in safety rules and safe work practices." 30 C.F.R. § 57.18006.

Frandsen testified that one of the two miners involved in the eye protection citation, discussed above, was a new and inexperienced miner, while the other was an experienced miner. (Tr. 77). According to Frandsen, the experienced miner was not modeling safe mining practices for the inexperienced miner. (Tr. 78). In particular, Frandsen noted that the experienced miner was allowing the inexperienced miner to drill without eye protection. (Tr. 79). Further, the experienced miner did not make sure that the inexperienced miner conducted a proper pre-operational inspection of the mucker, also discussed above. (Tr. 80). Frandsen explained that the new miner had incorrectly received "experienced miner training," had not been underground before, and needed to have "40 hours [of] inexperienced miner training." (Tr. 80-81, 86-87). Frandsen testified that, based on his observations, he could have issued multiple 104(g) orders to the mine for the inadequate training of the new miner. (Tr. 81).

I find that Silver Queen violated the cited standard. Clearly this new miner had not been trained in safe work practices. Both the new miner and experienced miner failed to wear eye

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<sup>6</sup> In determining whether an operator has met its duty of care, I consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

protection when hazards necessitating such protection were present. I agree with the inspector that the experienced miner failed to set an example for the new miner and did not indoctrinate him in the safety rules and safe work practices. The same could be said with regard to the citation issued for the inadequate pre-operational inspection. The violation is affirmed.

Frandsen testified that, because the new miner was not being trained correctly, it was reasonably likely that a permanently disabling injury would be sustained and that the violation was S&S. (Tr. 82-84). He explained that the poor example set by the experienced miner, in particular the failure of that individual to wear eye protection, should make “the hair on the back of your head . . . stand up.” (Tr. 82). Further, he noted multiple other dangers that could stem from the experienced miner’s failure to set a good example, namely, improper pre-operational equipment inspections, roof and rib concerns and knowing how to safely bar them down, and having proper personal protective equipment. (Tr. 82-83, 85). Frandsen explained that the miner’s lack of training would have eventually led to the loss of eyesight due to drilling without eye protection. (Tr. 83).

I find that the violation was S&S. I find that a discrete safety hazard existed in that the inadequate training regarding safety rules and safe work practices made the new miner a “hazard to himself and to others.” 30 U.S.C. § 814(g)(1). Here, as discussed above, the new miner was lucky to escape injury while drilling without eye protection. Moreover, also discussed above, the miner clearly had not been properly trained on how to conduct a proper pre-operational inspection, as evidenced by his failure to note the obvious condition of the missing nozzle on the fire suppression system. Consequently, I find it reasonably likely that, assuming continued mining operations, this miner would have injured either himself or another miner. In the event an injury was sustained as a result of the lack of training that resulted in the citations discussed above, the injuries would be serious. I affirm the S&S designation.

Frandsen determined that the mine was moderately negligent. (Tr. 84). Although he believed that the experienced miner did not set a good example, he felt that putting the new miner with the experienced miner was a mitigating circumstance. (Tr. 84).

I find that the mine was moderately negligent. I agree with Frandsen that having the new miner work with an experienced miner was a good decision. However, the experienced miner failed to teach safe work practices to the new miner. Management has a responsibility to not only train its miners, but also to ensure that the miners comply with the training. The mine failed to do so. Consequently, I find affirm the inspector’s moderate negligence determination.

As with the previous citation, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen’s high negligence. (Sec’y Br. 26). Inspector Frandsen testified that the violation was caused by management’s moderate negligence. (Tr. 85). The Secretary did not attempt to modify the citation at the hearing and did not raise this issue until it filed his post-hearing brief. For the same reasons set forth above and set forth with respect to the Secretary’s motion to amend Citation No. 8871177, the Secretary’s motion to amend this citation is **DENIED**.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$550.00 is appropriate. As with the previous violation, I raised the penalty based on the serious nature of the violation.

#### **4. Citation No. 8871180**

Safety Standard: 57.20011

Gravity: Unlikely, not S&S, lost workdays or restricted duty, 1 person affected

Negligence: Moderate

Proposed Penalty: \$100

The citation alleges that warning signs were not in place to warn miners that rocks could fall from an open hole at the South drift raise. (Ex. G-7). The citation further states that miners travel past the “area daily and regularly throughout the shift.” *Id.* The miners were exposed to broken bone injuries from falling and rolling rock. Section 57.20011 provides that “[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches.” 30 C.F.R. § 57.20011. The safety standard also requires that any warning signs “shall be readily visible, legible, and display the nature of the hazard and any protective action required.” *Id.*

Frandsen testified that he observed a hole in the roof of the mine. (Tr. 90). The mine had blasted the hole while evaluating whether to develop a raise to another level. (Tr. 92). Frandsen explained that the hole presented a hazard because rocks could fall from the hole and strike a miner. (Tr. 92). A lunch box was seen in the area and miners regularly walk through this area when going into and out of the mine. (Tr. 92). There were no warning signs in the area to indicate the presence of the hole and, according to Frandsen, the hole was not obvious. (Tr. 90, 96, 97). Frandsen did not immediately notice the hole. (Tr. 96-97, 101-102). Rock was piled up below the hole. (Tr. 96-97; Ex. G-8 p. 2). Frandsen initially assumed that the rock was just a muck bay where the muck was being temporarily stored. (Tr. 96-97). There were all different sizes of rock in the pile. (Tr. 99). It was not until he saw ventilation tubing in the area that he discovered the hole. (Tr. 92, 97, 102). Although Frandsen testified that the mine told him the hole was boarded up, that was not the case. (Tr. 93-94, 100). Rather, there were a few boards in the hole and there were plenty of gaps, including a ladder opening, through which rock could fall. (Tr. 94; Ex. G-8 p. 3).

I find that Silver Queen violated the cited standard. I find that a hazard existed. The hole had not been boarded up and sizeable rocks could easily fall through the openings seen in the picture taken by the inspector. (Ex. G-8 p. 3). I credit Frandsen’s testimony that rocks falling from the hole could have struck and injured a miner walking in the area. I further find that the hazard was not obvious. I credit the inspector’s testimony that he did not initially see the hole when he entered the area. Consequently, I find that the hazard was not obvious. Given that no barricades or warning signs were present to alert persons to the non-obvious hazard presented by the hole, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely because the muck pile would probably stop falling rocks from rolling too far and he was not certain what was up in the hole, if



a miner were hit by a rolling rock he could suffer an injury that would result in lost workdays or restricted duty. (Tr. 96, 101). Frandsen explained that, although he thought the rocks were at the angle of repose, a larger rock could bounce and roll off the pile and strike a miner in the ankle, leg, or foot, causing broken bones, strains, or sprains. (Tr. 96, 99-100). A preponderance of the evidence supports the inspector's gravity designation.

Frandsen determined that the mine was moderately negligent based on comments made by a mine examiner who said he knew the hole was there, but did not see it as a problem since rocks would not fall on anyone's head. (Tr. 98). However, according to Frandsen, the individual did not consider the possibility of rocks rolling and hitting miners. (Tr. 98). I affirm the inspector's moderate negligence determination.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$100.00 is appropriate.

#### **5. Citation No. 8871182**

Safety Standard: 57.12028

Gravity: Reasonably likely, S&S, fatal injury reasonably likely, 1 person affected

Negligence: Moderate

Proposed Penalty: \$585

This citation alleges that the operator failed to perform a ground continuity test after a new cable was installed between the generator on the surface and the two fan control stations at the portal. (Ex. G-9). The cable was changed out on or about January 4, 2015 by the operator's employees who had no electrical experience. Miners were exposed to fatal electrocution or electrical shock. Section 57.12028 provides that "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification and annually thereafter." 30 C.F.R. § 57.12028. The safety standard also requires that the operator keep a record of such examinations.

Frandsen testified that, at the direction of an electrical contractor, Graham and some miners changed out a 480 volt rated three phase main power cable between a generator and the controls for two fans used to ventilate the mine. (Tr. 107-109, 111). The mine failed to conduct a ground continuity test following the installation of the new cable. (Tr. 107).

I find that Silver Queen violated the cited standard. I agree with the inspector that, under the cited standard, following the installation of the new cable, a ground continuity test was required. The operator did not conduct a ground continuity test following the installation. Consequently, I find that a violation occurred.

Frandsen testified that the mine's failure to conduct a ground continuity test following the installation of the cable was reasonably likely to result in a fatal accident and designated the citation as S&S. (Tr. 114). Frandsen explained that the miners who installed the cable had limited electrical experience. (Tr. 109). Although they had been task trained by the electrical contractor on how to conduct a ground continuity test, neither the contractor nor the miners could

remember if they were trained on the need to conduct the test following the installation, which is something Frandsen said an experienced electrician would have known to do. (Tr. 109-111). Frandsen explained that when electrical work is done by someone with little electrical experience the risk is extremely high. (Tr. 114). This cable is not like a household extension cord and, instead, is part of a 480 volt system that requires someone replacing it to wire it, use proper lugs and fittings, check the rotation, and hook it up to the grounding. (Tr. 114). Failure to properly ground the cable could result in a fatal electrocution, especially because the fan controls that were supplied power by the cable were located in an area where there was a lot of water. (Tr. 115-116). By failing to conduct the ground continuity test the mine ran the risk that the cable was ungrounded, which could result in a loss of life. (Tr. 112).

I find that the violation was S&S. I find that a discrete safety hazard existed in that by failing to conduct a ground continuity test, miners could not know if they were at risk of electrocution when starting fans that were supplied power by this cable. The miners who changed the cable had little electrical experience and, although they knew how to do a ground continuity test, they failed to do so. Further, I credit the inspector's testimony that the risk of injury is high when miners with minimal electrical knowledge conduct this kind of work. Consequently, I agree that, assuming continued mining operations, it was reasonably likely that an injury would be sustained as a result of the mine's failure to conduct a ground continuity test as required by the standard.<sup>7</sup> The inspector did not know whether the cable passed the ground continuity test without any corrections being made when the test was performed to abate the citation. (Tr. 117-18). Nevertheless, I find that the hazard created by the violation was reasonably likely to lead to a serious injury. The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011). The Secretary established that the violation was S&S.

Frandsen determined that the violation was the result of Silver Queen's moderate negligence. (Tr. 116). He believed mitigating circumstances existed because the mine replaced the cable for safety reasons. (Tr. 116). Moreover, according to Frandsen, the miners told him that they could not remember if the electrical contractor told them that they needed to re-test the ground continuity after the new cable was installed. (Tr. 116-117).

I credit the inspector's testimony and find that Silver Queen was moderately negligent. Although the mine's decision to replace the old cable is commendable, the failure to test the cable after installation demonstrates moderate negligence.

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<sup>7</sup> During cross-examination the representative for the mine asked multiple questions regarding whether the inspector checked the cable to see if it was in fact grounded. (Tr. 120-123). However, the question whether the cable was grounded at the time of the inspection does not resolve the issue before the court. Rather, the relevant issue is whether the mine checked to see if it was grounded. Here, the mine did not determine whether the cable was grounded and, as a result, could not have known if the cable was safe for use.

As with two other citations, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen's high negligence. (Sec'y Br. 31). Inspector Frandsen testified that the violation was caused by management's moderate negligence. (Tr. 116). The Secretary did not attempt to modify the citation at the hearing and did not raise this issue until he filed his post-hearing brief. For the same reasons set forth above and set forth with respect to the Secretary's motion to amend Citation No. 8871177, the Secretary's motion to amend this citation is **DENIED**.

Based on my findings and the penalty factors discussed below, I find that a penalty of \$584.00 is appropriate.

#### **6. Citation No. 8871183**

Safety Standard: 57.18002(a)

Gravity: Unlikely, not S&S, lost workdays or restricted duty, 1 person affected

Negligence: Moderate

Proposed Penalty: \$100

The citation alleges that the operator had not designated a competent person to perform workplace examinations for the surface area of the mine. (Ex. G-11). The citation further states that surface areas include repair benches, bulk oil and fuel storage areas, the explosive magazine, and other work areas. The inspector stated that miners could be injured because the areas were not examined and noted that the mine manager said that every miner regularly looks over the area because cows travel through the site and tear things up. Section 57.18002(a) provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions that any adversely affect safety or health." 30 C.F.R. § 57.18002(a).

Frandsen testified that Graham told him that the mine did not have a designated person to examine the surface of the mine. (Tr. 126). The surface areas of the mine were not being inspected despite the fact that miners worked in some of those areas daily. (Tr. 126-127). Rather, according to Frandsen, Graham told him that if the miners saw something that was not safe, they would fix it. (Tr. 128, 139).

I find that Silver Queen violated the cited standard. The surface had multiple working places that were accessed daily and needed to be examined at least once each shift. I credit Frandsen's testimony that Graham told him that the mine did not have a designated person who examined the surface. As a result, I find that the violation is proven.

Frandsen testified that an injury was unlikely because the miners generally fixed problems when they found them. Any injury was reasonably likely to result in lost workdays or restricted duty. (Tr. 128-129). Frandsen noted that the types of injuries generally associated with failure to examine these areas are electrical injuries, broken bones, tripping injuries, and housekeeping, fire and smoke related injuries. (Tr. 129). I agree with the inspector's gravity findings.

Frandsen determined that the mine was moderately negligent based on what Graham told him about the miners fixing problems on the surface when they found them. (Tr. 129). Frandsen noted that, aside from this citation, he did not see any violations on the surface. (Tr. 129). I affirm the inspector's moderate negligence determination.

Based on my findings and the penalty factors discussed herein, I find that a penalty of \$100.00 is appropriate.

## **II. APPROPRIATE CIVIL PENALTY**

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Silver Queen had a history of 13 violations during the 15 months preceding the issuance of the subject citation, but only two were S&S. Respondent is a small operator that worked just over 8,000 hours in 2014. The violations were abated in good faith. The operator did not establish that the proposed penalties will have an adverse effect upon its ability to continue in business.

### III. ORDER

Based on the penalty criteria, I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2015-448-M		
8871120	57.6306(g)	\$1,500.00
8871121	57.6202(a)(5)	162.00
8871122	57.14132(b)(1)	540.00
8871123	57.4102	162.00
8871124	57.12032	162.00
8871125	57.13011	100.00
8871126	57.8528	100.00
8871127	57.11053(c)	100.00
8871134	57.12018	100.00
8871135	41.12	50.00
WEST 2015-574-M		
8871177	57.14100(a)	100.00
8871178	57.15004	550.00
8871179	57.18006	550.00
8871180	57.20011	100.00
8871182	57.12028	584.00
8871183	57.18002(a)	100.00
TOTAL PENALTY		\$4,960.00

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as set forth above. The Silver Queen Mine LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$4,960.00 within 40 days of the date of this decision.<sup>8</sup>

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

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<sup>8</sup> 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

Distribution:

John Lauer, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518 (Certified Mail)

D. Scott Horn, Conference & Litigation Representative, Mine Safety & Health Administration, 991 Nut Tree Road, 2<sup>nd</sup> Floor, Vacaville, CA 95687 (First Class Mail)

Trenton Davis, The Silver Queen Mine LLC, 1477 Menlo Avenue, Clovis, CA 93611 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
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April 11, 2016

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

v.

NORTHSHORE MINING COMPANY,  
Respondent

**CIVIL PENALTY PROCEEDINGS**

Docket No. LAKE 2015-340-M  
A.C. No. 21-00831-374635

Docket No. LAKE 2015-395-M  
A.C. No. 21-00831-376944

Docket No. LAKE 2015-529-M  
A.C. No. 21-00831-381656

Mine: Northshore Mining Company

**DECISION AND ORDER**

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of  
Labor, Denver, Colorado, for Petitioner

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for  
Respondent

Before: Judge McCarthy

**I. STATEMENT OF THE CASE**

This case is before me upon three petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d).

At issue in this matter are 58 citations issued by the Secretary of Labor (“the Secretary”) under section 104(a) of the Mine Act charging mine operator Northshore Mining Company (“Northshore”) with violations of mandatory health and safety regulations. The parties settled 54 of the citations prior to hearing and litigated the remaining four.

The four citations that proceeded to hearing were Citations 8840455 and 8840744 in Docket Number LAKE 2015-529-M and Citations 8840631 and 8840659 in Docket Number LAKE 2015-395-M. Each citation presented the following issues: whether Northshore violated the mandatory health and safety standard cited by the Secretary; if so, whether the Secretary properly assessed the gravity of the violation and the level of negligence attributable to Northshore; and what penalties, if any, should be assessed against Northshore.

A hearing was held in Duluth, Minnesota on November 23-24, 2015. During the hearing, the parties presented testimony and documentary evidence.<sup>1</sup> Witnesses were sequestered. I vacated Citation Number 8840631 from the bench, finding that the Secretary had failed to prove the violation alleged therein.

I now issue further findings of fact and conclusions of law, beginning with findings of fact and discussion of legal principles germane to the disposition of all four disputed citations and continuing with separate findings of fact and conclusions of law for each citation. For the reasons set forth below, I find that Citations 8840455, 8840744, and 8840659 were properly issued and affirm them, as written. Applying the penalty criteria set forth under section 110(i) of the Mine Act to my findings, I assess penalties totaling \$3,503.00 for those three citations. I also discuss and affirm my bench findings supporting the decision to vacate Citation Number 8840631, and I review and approve the parties' settlement of the 54 citations that did not proceed to hearing.

Based on the entire record, including my observation of the demeanor of the witnesses,<sup>2</sup> and after considering the post-hearing briefs, I make the following findings:

## **II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND**

### **A. Stipulations of Fact and Law**

At hearing, the parties agreed to the following stipulations:

1. Northshore was at all times relevant to these proceedings engaged in mining activities at the Northshore Mining Company where the citations in this matter were issued.

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<sup>1</sup> Exhibits R-4, R-6, R-12, R-14, and S-1 to S-18, except for the portion of Exhibit S-17 consisting of a September 26, 2015 coal mine fatality notice (see Tr. 154 for my discussion of why the notice was excluded), were received into evidence at the hearing. Tr. 8-9, 268. The abbreviation "Tr." refers to the transcript of the hearing. In addition to the exhibits and testimony admitted at hearing, Northshore attached to its closing brief an exhibit, marked as Exhibit R-16, consisting of printouts from online weather services showing the temperature at the mine on January 25, 2015, the day one of the citations was issued. I decline to admit the printouts into evidence because the Secretary did not have an opportunity to respond to them. However, I will take judicial notice that publicly available weather reports show that the temperature was 19 degrees Fahrenheit at the mine on the day in question. I further admit into the record the Secretary's settlement motions with regard to the 54 settled citations. I have marked the settlement motion for Docket Number LAKE 2015-340-M as Exhibit ALJ-1, the settlement motion for Docket Number LAKE 2015-395-M as Exhibit ALJ-2, and the settlement motion for Docket Number LAKE 2015-529-M as Exhibit ALJ-3.

<sup>2</sup> In resolving conflicts in the testimony, I have taken into consideration the demeanor of the witnesses, their interest in this matter, their experience and credentials, the inherent probability of their testimony in light of other events, the corroboration or lack of corroboration for the testimony given, and the consistency, or lack thereof, within and between the testimony of witnesses.



2. Northshore's mining operations affect interstate commerce.
3. Northshore is subject to the jurisdiction of the Mine Act.
4. Northshore is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.
6. On the dates the citations in these dockets were issued, the issuing MSHA inspectors were acting as duly authorized representatives of the Secretary, were assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the subject MSHA citations.
7. The citations at issue in these proceedings were properly served upon Northshore as required by the Mine Act.
8. The citations at issue in these proceedings may be admitted into evidence.
9. The certified copy of the MSHA Assessed Violation History (marked as Exhibit S1) reflects the history of the citation issuances at the mine prior to the date of the last citation.
10. Northshore demonstrated good faith in abating the violations.
11. The penalties proposed by the Secretary in this case will not affect the ability of the Respondent to stay in business.

Ex. S-2; Tr. 8-9.

## **B. General Factual Background**

The four citations in dispute in this case were issued at the Northshore Mining Company mine ("the Northshore mine") in Silver Bay, Minnesota. Tr. 22. The mine, which is currently controlled by Northshore's parent company, Cliffs Natural Resources, has been in operation since the 1950s. Tr. 22, 48, 56. It is an aboveground processing facility that receives raw iron ore extracted at one of the controller's other mines and converts it into taconite pellets. Tr. 22, 39-40, 92. Work areas within the facility include the pelletizing plant, which houses various components of the pelletizing process such as the furnace where the pellets are dried and fired, and the yards and docks from which the finished product is shipped to buyers. Tr. 77-78, 113, 238. All of the structures, facilities, equipment, and machinery at the mine are subject to the mandatory health and safety regulations for surface metal and nonmetal mines promulgated by the Secretary in Title 30, Part 56 of the Code of Federal Regulations.

One of the citations at issue in this proceeding, Citation Number 8840455, was issued by MSHA Inspector Mindy A. Meierbachtol<sup>3</sup> for an electrical violation after a phase-to-ground fault occurred at the pelletizing plant while she was inspecting it in March 2015. Ex. S-6. The other three disputed citations were issued by MSHA Inspector Terrance Norman<sup>4</sup> for conditions he observed while inspecting the Northshore Mining Company mine in January and March 2015. Ex. S-9; Ex. S-15; Ex. S-18. All four of the citations were issued on separate dates and are unrelated to each other, although some of them involve the same witnesses. The independent facts and circumstances surrounding each of the citations are discussed in greater detail below.

### III. PRINCIPLES OF LAW

#### A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

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<sup>3</sup> Meierbachtol has been a mine safety and health inspector since September 2013. To become an inspector, she completed thirteen months of classes and field training at the Mine Safety and Health Academy in Beckley, West Virginia. She previously worked as a pilot. Along with her flight certificates, she also holds a Master's Degree in safety science. Meierbachtol testified that she is familiar with the Northshore mine because she spent about six weeks there during her Mine Academy training period and has since headed two regular inspections of the mine. Tr. 20-22, 39, 41.

<sup>4</sup> As of the hearing date, Norman had served as an MSHA inspector for about a year and a half after completing approximately one year of training. Before coming to MSHA, he spent fourteen years working at a steel mining plant, two years working for a sand and gravel company, and seven years working for a conveyor belt company called Northern Belt and Conveyor that installed and repaired belts at facilities including the Northshore mine. He served as a safety director for the conveyor belt company until he was laid off. Norman holds a B.S. and a Master's Degree in safety from University of Minnesota-Duluth. Tr. 91-92, 172-73.

## B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard 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, e.g., 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 an assessment of 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).

## C. Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1).<sup>5</sup>

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary’s argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. The Commission found that the Secretary’s interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act’s graduated enforcement scheme. 3 FMSHRC at 825, 828. The Commission also found that the Secretary’s interpretation would leave little room for inspectors to exercise their independent judgment. *Id.* at 825-26.<sup>6</sup> In addition, the Commission found that the Secretary’s interpretation would render the Act’s S&S

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<sup>5</sup> See also *id.* § 814(e), the Mine Act’s pattern-of-violations provision, which is the only other provision that mentions S&S, and which defines the term the same way as § 814(d)(1).

<sup>6</sup> The Commission has consistently reiterated that the inspector’s judgment is an important element of the S&S determination. However, the concept has generally been raised in the context of deferring to the inspector’s opinion that a violation was S&S, rather than in the context of examining whether the inspector exercised independent judgment in forming this opinion as opposed to merely following the “mechanical approach” advanced by the Secretary and rejected by the Commission in *National Gypsum*, 3 FMSHRC at 825. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

language almost superfluous, and would render the Act's pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id.* at 826-27. Although the Commission did not develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term "hazard" denotes "a measure of danger to safety or health" and that a violation is S&S if it "could be a major cause" of such a danger. *Id.* at 827.

In its subsequent *Mathies* decision, the Commission set forth a four-prong test for determining whether a violation is S&S under *National Gypsum. Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). 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. *Id.* at 3-4. The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). The assumption of continued normal mining operations considers "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," without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn's* discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit's decision in *Buck Creek*, *supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g., Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug.

2015).<sup>7</sup> Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard if it occurs”).

The evolving case law, however, has presented conflicting guidance as to how some of these principles should be applied. In particular, there is some confusion about how to evaluate the facts surrounding the violation and the likelihood of injury under the second and third prongs of the *Mathies* analysis. The Fourth Circuit’s recent decision in *Knox Creek, supra*, and the Seventh Circuit’s decision in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014), have cast doubt on whether the traditional application of the literal language of the second and third prongs of the *Mathies* test is still valid.

### **Traditional Application of *Mathies* Test**

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that “the reference to ‘hazard’ in the second element [of the test] 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. “There is no requirement of ‘reasonable likelihood’” encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which “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*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, “The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not.” *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a reasonable likelihood that the hazard will result in injury under the particular facts of the case at

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<sup>7</sup> It is not completely clear whether redundant safety measures are precluded from consideration such that it is error to take them into account, which could make it difficult for judges at the trial level to discharge their duty of considering all the particular facts surrounding the violation, or whether arguments that rely on redundant safety measures are simply disfavored as a defense to S&S. Compare *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence regarding redundant safety measures has been “consistently rejected as irrelevant”) with *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (stating only that such measures “do not prevent a finding of S&S”) and *Buck Creek*, 52 F.3d at 136 (“The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners.”).

hand, with the caveat that normal mining operations are assumed to continue without abatement of the violation. The crux of this traditional *Mathies* analysis is the third and fourth prongs of the test, which effectuate *National Gypsum*'s definition of S&S (reasonable likelihood of a reasonably serious injury) and are often combined into a single showing (reasonable likelihood that a particular serious injury will occur under the facts of the case). Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.<sup>8</sup>

Over the years, it appears that the Commission, with court approval, has developed special rules for applying the *Mathies* test in two situations. First, for violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied only when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 953; *Texasgulf*, 10 FMSHRC at 501; *see, e.g., Paramount Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). Second, for violations of emergency safety standards, the Commission assumes the emergency when making the S&S evaluation. *See, e.g., Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027-28 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

### Effect of Recent Fourth & Seventh Circuit Decisions

The Fourth Circuit's recent *Knox Creek* decision issued in January 2016 appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

In our view, the second prong of the test ... primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

*Knox Creek*, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162. The particular hazard confronted by the Fourth Circuit was the escape of ignited gas into the mine atmosphere through impermissible enclosures. *Id.* at 164. The parties

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<sup>8</sup> The Secretary's citation/order form contains boxes for inspectors to check the likelihood of injury and the expected severity of injury immediately above the line where they designate the violation S&S or non-S&S. *See, e.g., Ex. S-6*. Inspectors are trained not to designate a violation as S&S, unless item 10.A on the form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

had stipulated that the mine was a “gassy” mine that liberated more than 500,000 cubic feet of methane or other explosive gases per day. *Id.* at 164. Consequently, the ALJ had found that methane was reasonably likely to accumulate to explosive concentrations. *Id.* The ALJ had also found that a resulting explosion was reasonably likely to cause serious injuries, but he had ultimately declined to find that the violation was S&S because the Secretary had failed to prove the likelihood of an ignition. *Id.* at 154, 164-65. Without discussing the likelihood of ignition, the Fourth Circuit deemed the ALJ’s other findings sufficient to satisfy the third *Mathies* prong. *Id.*

Previously, in *Peabody Midwest Mining*, the Seventh Circuit had similarly suggested that the S&S analysis assumes the occurrence of the hazard. The violation at issue in that case was the mine operator’s failure to erect berms on an elevated roadway. The Seventh Circuit defined the hazard as the risk that a vehicle would veer off the roadway and go over the edge. *Peabody Midwest*, 762 F.3d at 616. The operator had argued that a vehicle was not reasonably likely to veer off the road. *Id.* However, the Seventh Circuit stated that the question “is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred” but “whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result.” *Id.*

*Peabody Midwest* does not discuss the proper role of deference in the S&S context, but the Fourth Circuit reached its holding in *Knox Creek* by deferring to the Secretary’s interpretation that the third *Mathies* element requires proof that the hazard, not the violation itself, is likely to cause injury. 811 F.3d at 161 (declining to afford deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but finding the Secretary’s interpretation persuasive and therefore entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Fourth Circuit further asserted that this interpretation is consistent with a number of prior cases, including the Seventh Circuit’s decisions in *Peabody Midwest* and in *Buck Creek*, *supra*, 52 F.3d at 135 (assuming occurrence of fire at third *Mathies* prong when ALJ had engaged in “confluence of factors” analysis at second prong); the Fifth Circuit’s decision in *Austin Power*, *supra*, 861 F.2d at 103-04 (declining to require evidence that the hazard was likely to occur); and the Commission’s decision in *Musser Engineering*, *supra*, 32 FMSHRC at 1280-81 (stating that the third *Mathies* prong requires a showing that the hazard, not the violation itself, will cause injury). 811 F.3d at 161-62.<sup>9</sup> The Fourth Circuit rejected the operator’s

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<sup>9</sup> It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant, except to the extent necessary to establish a “discrete” hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that “[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard.” 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the Court’s failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator’s argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, (continued...)

argument that under *Zeigler Coal Company, supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be “flatly contradicted” by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

The Fourth Circuit emphasized, however, that the *Mathies* approach that it has adopted “still allows plenty of room for a fact-intensive S & S analysis, both under prong two, where the Secretary must establish that the violation contributes to a discrete safety hazard, and within prongs three and four, where evidence is still necessary to establish that the hazard is reasonably likely to result in a serious injury.” *Id.* Realistically, however, it will likely require very little fact-specific analysis to conclude that any given non-technical violation contributes to a discrete safety hazard, because the Secretary generally does not promulgate a mandatory health and safety regulation (except technical regulations), unless the Secretary has already found that violating the standard would contribute to a hazard. Under the third *Mathies* prong, judges must consider all of the facts surrounding the violation, but must assume continued normal mining operations without abatement of the violation, and may not rely on redundant safety measures to mitigate the likelihood of injury. Now, under *Knox Creek* and *Peabody Midwest Mining*, judges must also assume that the hazard will actually occur. At some point, so many circumstances are either assumed or precluded from consideration that judges will find themselves evaluating the likelihood of injury in the abstract. If this is the case, the Commission will have turned its back on the principles set forth in *National Gypsum* because the *Mathies* test will have become a longhand expression for “non-technical violations.” S&S will apply to almost all violations and therefore will no longer serve as a statutory tool by which the Secretary can single out the violations that he believes the Commission should consider significant and substantial when assessing a penalty.

As noted above, the Fourth Circuit reached its result in *Knox Creek* by deferring to the Secretary’s interpretation of the Mine Act, and the Seventh Circuit reached a similar result. At the outset of its analysis, the Fourth Circuit indicated that it would review the Commission’s legal conclusions *de novo* but would afford deference to the Secretary’s, not the Commission’s, legal interpretations. *Id.* at 157 (citing *Sec’y of Labor ex rel. Wamsley v. Mut. Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996), in which the Fourth Circuit discussed the Mine Act’s split-enforcement scheme and concluded that an informal rule created and implemented by the Secretary was entitled to deference over a contrary Commission decision).

It is not surprising that the Circuit Courts have departed somewhat from the traditional *Mathies* analysis in favor of the Secretary’s legal interpretation, given the rule of deference mentioned above, and given the fact that the Secretary’s attorneys, and not the Commission’s, are the ones who argue for enforcement of the Commission’s decisions in the Circuit Courts of Appeals. That latter protocol is strange. Notwithstanding the propriety of the rule of deference applied by the Fourth Circuit, which raises concerns that I previously discussed in *Knife River Corporation Northwest*, 34 FMSHRC 1109, 1125-27 (May 2012) (ALJ), it does not make sense

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<sup>9</sup> (...continued)  
that could trigger a fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a “confluence of factors” analysis or a showing that an ignition source existed at any prong of the *Mathies* test.



that although Congress conferred independent adjudicatory authority upon the Commission to serve as an impartial forum for Mine Act litigation, and although the Commission itself laid out the test that parties have followed for more than thirty years to litigate S&S in this forum, the Secretary is permitted to challenge the Commission's interpretation of this long-standing test in the Circuit Courts of Appeals and litigate his own interpretation on behalf of the Commission. It should be obvious that since the Secretary is one of the litigating parties before the Commission at the trial level, the Commission's and the Secretary's views on interpretation of the Act may differ. See e.g., *The American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), *petition for interlocutory review granted*, Unpublished Order dated July 11, 2014. In my view, the Commission's interpretations of Mine Act provisions that turn on adjudication and not enforcement should be accorded at least some form of deference based on the power to persuade, as evidenced by the fact that courts and litigants have uniformly followed the Commission-derived *Mathies* test.<sup>10</sup> Compare *Chevron*, *supra* (according full deference to agency's reasonable interpretation of ambiguous statutory provision) with *United States v. Mead Corp.*, 533 U.S. 218 (2001) (according deference based on "power to persuade" under *Skidmore*, *supra*, and finding that *Chevron* applies only where the agency was authorized by Congress to make rules carrying the force of law and did in fact promulgate the proffered interpretation in the exercise of that authority). It is within the Commission's authority to specify how the second and third factors of the *Mathies* test should be applied – particularly, whether the hazard must now be assumed at the third factor, and if so, what steps of the test account for the facts surrounding the violation – and whether the *Mathies* test is still intended to effectuate *National Gypsum's* interpretation of the S&S provisions of the Mine Act or whether the Commission now interprets S&S differently.

Because I am bound by the *Mathies* test, but it is unclear how the second and third prongs of the test should be applied going forward, I will evaluate S&S under both the traditional approach and the more recent approach set forth in *Knox Creek* and *Peabody Midwest Mining*.

#### D. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach 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 if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. See generally *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). See also *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

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<sup>10</sup> But see *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (expressly declining to address validity of *Mathies* test).

The Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that “a foreman ... is held to a high standard of care”); *see also Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999) (“Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction,” *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although MSHA’s regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context 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. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator’s negligence, they are not limited to a

specific evaluation of potential mitigating circumstances, and may find “high negligence,” in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is “an aggravated lack of care that is more than ordinary negligence.” *Brody*, 37 FMSHRC at 1701, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

## **E. Penalty Assessment**

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator’s negligence; (4) the operator’s ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary’s penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel, supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency’s interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the citations at issue in this case.

## **IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW**

### **A. Citation Number 8840455 (Deficient Splice in Recoup Fan Panel)**

#### **1. Further Findings of Fact**

Citation Number 8840455 alleges that a cable at the pelletizing plant was not properly spliced, in contravention of 30 C.F.R. § 56.12013. Ex. S-6. The cable in question helps energize the recoup fan, which is located at the firing furnace on the bottom floor of the pelletizing plant. Tr. 82. The recoup fan serves the dual functions of pulling air through the pellet bed to cool the pellets as they exit the furnace, and pushing the hot air from the pellet bed back into the drying section of the furnace, thereby recouping some of the energy from the firing process. Tr. 25, 57,

77-78. The fan runs continuously, unless there is a power outage or the furnace is shut down for maintenance. Tr. 49-50, 57. It has a ten-foot blade powered by a fifteen-ton, 4160-volt motor running on 3000 amps of current. Tr. 25, 72-73.

The wires that energize the fan motor run through an electrical panel or junction box located on the bottom floor of the pelletizing plant, adjacent to a travelway. Tr. 30, 41. Inside the panel, they are joined to other wires to form three cables referred to by the parties as “phases,” which supply three-phase power to the fan motor and can be seen in photographs of the fan panel’s interior taken by Inspector Meierbachtol. Tr. 27-28, 58-59; *see* Ex. S-7 (photographs). Each phase consists of two wires coming from the starter that connect and terminate onto a larger cable that carries power to the fan motor. Tr. 61. The ends of the wires and cable are fitted with metal lugs that are bolted together to physically connect the conductors, and the entire connection is wrapped in tape to protect and insulate it. Tr. 66, 75-76.

A phase-to-ground fault (an unexpected flow of electrical current to ground) occurred at one of the connections inside the recoup fan panel in March 2015. This triggered an investigation that culminated in the issuance of Citation Number 8840455.

### **Events Surrounding Citation’s Issuance**

Inspector Meierbachtol, accompanied by Northshore safety representative Jared Conboy,<sup>11</sup> was at the pelletizing plant conducting a regular inspection on March 25, 2015 when a partial power outage caused one of the plant’s furnaces to shut down. Tr. 22-24, 50. Meierbachtol and Conboy heard over the radio that there was a problem at the control room and smoke was coming from the MCC (motor control center) room. Tr. 50, 52. They traveled to the control room to investigate, where they learned that company electrician Chris Mattson, who was not called to testify at the hearing, had traced the problem back to a phase-to-ground fault that had occurred at the recoup fan panel. Tr. 24-25, 46, 50-51. The fault had tripped at least one breaker, shutting down the power and blowing open the door to the MCC room. *See* Tr. 39 (Meierbachtol’s testimony agreeing that the fault “kicked the breakers and shut down the power”); Tr. 51-52 (Conboy’s testimony that “the secondary main breaker blew, and that was when the door came open”); Ex. S-8 at 5 (Meierbachtol’s field notes stating that Mattson told her two lighting arrestors blew out in the MCC room, tripping the fuses and blowing the door open). Fortunately, no one was injured. Tr. 39.

Meierbachtol and Conboy examined the recoup fan panel and Meierbachtol took several photographs, which have been admitted into evidence in Exhibit S7. The panel door had been removed before Meierbachtol and Conboy arrived, revealing two intact phases and one twisted, burnt phase that had failed at the point where its constituent wires were joined. Tr. 25, 34, 46-47;

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<sup>11</sup> At the time of the hearing, Conboy had been working for Northshore for almost four years. His job duties as a safety representative at the mine include identifying workplace hazards and escorting MSHA inspectors on the property. Previously, he earned a college degree in health education and worked for six years as a safety director for a construction company that installed mantels and built refrigerated buildings and warehouses. He has no electrical background. Tr. 44-45, 47.

see Ex. S-7. Burnt insulation and dust, which Inspector Meierbachtol assumed to be conductive taconite dust, were also visible inside the panel. Tr. 30, 41, 48.

A few days later, Inspector Meierbachtol discussed the phase-to-ground fault with Jeff Bagwell, an electrical master at MSHA who was not called to testify at the hearing. Tr. 25, 36; see Ex. S-8 at 1 (containing notes Meierbachtol wrote during her discussion with Bagwell). Bagwell told Meierbachtol that the failed electrical connection in the recoup fan panel was a splice that had not been properly constructed. Tr. 36-37, 48; Ex. S-8 at 1. A splice, Meierbachtol explained at hearing, is an insulated connection made between terminal ends to continue an electrical circuit. Tr. 26-27<sup>12</sup> According to Meierbachtol's field notes, Bagwell told her that the failed splice had been insufficiently insulated and should have been constructed using special tape and a high-voltage splice kit. Ex. S-8 at 1.

Based on her observations and the information that she had gathered, Inspector Meierbachtol issued Citation Number 8840455 on March 30, 2015, alleging as follows:

Inside the panel for the Recup [sic] Fan, a cable was not properly spliced to be insulated to that of the original and was not provided with damage protection as near as possible to that of the original. A phase to ground occurred on 3/25/2015 inside the enclosure where the improper splice was found. This condition exposed miners to electrical shocks/burn hazards resulting in injury.

Ex. S-6. The citation does not specifically reference the mechanical strength of the splice. However, Meierbachtol noted at the time the citation was written that an electrician at the mine had said that the mechanical connection may have come loose, and she later testified that she found a violation in part because the splice "was not properly up to the mechanical standard of the original or better." Ex. S-6 (Citation/Order Documentation); Tr. 26. She assessed the level of negligence as "moderate," the probability of injury as "reasonably likely," the severity of the expected injury as "fatal," and the number of persons affected as one, and she characterized the violation as S&S. Ex. S-6. She testified that the violation could result in 4160-volt electrical shocks and burns, and opined that it had, in fact, caused an arc flash. Tr. 30-31.

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<sup>12</sup> Specifically, Meierbachtol stated, "A splice is when you have one terminal end and you have another terminal end, and when you put them together you connect them together to keep the circuit going, and you use electrical tape to put around it." Tr. 26. The crux of this definition is the concept of creating an insulated connection between electrical conductors to continue a circuit. Northshore argues that Meierbachtol relied on Bagwell to tell her that the failed connection was a splice and that she "was not really qualified to testify on this issue." Resp. Br. 8, 9. However, Meierbachtol completed an electrical training module at the Mine Academy and professed to have some experience constructing low-voltage splices. Tr. 33, 41. Although she is not an electrician, it does not take years of experience to learn to identify a splice. I find her qualifications sufficient to lend reliability to her testimony identifying the cited electrical connection as a splice. I also find that her reasonable decision to talk to an electrical master before issuing a citation does not detract from the reliability of her testimony in this regard.

Inspector Meierbachtol traveled to the mine the day after she issued the citation to terminate it. Electricians had repaired the splice by cutting off the damaged parts of the wires, cleaning the conductors, installing and bolting together four new lugs, and wrapping the area with ten layers of high-voltage electric tape and a layer of scotch 33+ tape, which is general electrical tape rated for 500 volts. Ex. S-6; Tr. 31-33, 37-38, 64-65, 78, 81. The electricians who had performed the repairs told Meierbachtol that they had used a high-voltage splice kit. Tr. 33, 37. They also told her that “they don’t do splices here, they make connections.” Tr. 38; Ex. S-8 at 7 (noting mine’s lack of procedures for making splices).

While at the mine to terminate the citation, Meierbachtol further discussed the cause of the phase-to-ground fault with numerous Northshore employees. *See* Ex. S8 at 2-7. Ultimately, she concluded that the bolt and lugs holding the wires together in the splice had loosened over time, and because material could penetrate the loose connection and electricity was flowing through it, “eventually it just arc flashed inside [the recoup fan panel] and failed.” Tr. 29-30. She “was told that these failures happen quite often” at the mine. Tr. 31; Ex. S-8 at 3.

### **Testimony of Northshore’s Electrical Engineer, Michael Ketola**

Northshore called electrical engineer Michael Ketola<sup>13</sup> to discuss the cited equipment and the March 25 electrical incident. Tr. 55. Ketola was not involved in the incident or the subsequent repair work, but offered testimony based on his professional experience and knowledge, and his after-the-fact observations of the recoup fan panel. Tr. 57-58, 78.

When asked at hearing whether the failed connection in the recoup fan panel was a splice, Ketola conceded that it was “a splice of some sort, you could say. You’re splicing – you’re taking two cables that come from the starter and you’re terminating to one cable that comes from the motor. So you’re making a physical connection.” Tr. 81-82. Counsel for the Secretary subsequently elicited the following exchange:

Q [by counsel for the Secretary]: You just mentioned when you were talking to Judge McCarthy that the connection that we’re dealing with here of the lugs being connected with a bolt was a type of splice; is that correct?

A [by Ketola]: Yeah, it’s a termination, whatever you want to call it.

Q: It’s a type of splice, correct?

A: Correct.

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<sup>13</sup> Ketola has worked for Cliffs Natural Resources for twenty years, fifteen or sixteen of which have been at the Northshore mine. He is in charge of maintenance for the substations, high voltage motors, and other infrastructure at the mine. He previously worked as an electrical engineer for another construction company for about seven years. He holds a four-year degree in electrical engineering from Michigan Technological University. Tr. 55-56, 73.

Tr. 85-86. On redirect, Ketola explained that he typically thinks of a splice as a connection between two conductors of the same size in the middle of a run. Tr. 87-88. By contrast, he typically considers an end-to-end connection between multiple conductors of different sizes, (the type of connection at issue in this case), to be a termination, “but it could be considered a splice.” Tr. 87. Thus, while he considered the connection at issue in this case to be an unusual type of splice, he nonetheless conceded unequivocally that it could still be considered a splice.

The splice had been in place for years. Tr. 35, 63. According to Ketola, the connection originally was wrapped in a material called varnished cambric (VC) to pad the sharp edges of the lugs and bolt. Tr. 61-62. The connection was then covered with a layer of insulating tape and a layer of protective tape. Tr. 62-63. By contrast, after the phase-to-ground fault occurred, the splice was repaired by wrapping the lugs and bolt in a particular type of yellow tape instead of VC before adding a layer of 130C insulating tape and a layer of 33+ protective tape. Tr. 63-65. Ketola explained that Northshore had switched from using VC to using the yellow tape after 2001 because VC has an undesirable tendency to become dry and brittle over time, “caramelizing” to the connection, such that it cannot be easily removed. Tr. 63-64, 79. Although the mine no longer uses it, Ketola opined that VC provides protection and insulation equivalent to that provided by the yellow tape and stated that the VC and tape combination formerly used at the mine was intended to be equivalent to the insulation on the cables themselves. Tr. 65-66. Ketola suggested that using VC does not affect the integrity of a connection because VC’s main function is simply to cover the sharp edges of the lugs and bolts to prevent the outer layers of tape from being pierced, not to serve as an insulator. Tr. 78-79. Asked how long the VC plus tape combination would be expected to last, he indicated that it would depend on environmental factors and concluded “it’s really hard to say.” Tr. 79.

Ketola described a number of safety measures that are in place at the mine to prevent or mitigate shock hazards. The phase-to-ground fault had opened two breakers, one at the fan motor starter and the other at the powerhouse that feeds the starter. Ketola testified that these are redundant safety measures intended to prevent injury by shutting off the power. Tr. 67. In addition, the fan motor and recoup fan panel are grounded, and Northshore performs annual grounding and resistance testing on its equipment in accordance with MSHA requirements. Tr. 67-68, 71. Northshore also hires a contractor to perform motor circuit analysis on large motors such as the fan motor at six- or nine-month intervals to test the integrity of the grounding and insulation systems. Tr. 68-69. In fact, the recoup fan motor had just been tested eight to ten days before the phase-to-ground fault occurred. Tr. 69. As of the hearing date, Northshore was also in the process of implementing thermography analysis at the mine to detect heating at electrical connection points, but this had not been implemented at the fan motor or recoup fan panel before the phase-to-ground fault occurred. Tr. 70-71.

Ketola did not identify any safety measures that would have helped to ensure that the splice inside the recoup fan panel was physically sound and functioning as intended. Although the fan motor is periodically replaced, the wiring in the fan panel is not. Tr. 74-75, 85. The panel is bolted shut and likely would not have been opened, absent a problem, meaning that it is possible that no one had examined or even looked at the splice since its installation. Tr. 80, 84. Ketola himself did not recall ever looking in the panel before the phase-to-ground fault occurred, and he would not have expected the contractors, who performed circuit analysis on the motor, to do so either. Tr. 70, 79-80, 84. However, Ketola opined that even if the panel had been opened

before the incident, there would have been no visible indication that a failure was imminent. Tr. 83.

Ketola was not aware that Northshore had performed any analysis to determine why the phase-to-ground fault occurred. Tr. 72. In his opinion, the connection “just must have developed a high resistance and started heating and it deteriorated the insulation.” Tr. 72, 80. He posited that the re-energization of the fan motor, after undergoing circuit analysis eight to ten days before the incident, may have placed stress on the electrical system because the motor would have drawn higher amperage than usual while accelerating the fan to its normal speed. Tr. 72, 81-82. “[T]hat change over time could somehow loosen the lug washers or the bolt, or you could just have stress on the bolts themselves,” leading to high resistance, he explained. Tr. 81. He also acknowledged that taconite dust, which was visible in the picture of the recoup fan panel and is “typically all over everything” at the pelletizing plant, could have exacerbated an arc flash by trapping heat. Tr. 86-87, 89.

## **2. Analysis and Conclusions of Law**

### **i. Violation of 30 C.F.R. § 56.12013**

Section 56.12013 requires permanent splices and repairs in power cables to be mechanically strong, sufficiently insulated, and protected from damage. The regulation states:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

- (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
- (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
- (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

30 C.F.R. § 56.12013.

### **The Parties’ Positions**

The Secretary contends that the evidence establishes a violation of § 56.12013 because the cited electrical connection was a splice that failed because it was not mechanically strong or sound. Noting that Northshore pointedly used the word “connection” rather than “splice” at hearing, the Secretary characterizes this distinction as purely semantic and argues that Northshore’s own witness admitted the connection was a splice. To support the contention that the splice was not mechanically strong or sound, the Secretary cites testimony from Ketola and Inspector Meierbachtol indicating that the phase-to-ground fault occurred because the bolt holding the splice together had loosened. Sec’y Br. 9-13.

Northshore argues that the Secretary has failed to establish a violation of § 56.12013 because he has failed to prove that the connection in question was a splice or that it was not mechanically strong and sufficiently insulated. Northshore argues that the failure of the connection does not prove a violation occurred, that Inspector Meierbachtol’s testimony



regarding the cause of the failure is vague and speculative, and that I should credit the testimony of Northshore's more experienced and knowledgeable witness, Ketola, that the splice was adequately insulated and mechanically strong. Even if the connection was defective, Northshore asserts that it does not fit within the ordinary meaning of the term "splice," as defined by Ketola. Resp. Br. 5-9.

## Discussion

As a threshold matter, I find that Northshore has conceded that the cited electrical connection was a splice. Northshore's own witness, Ketola, admitted that this connection was "a splice of some sort" and could still "be considered a splice" even though it did not conform to his idea of a typical splice. Tr. 81, 87. Because this connection was a permanent splice, it was required to conform to the requirements of § 56.12013.

Even if Northshore had not conceded the issue, I would still reject its suggestion that the term "splice" should be narrowly interpreted to encompass only connections between two conductors of the same size in the middle of a run. The Secretary's regulations do not expressly define what constitutes a splice, such that it falls within the ambit of § 56.12013. However, to the extent that the regulation is ambiguous, the Secretary's interpretation is entitled to deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment on the matter. *Drilling & Blasting Systems, Inc.*, 38 FMSHRC \_\_, slip op. at 5 (Feb. 22, 2016) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) and *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)). In this case, the Secretary's interpretation of § 56.12013 to encompass electrical connections of the type cited by Inspector Meierbachtol is reasonable, persuasive, and entitled to deference, for the following reasons.

First, the Secretary's interpretation is supported by the evidence presented by both parties. The Secretary presented testimony from Inspector Meierbachtol, who consulted an electrical master at MSHA, and then concluded that a splice is an insulated connection made between the ends of conductors to continue a circuit. Tr. 26, 36. Consistent with this definition, the connection at issue here was an insulated connection made between the ends of conductors to continue the power circuit feeding the recoup fan motor. As noted above, Northshore's electrical engineer, Ketola, also testified that the connection at issue here is a type of splice.

Further, the Secretary's interpretation of § 56.12013 is more consistent than Northshore's with the text of the regulation, the pertinent regulatory framework, and the safety-promoting purposes of the Mine Act. Section 56.12013 applies to "[p]ermanent splices" and "repairs made in power cables." The requirements that the regulation sets forth for mechanical strength, insulation, and protection are appropriate and promote safety when applied to the connection at issue here. If the regulation were interpreted, as Northshore suggests, to apply only to splices made in the middle of a run, which are essentially repairs, the reference to "splices" would be superfluous, and permanent electrical connections of the type at issue here would be excluded from regulation entirely. Review of the Secretary's electrical standards reveals no intent to distinguish between different types of permanent splices or to exclude certain types of electrical connections from regulation, which would undermine the Act's safety-promoting purposes. *See* 30 C.F.R. Part 56, Subpart K. The Secretary's interpretation, by contrast, furthers the Act's

safety-promoting purposes and conforms to the regulatory framework governing electrical equipment.

For the foregoing reasons, I find that the connection at issue here was a type of permanent splice. I accept and accord deference to the Secretary's interpretation of § 56.12013 as applying to this splice.

A preponderance of the evidence establishes that the cited splice was not sufficiently well-insulated or mechanically strong to meet the requirements of § 56.12013. The splice failed when a phase-to-ground fault occurred. Although the failure itself does not necessarily prove the violation, the fact that electrical current was able to escape from the power circuit at this point supports an inference that the splice was not as effectively insulated or mechanically sound as the rest of the cable. The evidence wholly supports this inference.

No one observed the splice just before the phase-to-ground fault occurred. However, the evidence indicates that the connection likely failed because the insulation had deteriorated and the mechanical connection had loosened over time. It is unclear when, if ever, the splice had last been visually checked to ensure the connection was tight and properly insulated. Ketola testified that the splice had been constructed using lugs, a bolt, varnished cambric, and tape intended to provide the same insulation and protection as the cables themselves, but he could not say how long this construction would be expected to last. Tr. 61-62, 65, 79. Northshore stopped using varnished cambric after 2001. Tr. 63. This means that the splice was probably installed in 2001 or earlier, providing ample time for the integrity of the connection to deteriorate if it was not being checked, at least occasionally, and repaired, tightened, or reinsulated, as needed. Inspector Meierbachtol opined that the phase-to-ground failure had been caused by the splice's mechanical connection loosening over time. Tr. 29-30. This would have increased resistance at the connection, permitting heat to accumulate and setting the stage for a failure.

Contrary to Northshore's assertions, Meierbachtol's findings regarding the cause of the phase-to-ground failure are neither vague nor too speculative to credit. She reached her conclusions only after examining the damaged splice and speaking to an electrical master at MSHA and to several of Northshore's own electricians, one of whom told her that the possible cause of the failure was that the connection had become loose. *See* Tr. 25; Ex. S-6, (Citation/Order Documentation); Ex. S-8 at 1. Moreover, Ketola's testimony is consistent with her conclusions. He attributed the splice's failure to high resistance at the connection, which he said would cause heating and deterioration of the insulation. Tr. 72, 80-82.

I accept Ketola's testimony that the failure of the splice may have been precipitated by the recent restarting of the fan motor, after it underwent circuit testing. He explained that high resistance paired with high current would be expected to place stress on the mechanical connection, causing the lugs and bolt to loosen. Tr. 80-81. However, this would not relieve the operator of its duty to maintain the splice in safe condition in accordance with the requirements of § 56.12013, which it failed to do.

I affirm Inspector Meierbachtol's findings that the splice failed because it was not as mechanically strong or as well insulated as the rest of the cable. Accordingly, I find that a violation of § 56.12013 occurred.

## **ii. S&S and Gravity**

### **The Parties' Positions**

In support of Inspector Meierbachtol's S&S designation, the Secretary argues that this violation exposed at least one miner to multiple severe and discrete safety hazards, including the hazard of being exposed to an arc flash or electrical shock, and the hazard of a fire occurring in the recoup fan panel. The Secretary further contends that these hazards were reasonably likely to immediately result in serious injury in this case because arc flashes potentially occurred inside the recoup fan panel, which was next to a travelway, and in the MCC room, which is frequented by miners. The Secretary also notes that Inspector Meierbachtol was told "these failures happen quite often" at the mine, indicating a continuing risk. Sec'y Br. 13-15.

Northshore disputes the S&S designation and claims that the Secretary has not established a potential for injury to any miners. Northshore argues that because the cited splice was located inside the recoup fan panel and the panel was grounded, there was no likelihood of exposure. Northshore also points out that the electrical circuit itself features built-in protections that functioned, as intended, to shut down the power supply when the fault occurred. Northshore's closing brief does not mention the possibility of an ignition or arc flash, except to note in passing that Inspector Meierbachtol failed to explain how the dust in the box could be ignited or conduct electricity. Resp. Br. 9-12.

### **Discussion**

I have already found that a violation of a mandatory safety standard occurred, satisfying the first element of the *Mathies* test.

Turning to the second *Mathies* element, I find that this violation contributed to the discrete hazard of the deficient splice failing and allowing electrical current to escape from the fan motor circuit at the failure point, creating additional discrete hazards of an arc flash, an electrical shock, or an electrical fire. These hazards created a measure of danger to safety for any miners working nearby in the pelletizing plant.

As discussed above, the Fourth Circuit has held that the second *Mathies* element requires a further showing that the violation is "at least somewhat likely to result in harm." *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016). I find that this violation was more than somewhat likely to result in harm because the hazards to which it contributed were highly likely to occur, it was reasonably likely that miners would be exposed to the hazards, and injury was reasonably likely to result.

The hazards to which this violation contributed were highly likely to occur, and some of the hazards did in fact occur. The splice failed, allowing electrical current to escape along an unintended path. Fortunately, no one was injured. However, the phase-to-ground fault pulled the cited splice apart, burned its insulation, and destroyed the ends of its constituent wires. *See* Ex. S-7. An arc flash almost certainly occurred. Tr. 30, 81. Enough heat or force was created to trip at least one breaker and blow open the door to the MCC room. Tr. 39, 51-52, 67; Ex. S-8 at 5. Even if the failure had not yet occurred at the time the citation was issued, the deficiencies in the

splice were highly likely to eventually cause it to fail in a similar manner if normal mining operations had continued. The recoup fan panel apparently was never opened unless there was an obvious problem, even when the fan motor was periodically replaced. Tr. 70, 80. This made it unlikely that the splice would be examined or that any structural deficiencies would be discovered and addressed in the normal course of operations before the violation contributed to a catastrophic failure, such as the phase-to-ground fault that actually occurred. In fact, Inspector Meierbachtol was told that “these failures happen quite often” at the mine. Tr. 31.

Miners were reasonably likely to be exposed to the hazards created by this violation. The splice was located in the pelletizing plant inside the recoup fan panel, which is adjacent to a travelway used by miners and vehicles. Tr. 30. There was a reasonable likelihood that miners using the travelway or working nearby would be exposed to the hazards of an arc flash or electrical fire at this location. Additionally, a more serious electrical event at the fan panel could cause problems elsewhere along the fan motor circuit, which spans about 500 feet of cable from the starter in the MCC room to the fan itself. Tr. 79. This potential occurrence could have exposed miners to electrical hazards at other locations or equipment along the circuit.

Miners’ exposure to the hazards contributed to by this violation was reasonably likely to result in injury or harm. The hazards in question included the failure of the splice and resultant escape of electricity, and by their nature, these hazards would be expected to cause an arc flash and shock a nearby miner or spark a fire. Further, this violation involved dangerously high amounts of electricity. The splice was feeding a 4160-volt, 3000-amp motor. Tr. 25, 73. This increased the risk of injury from an electrical shock or arc flash. In fact, Ketola testified that arc flashes can jump further at higher voltages. *See, e.g.*, Tr. 87. In addition, the conductive taconite dust inside the recoup fan panel would have exacerbated an arc flash and increased the risk of a fire being propagated. Tr. 86. Although Northshore argues that redundant safety measures, such as circuit breakers and grounding systems for the recoup fan panel and fan motor, were in place to mitigate the risk of injury to miners, the Commission has made clear that redundant safety measures do not operate as a defense in the S&S context. *E.g.*, *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (noting that redundant safety measures do not prevent S&S finding); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) (taking this principle even further by characterizing evidence of redundant safety measures as “irrelevant”).

Because this violation contributed to hazards that were highly likely to occur, miners were reasonably likely to be exposed to the hazards, and injury was reasonably likely to result, I find that this violation was more than somewhat likely to result in harm. Accordingly, the second *Mathies* element is satisfied under the Fourth Circuit’s *Knox Creek* analysis.

As discussed in the “Legal Principles” section above, a hotly disputed aspect of the S&S analysis is whether the third step of the *Mathies* test requires consideration of the likelihood that the hazard itself will occur or simply the likelihood that injury will occur as a result of the hazard. The federal appellate courts have assumed the occurrence of the hazard at this step of the analysis, which is in line with recent Commission precedent. *See Knox Creek*, 811 F.3d at 161-62 (citing *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin*

*Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988); and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)).

Applying this approach and assuming that the hazards contributed to by this violation were to occur, I find that injury was reasonably likely to occur as a result of the hazards. Miners were reasonably likely to be exposed to the hazard of the splice failing, due to its location adjacent to a travelway in the pelletizing plant where miners frequently work and travel. Any miners exposed were reasonably likely to incur injuries, given the high voltage and amperage involved, and the nature of the condition, which was likely to result in an arc flash or shock hazard at unexpected locations, or could spark a fire. In making these findings, I rely on, and incorporate by reference, my findings and discussion with regard to the second *Mathies* element above.

Under the traditional approach to the *Mathies* analysis, the third element requires consideration of the likelihood of an injury-causing event without assuming the occurrence of the hazard. I have already found that the hazards contributed to by this violation were highly likely to occur and reasonably likely to result in harm, for the reasons discussed above in my consideration of the evidence at the second *Mathies* prong. Accordingly, I find the evidence sufficient to satisfy the third *Mathies* element under either the traditional approach or the approach embraced by the Fourth Circuit in *Knox Creek*.

Because of the high voltage and amperage this violation involved, any electrical shock caused by the violation would be reasonably expected to be serious or fatal. An electrical fire would also be expected to result in serious or fatal burn injuries. Thus, the fourth *Mathies* element is satisfied.

Because all four of the *Mathies* criteria are met, this violation is S&S. I further find that the gravity of this violation was high in light of its contribution to a serious electrical event that caused damage to electrical equipment and exposed miners working at the pelletizing plant to a potential shock and fire hazard.

### **iii. Negligence**

Inspector Meierbachtol charged Northshore with moderate negligence because she was told that failures such as the one that occurred on March 25, 2015 happened quite often, and therefore Northshore was aware of this recurring problem and should have been checking the splices in the recoup fan panel to ensure that they were tight and properly insulated. Tr. 31. The Secretary asks me to uphold the moderate negligence designation, asserting that Northshore should have been checking the splices, but that mitigating factors exist, such as the redundant safety measures that were in place to prevent or mitigate the hazards of an electrical shock or surge. Sec'y Br. 15-16. Northshore has presented no arguments with respect to negligence.

I affirm Inspector Meierbachtol's finding of moderate negligence. The operator should have known that this splice was defective. The splice had been installed so long ago that one of the materials used in its construction, varnished cambric (VC), was no longer in common use at the mine. During the splice's lengthy life, the fan motor it helped energize was likely replaced numerous times due to regular wear and tear, yet there is no indication that the operator ever

opened the recoup fan panel to make sure the splice was still intact and in safe condition. Section 56.12013 requires a splice's insulation and degree of mechanical strength to be maintained as near as possible to the same level as the original wire. Northshore's conduct failed to meet or even approach this high standard of care. Periodic checks of the wiring inside the recoup fan panel could have revealed that the splice's insulation was deteriorating or its mechanical connection was loosening, but Northshore failed to take this simple step that could have possibly prevented the phase-to-ground fault.

I note, however, that Northshore does engage a contractor to conduct regular motor circuit analysis that should have revealed any abnormal resistance levels along the circuit, including at the splices inside the recoup fan panel. Tr. 68-69. Also, the defective condition could have arisen recently if the splice's mechanical connections became loose due to the fan motor being stopped and restarted eight to ten days before the citation was issued. Tr. 69. After weighing all of the evidence, I find that Northshore's conduct in connection with this violation was moderately negligent.

#### **iv. Penalty Assessment**

As discussed above, the Mine Act requires the Commission to consider the six criteria set forth in section 110(i), 30 U.S.C. § 820(i), when assessing a civil penalty, and I look to the Secretary's penalty regulations and proposed assessment as a useful starting point.

The Secretary proposed a penalty of \$2,678.00 for this violation after considering the six statutory penalty criteria under his penalty formula set forth in 30 C.F.R. Part 100. Ex. S-3; Ex. S-5. I have affirmed the Secretary's gravity and negligence findings. Exhibit A to the Secretary's penalty petition shows how he weighed Northshore's size and violation history, and Northshore has not challenged his findings in this regard. Ex. S-5; *see also* Ex. S-1 (MSHA's Assessed Violation History Report for the mine). The parties have stipulated and the evidence reflects that Northshore promptly abated this violation in good faith, and the Secretary accounted for this factor in his proposed assessment. Ex. S-2; *see* Ex. S-5 (showing 10% penalty reduction for good faith). The parties have also stipulated that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S-2.

Based on the legal principles outlined above, after considering the six statutory penalty criteria, I find that the proposed assessment of \$2,678.00 is appropriate.

### **B. Citation Number 8840744 (Uncovered Welding Lead)**

#### **1. Further Findings of Fact**

Citation Number 8840744 alleges that Northshore failed to properly guard an electrical connection where one of two welding leads was attached to an arc welding machine. Ex. S9. An arc welding machine generates electrical current that passes through a welding lead to an electrode and arcs to the piece of metal on which the work is being performed. This welding lead, which supplies current to the electrode, is referred to as the electrode lead or positive lead. Tr. 99, 118. The second welding lead, referred to variously as the negative, neutral, ground, or work lead, is electrically common with the ground and with the chassis of the welder and is

clamped to the work piece to complete the welding circuit. Tr. 118-19, 126.<sup>14</sup> Thus, the two welding leads form a circuit similar to that created by a pair of jumper cables running between two car batteries. Tr. 99, 119-20.

### Events Surrounding Issuance of Citation

Inspector Norman was at the pelletizing plant conducting a regular inspection on March 31, 2015 when he spotted a portable 480-volt arc welding machine sitting on the side of a travelway along the 107N conveyor. Tr. 93-94; Ex. S-9. According to Conboy, who was accompanying Norman on the inspection, this was the welder's storage location. Tr. 106. The welder was not in use, although it was not locked or tagged out, and the welding leads were coiled and hanging on the side of the machine. Tr. 103-04; *see* Ex. R-12 (photographs submitted by Northshore).

Inspector Norman noticed that the welder's negative lead, unlike the positive lead, was unguarded at the point where it connected to the welder. Tr. 94. Photographs submitted by both parties show that the two welding leads terminate in a metal lug that slips over a stud protruding from a panel at the bottom of the welder, which is tightened down with a nut. Ex. S-10; Ex. R-12; *see also* Tr. 95-96, 101. The lug nut assembly at the end of the positive lead was covered by a plastic sleeve, preventing contact with the conductive metal pieces, but the negative lead's terminal, connective, lug-nut assembly was bare. *See* Ex. R-12.

Inspector Norman observed that the negative terminals were guarded on other welders that he examined during the inspection. Tr. 94, 102. Norman opined that leaving a negative terminal bare and unprotected could create a hazard if anything fell against it, explaining, "I've welded myself. I've taken that stinger with a piece of rod in it, draped it over the machine and made contact with that [the bare terminal]. So you can get an arc flash. You could become the ground." Tr. 96.

Based on his observations and concerns, Inspector Norman cited Northshore for a violation of 30 C.F.R. § 56.12023, which he believed required the negative terminal to be "insulated to protect anybody from coming into contact with it." Tr. 94.<sup>15</sup> The narrative portion of the citation alleges that the welder "was not properly insulated at the terminal where the welding lead connects to the welder," which "exposed the miner to contacting the 480 volt terminal, resulting in shock and or electrocution." Ex. S-9. Norman assessed the violation as

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<sup>14</sup> I accept Ketola's testimony that the ground lead is clamped "to your project or to whatever you're welding to complete the circuit" (Tr. 118) and reject Conboy's contrary testimony that it is clamped to "a ground conductor" or "anything metal" such as a beam in the building (Tr. 108). Conboy has no electrical background and has never operated a welding machine. Tr. 47, 108, 115. By contrast, Ketola has served as an electrical engineer for more than twenty years, (Tr. 55), and his testimony, as a whole, makes sense and evinces a thorough knowledge of welding.

<sup>15</sup> Considering the context, I find that Norman was using the term "insulated" to mean "guarded." I therefore reject Northshore's contention that the Secretary alleged only that the connection was uninsulated, not that it was unguarded. *See* Resp. Br. 14-15.

unlikely to cause injury, non-S&S, capable of causing a fatal injury, affecting one person, and resulting from moderate negligence. Tr. 97; Ex. S-9. He terminated the citation the next day, after Northshore had abated the violation by covering the negative terminal with electrical tape. Tr. 98; Ex. S-9.

### **Testimony from Northshore's Witnesses**

Conboy, who had observed the welder at the time the citation was issued, did not dispute that the end of the negative lead was bare at the point where it connected to the welder. Tr. 109-10. He also agreed that the negative terminals were covered on many of the other welders that he and Norman had seen during the inspection. Tr. 116. However, Conboy expressed doubt that the standard cited by Norman, § 56.12023, applied to the negative welding lead. *See* Tr. 109. Conboy testified that nothing would happen if a person were to touch the bare terminal where the negative lead meets the welder. Tr. 114. He asserted that he had accompanied an MSHA inspector named Dan Goyen on two past inspections at the mine. Conboy testified that during these inspections, a welder was twice found to be in the same condition as the welder at issue here, with a cover over the end of the positive welding lead but not the negative. Conboy testified that Inspector Goyen had not cited or mentioned the condition on either occasion. Tr. 110-14.

Ketola was called to testify in his capacity as an electrical engineer. Like Conboy, Ketola did not recall that the mine had received any citations solely for a bare negative terminal on a welder, but he acknowledged that the mine had been cited eight to ten years earlier when neither the negative nor the positive terminal was covered. Tr. 123-25. Thereafter, Ketola purchased dozens of cheap plastic covers intended for use on the positive terminals. Tr. 123-25. Ketola opined that it was unnecessary to cover the negative terminals because the negative leads were grounded to the chassis of the welder. Tr. 118-19, 123, 126-27. However, mine employees ended up using the covers on both terminals because the covers were “pretty cheap compared to coming out here [to a hearing] and spending half a day.” Tr. 123. In other words, Ketola was of the view that covering the negative terminals, while unnecessary, was cheaper than risking a citation, “[s]o it’s just one of [those] things where we do it just because it doesn’t bring unwanted meetings down here in the Federal Building.” Tr. 120-21.

## **2. Analysis and Conclusions of Law**

### **i. Violation of 30 C.F.R. § 56.12023**

Section 56.12023 provides: “Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location.” 30 C.F.R. § 56.12023.

### **The Parties' Positions**

The Secretary argues that § 56.12023 was violated because the negative terminal cited by Inspector Norman is part of an electrical connection that was exposed, protruding, and unprotected, unlike the negative terminals on other welding machines at the mine. Sec’y Br. 17-19.



Northshore argues that a violation has not been established under the reasonably prudent person standard because insulating a neutral lead is unnecessary and the mine has not been cited for failing to do so in the past. In a footnote, Northshore also states that the cited connection is protected by its recessed location at the bottom of the welding machine. Northshore further disputes that the cited connection is an “electrical connection” within the meaning of § 56.12023, arguing that it is not an electrical connection because the negative lead is neutral and carries no current. Resp. Br. 14-16.

## Discussion

I reject Northshore’s argument that the cited connection is not an “electrical connection” within the meaning of § 56.12023. Although the negative welding lead is electrically common with the ground, it is an essential part of the welding circuit, which conducts direct current in a manner similar to jumper cables connecting car batteries. *See* Tr. 99, 118-21, 126. Thus, the connection between the negative lead and the body of the machine is an electrical connection because it is a conductive connection between electrical components of the machine. *See Falkirk Mining Co.*, 19 FMSHRC 149, 152 (Jan. 1997) (ALJ) (finding that connection between negative welding lead and welder “is clearly an electrical connection” because it is a connection of insulated wires to each other or equipment permitting flow of electrical current).

Under § 56.12023, the cited electrical connection should have been either guarded or protected by its location. There is no dispute that the connection was unguarded, as depicted in a close-up photograph submitted by Northshore showing that the lug-nut assembly connecting the negative terminal to the welding machine was completely bare. Tr. 94; *see* Ex. R-12. The photograph shows that the stud to which the negative lead connects sits in a slightly recessed panel at the bottom of the welding machine. Ex. R-12. However, the metal lug at the end of the negative lead protrudes beyond the plane of the machine, and therefore that portion of the connection is not protected by its location. *Cf. Falkirk*, 19 FMSHRC at 152-53 (finding violation when negative terminal lug protruded outside vertical plane of welder); *Ammon Enters.*, 30 FMSHRC 799, 813 (July 2008) (ALJ) (finding no violation when photograph showed lugs were recessed a few inches into a relatively small opening). Although the welder was not in use at the time of the inspection, it was not locked and tagged out. Tr. 103-04. The equipment should have been maintained in compliance with the Secretary’s safety requirements because it was available for use and had not been removed from service. *Cf. Wake Stone Corp.*, 36 FMSHRC 825, 828 (Apr. 2014) (requiring that equipment be maintained in functional condition even when not in use, unless it has been removed from service).

Northshore contends that a reasonably prudent person would not have recognized a need to cover the negative terminal. However, the negative terminal is part of an electrical connection and part of the welding circuit, and the plain language of § 56.12023 requires that it be either guarded or protected by location. Significantly, the negative terminals were covered on the other welding machines at the mine. Tr. 94, 102, 116, 123. Northshore presented testimony suggesting that covering the negative terminals is a senseless practice carried out merely to avoid “unwanted meetings down here in the Federal Building.” Tr. 121; *see* Tr. 114, 118-27. However, even though Northshore’s witnesses questioned the rationale behind this application of § 56.12023, the operator’s act of covering the negative terminals on most of its welding machines evinces an implicit recognition that the standard does apply and that these linkage points constitute

electrical connections that must be guarded. Given that the plain language of § 56.12023 applies and that the negative terminals were covered on the other welding machines at the mine, I reject Northshore's argument that a reasonably prudent person would not have recognized a violation.

Based on all the foregoing, I find that the Secretary has established a violation of § 56.12023 because the cited electrical connection was not guarded or protected by its location.

## **ii. Gravity**

Inspector Norman assessed this violation as non-S&S and unlikely to cause injury, but capable of causing a fatal injury to one person. He testified that a person touching the exposed negative terminal could "become the ground." Tr. 96. He failed to explain how this could occur given that the negative lead is electrically common with the ground. However, he also identified a risk that an arc flash could occur if the electrode at the end of the positive welding lead were to come into contact with the bare conductor at the negative terminal, and illustrated the plausibility of this scenario with a first-hand example. *See* Tr. 96 ("I've taken that stinger with a piece of rod in it, draped it over the machine and made contact with [the negative terminal]."). Ketola agreed that the electrode would draw an arc if it came into contact with the bare negative terminal, while the welding machine was running. Tr. 120. The machine was not in use at the time of the inspection, but it was not locked and tagged out. Tr. 104.

I find that this violation created a hazard of electricity arcing and potentially shocking a miner. This could result in serious or even fatal injuries given that this is a 480-volt welding machine. Tr. 95, 116. However, the gravity of the violation is not serious because only a small portion of the negative conductor was exposed near the bottom of the welding machine and the probability of injury was low.

## **iii. Negligence**

Inspector Norman attributed this violation to Northshore's moderate negligence because it was obvious and should have been detected during workplace exams. Tr. 97. His opinion on negligence was also influenced by the fact that the negative terminals were covered on all the other welders that he had seen at the mine. Tr. 97.

The Secretary asks me to uphold the moderate negligence designation. The Secretary asserts that the operator should have known of the violative condition, but concedes that mitigating factors existed because the welding machine was not in use at the time of the inspection and the duration of the violation is unclear. Sec'y Br. 19.

Northshore makes no arguments with respect to negligence except to note that the inspector's designation "would appear to be excessive." Resp. Br. 16 n.9.

I affirm the Secretary's moderate negligence designation. This violation was not extensive, the degree of danger it posed was low, and the cited electrical connection was located at the bottom of the machine, meaning the violation may not have been obvious to a casual observer. However, the violation would have been obvious to anyone checking the machine for safety hazards, and it should have been detected and addressed during a workplace exam.

#### **iv. Penalty Assessment**

The Secretary proposed a penalty of \$540.00 for this violation after considering the six statutory penalty criteria. *See* Ex. S3; Ex. S5. I have affirmed the Secretary's gravity and negligence findings. The parties have stipulated that Northshore abated this violation in good faith and that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S2. The Secretary's penalty petition reflects that he adequately accounted for Northshore's size, violation history, and good-faith abatement efforts in formulating his proposed penalty. *See* Ex. S5.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that the proposed assessment of \$540.00 is appropriate.

#### **C. Citation Number 8840631 (Alleged Fall Protection Violation)**

##### **1. Summary of Evidence**

Citation Number 8840631 alleges that Inspector Norman observed a miner disconnecting his fall protection gear from its tie-off point, walking approximately four feet along an elevated conveyor belt without being tied off, then climbing down a ladder to reach the ground six feet below. Ex. S-15. Norman cited Northshore for a violation of 30 C.F.R. § 56.15005, which requires miners to wear safety belts and lines wherever there is a danger of falling. Ex. S-15. At hearing, the parties presented conflicting evidence as to the events surrounding the issuance of the citation, particularly the positioning of the ladder.

##### **Inspector Norman's Testimony**

Inspector Norman issued the citation at the pelletizing plant during a regular inspection on January 13, 2015. Tr. 134-35; Ex. S-15. Norman testified that he and company safety representative, Scott Blood, were walking in an upper level of the plant, when Norman caught sight of two miners, a Northshore employee named David Aho, (who was called to testify at the hearing), and a contractor named Chris Harris, (who was not called to testify), standing on an elevated conveyor belt, one level down. Tr. 135-36, 142-43; Ex. S-15. The miners were changing the B-belt next to the belt drive motor, wearing harnesses with the lanyards tied off to a lifting eye for the motor. Tr. 139. Inspector Norman estimated the lifting eye was about five feet above the belt. Tr. 139. The belt was locked and tagged out. Tr. 166. While Norman watched, the miners disconnected their lanyards and walked along the belt toward a ladder which Norman estimated to be four feet away. Tr. 135, 140-41.

Norman initially testified that the two miners disconnected their lanyards "[a]t the same moment," then acknowledged he did not remember which miner unhooked his lanyard first. Tr. 140-41. He did not see the miners reach the ladder four feet away, or climb down it, because by that time, he was descending a nearby stairway. Tr. 141, 166-67. When asked how Blood had reacted to seeing the miners walking along the belt without fall protection, Inspector Norman responded, "I don't remember him saying anything. I just said what the heck are they doing, you know, and I went down." Tr. 137.

By the time Norman and Blood reached the lower level, Aho and Harris had descended the ladder and were on the ground. Tr. 135. According to Norman, when he asked why Aho and Harris had not been properly tied off, they told him there was no place to do so. Tr. 142-43. After speaking to the miners, Norman issued Citation Number 8840631 and terminated it immediately because the miners were already on the floor. Tr. 160-61. He also issued a citation for the same violation to VanHouse Construction, the contracting company that employed Harris. Tr. 159-60.

When asked what Blood said during the conversation with the miners, Norman spontaneously asserted that Blood had moved the ladder Aho and Harris had used to dismount from the belt. Tr. 143-46. According to Norman, this ladder is about six or seven feet tall and the top step is either “pretty even” with the belt or “a few inches” above it. Tr. 141, 163. As I noted at hearing, however, the ladder actually appears to be about a foot higher than the belt in a photograph submitted by the Secretary. Tr. 163; *see* Ex. S-16. Norman, who took the photograph, asserts that it shows the ladder’s position at the time the miners used it. His contention is that Blood moved the ladder before the photograph was taken and asked if this would have prevented the violation. Tr. 144. Norman then chided Blood for “disturb[ing] my scene” and asked him to move the ladder back. Tr. 144, 145. According to Norman, Blood retorted that he had moved it only a few inches. Tr. 144, 145. An argument ensued. In Norman’s words:

He [Blood] moved it [the ladder] back, and I said you can see the drag marks in the dirt. I said you can see it was back about two more feet, and he moved it a couple more times a couple inches at a time, he moved it back, and I took the ladder and I moved it about ten inches, and it wasn’t quite all the way back to the drag marks. There was probably about approximately three inches from where the drag marks started. And I told him, I said, my concern here is that the miners are on top of this belt not properly tied off.

Tr. 145-46. On cross examination, Inspector Norman admitted that Blood had accused him of moving the ladder, but claimed that he (Norman) had made his accusations first. Tr. 163-64.

Inspector Norman has raised two theories as to how § 56.15005 was violated. The citation alleges that Aho and Harris violated the standard by traveling approximately four feet on the elevated belt, without being tied off. Tr. 136; Ex. S15. “They should have had somebody come and move that ladder closer to them so they could get down safely,” Norman explained at hearing. Tr. 146. His testimony raised the additional theory that the miners “shouldn’t have been up there in the first place the way they were tied off” because their fall protection was inadequate. Tr. 146. Specifically, he testified that both miners were tied off to the same lifting eye, which was intended to lift a 100-pound motor, and that the lanyards they were using would not have stopped them from falling six feet to the ground below because each lanyard was six feet long with a three-foot shock absorber, and “[w]ith the safety factor it takes 18 feet to stop them.” Tr. 136.

The Secretary presented no field notes, measurements, pictures, corroborating testimony, or other evidence that supports Inspector Norman’s testimony regarding the strength of the

lifting eye or the stopping distance of the lanyards. The citation and Norman's contemporaneous notes give no indication that he questioned the adequacy of the miners' fall protection at the time he wrote the alleged violation (see Exhibits S15 and S19), and Norman admitted on cross examination that he did not raise this allegation when he issued the citation. Tr. 161-62.

Inspector Norman attributed the alleged violation to Northshore's moderate negligence because Respondent provided him with no evidence that the company had provided safety talks regarding how to properly tie off. Tr. 158; Ex. S-15. He further assessed the violation as S&S and reasonably likely to result in fatal injuries to one miner. Ex. S-15.

The hazard Inspector Norman was concerned about was a fall from the belt, which he asserted was slippery and unstable and about six feet high. Tr. 140, 146-47. He claimed to have measured the belt's height using a tape measure, while Blood, Aho, and Harris were present. Tr. 147, 157, 164-65. However, no measurements appear in his field notes or citation documentation.

The height of the belt is significant because MSHA has indicated that compliance with OSHA's fall protection standard, which applies only at elevations of six feet or higher, will often satisfy the requirements of § 56.15005. Tr. 165-66; *see* 29 C.F.R. § 1926.501(b)(1) (OSHA's fall protection standard). Northshore submitted a copy of a Program Policy Letter (PPL) issued by MSHA, which states that compliance with OSHA's fall protection standard will satisfy MSHA's standards in many cases. Ex. R-14; Tr. 165-66. When asked what the PPL means to him, Norman testified, "It means not all cases." Tr. 170. When prodded, he elaborated that the PPL discusses "[c]ompliance with OSHA, whatever their standard is, their six-foot fall rule or four-foot fall rule." Tr. 170. Questioned further, he conceded that the OSHA rule is six feet, not four feet. Tr. 170-71. He testified that he had mentioned a four-foot rule because he "did hear once they were going to lower it to four feet." Tr. 171.

In support of his opinion that a fall from six feet would likely be fatal, Norman testified that he knew of fatalities caused by falls from lesser elevations. Tr. 147-48. The Secretary offered several Fatalgrams and accident reports purporting to show that falls from a lesser elevation were fatal in six past cases. Tr. 153, 167-68; Ex. S-17. I excluded one of them (the September 26, 2015 notice) because it contained no evidence that a fall hazard existed or that the victim actually fell, and I find that two others (the May 18, 2015 notice and November 26, 2014 report) are entitled to very little probative weight because neither specifies the height from which the victim fell. Tr. 148-56; Ex. S-17.

## Testimony of Scott Blood<sup>16</sup>

Blood testified that he and Inspector Norman were walking down some stairs when they first saw Aho and Harris on the elevated conveyor belt. Tr. 177. Norman did not say anything to direct Blood's attention to the miners on the belt, and Blood did not notice whether they were tied off, nor did he see them unhook their lanyards. Tr. 177, 191-93. Blood testified he did not even notice that Norman was watching the miners until the inspection party reached the lower level. Tr. 203. By the time they got there, one of the miners had climbed down the ladder and the other was just reaching the floor. Tr. 178-79.

Norman asked Blood if the mine had a fall protection training program and if mine employees were aware of the three-point contact rule, which requires miners working on an elevated surface to wear fall protection whenever they cannot maintain three points of contact. Tr. 177-78. At that time, Blood belatedly realized that Norman was referring to Aho and Harris. Tr. 203. The miners were called over to speak to the inspector, and supervisors for Northshore and the contracting company were summoned to the scene because both operators were being cited. Tr. 179-80, 183.

According to Blood, as the men were standing in a group about six to ten feet away from the ladder and he was contacting Harris's supervisor, Blood saw Inspector Norman walk over and move the ladder to the left away from the belt drive motor to the position where it is depicted in Norman's photograph. Tr. 183-84, 195. Blood returned to the scene about an hour later and took pictures showing what he believed to be the ladder's initial position, which was several feet closer to the motor than in Norman's picture. Tr. 180-81, 191; *compare* Ex. R-4 with Ex. S-16. Blood asserted that he had immediately confronted Norman about moving the ladder, but did not himself touch the ladder until he was taking pictures later. He provided the following account of the incident:

Q [by Mr. Moore, counsel for Northshore]: And what was your discussion with the inspector about his moving the ladder?

A [by Blood]: I says Terry, you can't move that ladder prior to us taking pictures. And he said this is where the ladder was. And I said no, it wasn't. And basically [he] took his picture and walked away.

THE COURT: Did you move the ladder before –

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<sup>16</sup> Blood has worked for Northshore for more than 26 years, including at least 14 years in the safety department. As a safety representative, he is responsible for safety activity at the mine and sometimes accompanies MSHA representatives during inspections. He also handles the workers' compensation program at the mine and is a facilities' security officer for homeland security. Before working for Northshore, he worked in the finance department at a manufacturing company for about a year and worked for a railroad. Tr. 175-76. Blood was one of the witnesses, who was sequestered at the commencement of the hearing. *See* Tr. 10.

THE WITNESS: No, I moved the ladder back before I took my picture. I did not touch the ladder prior to him touching it. So I did move the ladder back after – as you can see in my picture, when the guard [to the motor] was on.

BY MR. MOORE: So you're saying you did not move it prior to his taking his picture?

A: No. I've been accompanying inspectors for 15 years, and I know I cannot alter a scene prior to them taking a picture. I've been told that many times, and I would not do that.

Tr. 183-84.; *see also* Tr. 193-95 (Blood's testimony on cross-examination consistently repeating this account). Blood explained that he was able to move the ladder back to its proper position because he could see marks in the dust on the floor where it had been dragged, which he said he had mentioned to Inspector Norman when he confronted him about the ladder. Tr. 185.

When counsel for the Secretary suggested that Northshore may have initially moved the ladder rather than Inspector Norman, Blood – apparently unaware that this accusation was directed at him – testified that the miners at the scene probably would not have been paying attention to the ladder once the inspector arrived because they would have been wondering what they did wrong and whether they were in trouble. Tr. 194. On redirect, Blood testified that moving the ladder farther away from the belt drive motor, as he asserted Norman had done, would have made the citation more supportable because miners dismounting from the belt could not have maintained three-point contact if the ladder had been that far away from the motor. Tr. 198-99.

Blood is six feet tall. Tr. 182. He testified that the ladder was also six feet tall and the top of the belt was approximately five feet off the floor, or about the height of his chest and shoulders. Tr. 181-82, 190. Thus, the distance between the top of the ladder and the belt was approximately one foot. Tr. 182. The pictures he took appear to support these height estimates. *See* Ex. R-4. The belt, which is made of rubber, is flat, dry, and not slippery, according to Blood. Tr. 185, 190. He did not recall seeing Inspector Norman measure the belt's height. Tr. 182, 203-04.

Blood opined that no violation had occurred because mine employees are trained to maintain three-point contact when dismounting from the belt and to use fall protection when there is a danger of falling. Tr. 185, 202. He further opined that Aho and Harris had in fact been tied off to the lifting eye for the belt drive motor while working atop the belt. Tr. 185-86. Blood did not recall Inspector Norman raising any issues about the adequacy of the lifting eye as a tie-off point. Tr. 186. Blood could not testify definitively whether the miners had maintained three-point contact when climbing down the ladder because he did not watch them descend. Tr. 179, 192. However, he testified that it would have been possible for them to do so based on the placement of the ladder. Tr. 199, 201-02.

On cross-examination, counsel for the Secretary questioned Blood as to whether he had been charged with impeding inspections, whether he held a reputation for being intimidating and verbally abusive to inspectors, and whether he had, in fact, sworn at Inspector Norman when the fall protection citation was issued. Tr. 187-90. Blood denied ever being issued an impedence, although he recalled that Inspector Norman had threatened to issue one in an unrelated matter that occurred after the issuance of the fall protection citation. Tr. 187-89, 196-200. He also denied engaging in any verbal abuse or intentionally intimidating inspectors. Tr. 189-90, 196. I note that there is no record evidence of Blood swearing at Norman, but Norman's field notes disclose an unrelated verbal altercation with Conboy that occurred in March 2015, which resulted in Conboy apologizing for hostile behavior and profanity. Ex. S-11 at 17-19.

### **Testimony of David Aho<sup>17</sup>**

Aho is a shift maintenance technician, who performs mechanical work and repairs conveyor belts at the Northshore mine. Tr. 205. On the day the citation was issued, Aho was serving as the go-to person for a group of contractors, who were performing maintenance and repair work while a conveyor was shut down. Tr. 206. The job required Aho and one contractor, Harris, to climb onto the conveyor belt to remove the guard from the belt drive motor and inspect some of the motor's components. Tr. 206-07; *see also* Tr. 217-18, 222-23 (Aho's testimony describing where he and Harris were working with reference to the photographs submitted by the parties).

Aho testified that the stepladder, which he and Harris climbed to get onto the belt, was six feet tall. Tr. 206-07. He initially testified that the belt was about four feet high, but then decided it was probably closer to five feet, as he is 5'5" tall and the belt was approximately at his eye level. Tr. 205, 208-09. The belt was broad, dry, and easy to stand on. Tr. 215. He never saw Inspector Norman measure the belt. Tr. 214.

Aho described how he and Harris had climbed onto, and off of, the conveyor belt. After setting their tools on the belt and climbing the ladder, Aho tied his fall protection to the eye bolt on top of the motor, which he estimated to be approximately three feet above the belt, and Harris tied off to "a different spot on the framework." Tr. 208, 219. To climb down, Aho turned around to face away from the ladder; gripped the framework of the motor with his right hand; stepped off the belt onto the conveyor framework with his right foot; stepped off the belt onto the painter's platform on the ladder with his left foot; unhooked his lanyard from the tie-off point with his left hand and attached it to his safety harness; grasped the ladder; then moved both feet onto the ladder and proceeded down. Tr. 210-12, 219-22. Aho asserted that he maintained three points of contact throughout this process and denied that it felt "risky" to stand with one foot on the ladder and one on the conveyor frame. Tr. 221. He initially testified he did not remember whether he or Harris had dismounted from the belt first and did not pay attention to how Harris unhooked his fall protection device, but later recalled that he had unhooked and dismounted first. Tr. 211, 218, 224.

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<sup>17</sup> Aho has worked for Northshore for six years. He previously worked for a paper mill for 32 years. Tr. 205.



Aho testified that he did not recall whether Blood and Inspector Norman were present when he climbed down from the belt because he was watching Harris dismount. Tr. 224. Once Harris reached the ground, Inspector Norman asked Aho why the guard was off the motor, and Aho responded they were working on it. Tr. 225. Inspector Norman then stated that Aho and Harris had not maintained three-point contact while climbing down the ladder, an allegation that Aho denied. Tr. 225. A few minutes later, while he was standing in a group and talking to the contractor's safety representative, Aho heard that he and Harris had been further accused of walking four steps or more down the belt without being tied off, an allegation that Aho also denied. Tr. 213-14, 225-26.

Aho then overheard Blood asking the inspector why the ladder had been moved. Tr. 213, 226. Afterward, he saw Blood move the ladder back to its initial position, which could be ascertained by the marks on the floor. Tr. 214-16. According to Aho, the photographs taken by Blood accurately reflected the ladder's position at the time that he and Harris had used it, but in the photograph taken by Inspector Norman, the ladder was too far away from the eye bolt to permit three-point contact, while dismounting from the belt. Tr. 207, 214, 216-17.

## **2. Bench Decision**

I rendered the following decision from the bench: "I'm going to dismiss this citation. I'm going to find that there were three points of contact held at all times. I'm going to credit the testimony of Mr. Blood that the inspector moved the ladder. I'm going to find that the Secretary has failed to establish by a preponderance of the evidence that this event occurred, as written in the citation." Tr. 227.

## **3. Further Discussion**

I hereby reaffirm my bench decision, for the following reasons.

The cited standard provides in pertinent part: "Safety belts and lines shall be worn when persons work where there is a danger of falling." 30 C.F.R. § 56.15005. The Commission has interpreted this provision to require miners to wear fall protection "in a safe and proper manner in the vicinity of a fall hazard." *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681-82 (July 2002); *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 757 (May 1992). Applying the reasonably prudent person test, the pertinent inquiry is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Elec. Co.*, 5 FMSHRC 840, 842 (May 1983).

In this case, the Secretary has not established by a preponderance of the credible evidence that Northshore's employee, Aho, failed to wear fall protection gear in a safe and proper manner when there was a danger of falling. I reached this conclusion from the bench after evaluating and comparing the witnesses' credibility based on the substance of their testimony and my observations of their respective demeanors. I found that I could not credit Inspector Norman's account of the events surrounding the issuance of the citation.

A number of imprecisions and discrepancies in Inspector Norman's account cast doubt on its reliability. His initial theory of violation was that Aho and Harris had walked four feet along

the conveyor belt and climbed down the ladder without being tied off, but admittedly, he did not see the miners reach the ladder or climb down it. Tr. 141, 166-67. Thus, he could not have seen whether the miners maintained three points of contact. He did not know which miner had disconnected his lanyard first, and could not describe with clarity his conversation with the miners. *See* Tr. 140-42. Taken as a whole, his testimony on direct examination implausibly suggested that Aho and Harris said and did the same things at the same time throughout his interactions with them. Norman's testimony gave the impression he had exclaimed, "What the heck are they doing?" as soon as he saw the miners atop the belt and had hurried down the stairs to stop what he perceived as a dangerous situation. Tr. 137. However, Blood did not recall Norman making such an exclamation and stated that Norman did not call attention to the situation until the inspection party had descended the stairs. Tr. 177-78, 192-93, 203. Inspector Norman's assertion that he measured the height of the belt with a tape measure in front of Blood and Aho was also contradicted by both witnesses and is not supported by his field notes or any other contemporaneous record of measurement, even though this is an important factor in finding a violation of the fall protection standard. Tr. 164-65, 182, 203-04, 214.

Norman's theory of violation appeared to evolve at hearing to include unsupported new allegations regarding the adequacy of the fall protection the miners were using, which struck me as a post-hoc rationalization spurred by a realization that the initial theory of violation might not be adequately supported. *See* Tr. 136, 146, 161-62. Additionally, when discussing MSHA's Program Policy Letter, which essentially adopted OSHA's six-foot fall protection standard, Norman seemed to be straining to bend the rules to conform to the facts of this case. Tr. 170-71. Again, this suggests an attempt at after-the-fact rationalization of a poorly supported theory.

I found unusual and noteworthy the manner in which Inspector Norman raised, unbidden, the issue of the ladder being moved on direct examination. *See* Tr. 143-46. His description of the incident was confusing and cast blame on Blood. However, Blood testified he had been accompanying inspectors for years and knew better than to move anything before pictures were taken, and he provided a simpler and clearer description of the ladder being moved first by Inspector Norman. Tr. 183-85, 193-95. Aho corroborated Blood's account of this incident in all respects. Tr. 213-17, 226. I note that Inspector Norman had a motive to move the ladder, as he clearly relied on its alleged positioning to support his initial theory of violation. *See* Tr. 146, 198-99.

After considering all the foregoing at the hearing, I declined to credit Norman's account of the alleged violation. Instead, I credited Blood's testimony, corroborated by Aho, that the inspector had moved the ladder to position it farther away from the point where Aho and Harris had disconnected their lanyards. I also credited Aho's cogent, detailed testimony explaining how he had maintained three points of contact at all times after unhooking his lanyard. Tr. 210-12, 219-22. This was bolstered by Blood's testimony that the miners were trained in maintaining three-point contact and would have been able to do so under the circumstances. *See* Tr. 199, 201-02. Because the Secretary failed to establish that Aho did not maintain three-point contact after his fall protection gear was unhooked, I declined to find a violation.

## **D. Citation Number 8840659 (Defective Seatbelt)**

### **1. Further Findings of Fact**

This citation alleges: “The passenger seat belt latch in the GMC pickup c/n 621 ... did not function properly. The Shift Supervisor stated that the seat belt latch wasn’t functioning properly ‘last week.’” Ex. S-18.

### **Events Surrounding Issuance of Citation**

Inspector Norman issued this citation on January 25, 2015, during a regular inspection of the mine. Ex. S-18. He was accompanied on his inspection that day by shift supervisor Molly Burger, who was not called to testify at the hearing. Tr. 229. According to Conboy, the crew’s regular supervisor was out of work on disability at the time, and Burger was filling in for him to gain supervisory experience. Tr. 237. Burger was “fairly young” and was working at the mine through “an internship of some sort.” Tr. 237-39.

About an hour into the inspection, Norman climbed into the passenger seat of the shift supervisor’s service truck, which was a GMC pickup truck with a bench seat, in preparation to ride to the yard and docks. Tr. 229, 233, 244; Ex. S-19. However, he was unable to buckle the seat belt, despite getting out of the truck and trying multiple times to latch it. Tr. 230. Norman testified, “As I came over and tried to get [the shoulder strap] into the lock part of the seat belt it wouldn’t lock, and I was trying and trying, and [Burger] said they had been having intermittent problems with it latching” during the past week. Tr. 229, 234. Norman further testified that Burger could not get the seat belt to latch either, although his field notes from the inspection indicate that she was able to get the belt to work after two tries. Tr. 230; Ex. S-19. Regardless, because Norman was unable to wear the belt, he exited the truck to continue the inspection on foot, and wrote Citation Number 8840659, which alleged that the seat belt was defective and had not been timely repaired. Tr. 229-30.

Inspector Norman assessed the violative condition as unlikely to cause injury, but capable of causing permanently disabling injuries to one miner, explaining that the condition could lead to a head injury if an accident were to occur. Tr. 230-31. He designated Northshore’s level of negligence as “moderate,” but asserted at hearing that he should have marked it as “high” because the shift supervisor had been aware of the condition for a week. Tr. 231. The citation was terminated eight days after its issuance because a new seat belt latch had been installed in the truck. Tr. 231-32, 241; Ex. S-18.

### **Northshore’s Testimony**

Conboy arrived at the mine and met with supervisor Burger shortly after the citation had been written and after the inspection party had moved on to the yard and docks. Tr. 238, 248. Burger told Conboy that the seat belt “was sticky and it wasn’t working right.” Tr. 239. At hearing, Conboy attempted to downplay the significance of this admission, explaining that “[s]he said sometimes you have to jam it in there to get it to work, but it’s no big – I mean you just plug it in and it will work.” Tr. 239. On cross-examination, Conboy asserted that Burger had been able to get the seat belt to function properly once and denied that she told him she could not get it

to work, instead quoting her as making the more general observation that seat belts “get sticky sometimes.” Tr. 247. Conboy also testified that Burger had seemed “very nervous” and “flustered” by her encounter with an MSHA inspector, due to her age and inexperience. Tr. 238-39, 250. Inspector Norman, however, provided rebuttal testimony that Burger was calm and did not appear intimidated at the time the citation was written. Tr. 265.

Although Conboy and Inspector Norman discussed the citation on the day it was written, Norman did not testify as to the substance of this conversation. Tr. 235-36, 248. The conversation “got to be a little bit heated,” according to Conboy. Tr. 248. He testified that Inspector Norman told him the seat belt had worked once, but then began sticking. Tr. 240-41, 248. Conboy said he asked why Norman had ridden in the truck without a functioning seat belt and whether every seat belt in a vehicle now needed to be checked before the vehicle was used. Tr. 248-49. However, he did not actually see Norman ride in the truck after Norman determined that the seat belt was defective, and I credit Norman’s testimony that he did not do so, a point which is corroborated by Norman’s contemporaneous field notes.

According to Inspector Norman, when he discussed the termination date for the citation with Conboy, Conboy requested an extension of time to order a new seat belt latch because the cited latch was broken. Tr. 231-32. Conboy, however, denied telling Norman that the latch was broken. Tr. 241, 246. He testified that Dean Floen,<sup>18</sup> the truck shop mechanic who repaired the seat belt, was unable to find anything wrong with the latch, but stated, “I told [Floen] to swap it out anyway because we got cited on it.” Tr. 241. Floen appeared at the hearing and confirmed that he had replaced the latch, but that it had seemed to be working properly when he tested it after removing it from the vehicle. Tr. 254.

Conboy had subsequently retrieved the latch from Floen and had taken pictures of it. Tr. 241-42, 245, 254-55; *see* Ex. R-6 (photographs). At hearing, Northshore offered the latch as a demonstrative exhibit over the Secretary’s objections on grounds that the chain of custody was not established. Tr. 244-45, 255-60. However, I declined to admit it as a demonstrative exhibit, finding that Northshore had failed to make any demonstration because the other half of the seat belt was not available, which precluded me from drawing any conclusions as to the latch’s functionality. Tr. 260. Nonetheless, Conboy testified that the latch had functioned properly when he had tested it on the car he drove to the hearing. Tr. 243-44.

Conboy attributed Inspector Norman’s inability to latch the seat belt to “operator error,” opining that Norman may have tried to plug the belt into the wrong buckle or may not have pushed it all the way closed due to his size and bulky coat. Tr. 246. Conboy testified that it was cold on the day of the inspection and that Norman, who is a large man, was wearing a Carhartt or similar heavy winter work coat. Tr. 238, 240. Conboy also recalled two past incidents when he had been traveling in his work vehicle with Inspector Norman and Norman’s seat belt had spontaneously unlatched. Tr. 239, 246, 250-51. In addition, safety representative Blood testified that he had once helped Norman buckle his seat belt because Norman was having trouble latching it. Tr. 261-63. Norman weighs 315 pounds and acknowledged that he is a large man, and

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<sup>18</sup> Floen has worked at Northshore since 1990. As of the hearing date, he had worked as a light fleet mechanic for six years and previously worked in the operations and maintenance departments and as a heavy fleet mechanic. Tr. 252-53.

he conceded that the temperature may have been about 19 degrees Fahrenheit on the day of the inspection. Tr. 234-35. However, he denied wearing a bulky jacket the day the citation was issued, or having trouble buckling seat belts at the mine in the past due to his size. Tr. 235, 265.

I take judicial notice that publicly available weather reports show that the temperature was below freezing in Silver Bay, Minnesota on the day the citation was issued. Considering the temperature, I find Norman's assertion that he was not wearing a heavy coat to be implausible, and I credit Conboy's testimony to the contrary. I also credit Blood's testimony, corroborated by Conboy, that he helped Inspector Norman buckle a seat belt one time. However, I decline to credit Conboy's uncorroborated testimony regarding seat belts popping open while Norman was wearing them, because Conboy did not explain how a seat belt would spontaneously unlatch and Norman denied that this had ever happened. I also reject, as purely speculative, Conboy's suggestion that Inspector Norman may have tried to plug the seat belt into the wrong buckle.

## **2. Analysis and Conclusions of Law**

### **i. Violation of 30 C.F.R. § 56.14100(b)**

Section 56.14100(b) mandates: "Defects 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). Thus, to prove a violation of this mandatory safety standard, the Secretary must establish (1) the existence of a defect that could create a hazard to persons, and (2) the operator's failure to correct the defect in a timely manner. The Commission has stated that whether a defect was timely corrected "depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001) (finding no violation of § 56.14100(b) when Secretary failed to show when the cited equipment became defective).

### **The Parties' Positions**

The Secretary argues that § 56.14100(b) was violated because the failure of the seat belt to consistently lock constituted a defect affecting safety and Northshore failed to correct the defect in a timely manner, despite supervisor Burger's awareness of intermittent problems. Sec'y Br. 21.

Northshore characterizes the evidence as equivocal and contends that the Secretary has failed to prove that the seat belt could not be buckled, or that the cited defect existed for a definite time period. Resp. Br. 19-23.

### **Discussion**

Uncontroverted testimony from both Inspector Norman and safety director Conboy establishes that shift supervisor Burger, an agent of the operator, was aware that the seat belt "was sticky and it wasn't working right" during the week preceding the issuance of the citation. Tr. 229, 234, 239. Without calling Burger as a witness, Northshore suggested that she was nervous and flustered at the time that she reported the problems with the seat belt to Inspector Norman. Tr. 238-39, 250. Norman disagreed. Tr. 265. I find it logical to believe that Burger may have been flustered, considering that she was a relatively young and inexperienced intern,

confronted by an authority figure about a safety problem. However, Burger's state of mind at the time that she made the comments is irrelevant, because Northshore has not contended or established that these comments were inaccurate. I find that Northshore was aware, through Burger, that the seat belt was defective during the week preceding the issuance of the citation. The defective seat belt created a hazard to anyone riding in the passenger seat of the truck, especially a large person like inspector Norman. Northshore's failure to promptly address the problem by fixing the seat belt or at least tagging out the equipment amounted to a violation of § 56.14100(b).

Northshore presented evidence to dispute that the seat belt was broken. Conboy testified that Norman and Burger each were able to get the seat belt to work on the day the citation was issued. Tr. 240-41, 247-48. In addition, both Conboy and Floen testified that the seat belt latch worked properly when they tested it after it was removed from the truck. Tr. 243-44, 254. However, this testimony is not inconsistent with Norman's allegation that the seat belt was *intermittently* nonfunctional. I credit his testimony that he issued the citation because he was unable to get the seat belt to work when he tried to put it on to ride to the yard and docks on January 25. The belt's failure to work on that occasion provided a valid ground to find it defective.

Northshore has emphasized Inspector Norman's size, suggesting that he could not get the seat belt to work because he is a large man. This suggestion is not persuasive. There is no allegation that the belt was too short. Rather, the latch was not engaging properly. The latch had been "sticky" for a week before the citation was issued. To the extent that the operator is suggesting the latch would not hold because of the strain created by a large passenger, I note that seat belt latches are intended to be strong enough to counter the force generated by the forward momentum of a passenger during a collision. A functional latch should certainly be strong enough to withstand the strain of the belt being pulled tighter than usual by a big man in a bulky coat.

Based on all the foregoing, after consideration of all the evidence and the parties' arguments, I find that a violation of § 56.14100(b) occurred.

## **ii. Gravity**

As noted above, Inspector Norman assessed this violation as non-S&S and unlikely to cause injury, but capable of causing permanently disabling injuries to one miner. Ex. S18; Tr. 230-31. The parties did not address the gravity of this violation in their closing briefs.

I affirm the inspector's gravity designations. The seat belt was intermittently functional and the Secretary conceded that it was not used frequently because passengers rarely traveled in the truck. Sec'y Br. 23. Both of these factors decrease the likelihood of injury. Also, injury would occur only in the event that the truck was involved in an accident, and the Secretary presented no evidence as to where and how the truck is used at the mine, how fast it was typically driven, or any other factors that would shed light on the degree of danger presented by riding in the truck without a working seat belt. For these reasons, it was appropriate for Inspector Norman to characterize the probability of injury as unlikely. On the other hand, in the event of an accident, a defective seat belt could cause serious injury if an unrestrained passenger were

ejected from the truck or flung against the windshield or other parts of the cab. Accordingly, I find that this violation created an unlikely risk of permanently disabling injuries to one miner.

### **iii. Negligence**

Inspector Norman charged Northshore with moderate negligence in connection with this violation. Ex. S-18. The Secretary contends that this negligence designation is appropriate because Northshore knew the seat belt was defective, but the negligence is mitigated by the fact that passengers rarely traveled in the truck. Sec'y Br. 22-23. Northshore makes no arguments with respect to negligence in its post-hearing brief.

I affirm the Secretary's finding that this violation resulted from Northshore's moderate negligence. Section 56.14100(b) imposes upon mine operators a duty to promptly address defects affecting safety so as to minimize hazards to miners. In this case, a shift supervisor, Burger, was aware that the seat belt had not been working properly for the past week, yet she failed to take any corrective action. As a supervisor, she should have exercised a higher degree of care, and her negligence is imputable to Northshore. However, I reject Inspector Norman's suggestion at hearing that the degree of negligence should be raised from moderate to high due to Burger's failure to correct the condition for a week. *See* Tr. 231. The seat belt worked intermittently, and the Secretary has conceded that it was infrequently used because passengers rarely rode in the shift supervisor's truck. For these reasons, Burger may not have realized that the condition warranted immediate corrective action, mitigating her negligence somewhat. Accordingly, a finding of moderate negligence is appropriate.

### **iv. Penalty Assessment**

After considering the six statutory penalty criteria, the Secretary proposed a penalty of \$285.00 for this violation. Ex. S-12; Ex. S-13. I have affirmed the Secretary's gravity and negligence findings. The parties have stipulated that Northshore abated this violation in good faith and that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S-2. Exhibit A to the penalty petition reflects that the Secretary accounted for Northshore's size, violation history, and good-faith abatement efforts in a reasonable manner in accordance with the Part 100 penalty regulations to reach the proposed penalty. *See* Ex. S-13.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that the proposed assessment of \$285.00 is appropriate.

## V. REVIEW AND APPROVAL OF PARTIAL SETTLEMENT

As noted above, prior to hearing, the parties agreed to settle 54 of the 58 citations initially at issue in these three dockets. The Secretary has now submitted settlement motions setting forth the proposed settlement terms, which are summarized below.<sup>19</sup> See Ex. ALJ-1; Ex. ALJ-2; Ex. ALJ-3.

### Docket Number LAKE 2015-340-M

The Secretary originally proposed penalties totaling \$7,981.00 for the eleven citations at issue in this docket and the proposed settlement is for \$5,541.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-1) are summarized in the table below:

Citation No.	MSHA's Initial Proposed Penalty	Settlement Amount	Other Modifications
8840637	\$807.00	\$807.00	None; Respondent accepts citation as issued.
8840634	\$243.00	\$0.00	None; citation has been vacated. The Secretary's discretion to vacate a citation is not subject to review. <i>RBK Constr., Inc.</i> , 15 FMSHRC 2099 (Oct. 1993).
8840403	\$1,203.00	\$843.00	Reduce severity of injury from "fatal" to "permanently disabling."
8840411	\$308.00	\$216.00	Reduce negligence from "moderate" to "low."
8840619	\$1,795.00	\$1,256.00	Reduce negligence from "moderate" to "low."
8840620	\$362.00	\$253.00	Reduce negligence from "moderate" to "low."
8840621	\$362.00	\$253.00	Reduce negligence from "moderate" to "low."
8840622	\$362.00	\$253.00	Reduce negligence from "moderate" to "low."
8840623	\$1,304.00	\$807.00	Change cited standard from 30 C.F.R. § 56.12030 to 30 C.F.R. § 56.12023.
8840636	\$873.00	\$600.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840638	\$362.00	\$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
<b>TOTAL</b>	<b>\$7,981.00</b>	<b>\$5,541.00</b>	

<sup>19</sup> Each motion states that the Secretary believes, consistent with the position he has taken before the Commission in *The American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), *petition for interlocutory review granted*, Unpublished Order dated July 11, 2014, that the pleadings submitted by the parties and a terse, factually unsupported summary of the proposed settlement give the Commission an adequate basis to review and approve it. See, e.g., Ex. ALJ-1 ¶¶ 2-4. Pursuant to Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), and Rule 12(f) of the Federal Rules of Civil Procedure, Fed. R. Civ. Pro. 12(f), I strike these assertions from each motion as impertinent and immaterial to the issues legitimately before me. In the *American Coal Company* case, the Secretary has misinterpreted and misrepresented Commission case law, the Mine Act and regulations, and Congressional intent regarding settlements under the Act. Rather than rubber-stamping the Secretary's proposed settlement terms, I have evaluated them in accordance with sections 110(i) and 110(k) of the Mine Act.



I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

**Docket Number LAKE 2015-395-M**

The parties have agreed to settle 21 of the 23 citations at issue in this docket. The Secretary originally proposed penalties totaling \$17,711.00 for the 21 citations and the proposed settlement is for \$12,341.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-2) are summarized in the table below:

<b>Citation No.</b>	<b>MSHA's Initial Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other Modifications</b>
8840643	\$362.00	\$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840644	\$362.00	\$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840645	\$362.00	\$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840648	\$285.00	\$200.00	Reduce negligence from "moderate" to "low."
8840650	\$285.00	\$200.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840652	\$190.00	\$150.00	None; penalty reduction only.
8840653	\$2,473.00	\$1,701.00	Remove S&S designation.
8840654	\$2,473.00	\$1,731.00	None; penalty reduction only.
8840661	\$687.00	\$481.00	Reduce negligence from "moderate" to "low."
8840662	\$946.00	\$700.00	Reduce severity of injury from "permanently disabling" to "lost workdays or restricted duty."
8840664	\$634.00	\$444.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840668	\$1,795.00	\$1,257.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty"; reduce negligence from "moderate" to "low."
8840669	\$1,304.00	\$913.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840676	\$540.00	\$378.00	Reduce negligence from "moderate" to "low."
8840677	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840681	\$540.00	\$540.00	None; Respondent accepts citation as issued.
8840682	\$540.00	\$378.00	None; penalty reduction only.
8840686	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840687	\$1,203.00	\$725.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840688	\$162.00	\$100.00	Reduce negligence from "moderate" to "low."

8840691	\$162.00	\$0.00	Citation has been vacated.
<b>TOTAL</b>	<b>\$17,711.00</b>	<b>\$12,341.00</b>	

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

#### **Docket Number LAKE 2015-529-M**

The parties have agreed to settle 22 of the 24 citations initially at issue in this docket. The Secretary originally proposed penalties totaling \$17,437.00 for the settled citations and the proposed settlement is for \$12,379.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-3) are summarized in the table below:

<b>Citation No.</b>	<b>MSHA's Initial Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other Modifications</b>
8840750	\$100.00	\$100.00	None; Respondent accepts citation as issued.
8840758	\$207.00	\$207.00	None; Respondent accepts citation as issued.
8840762	\$207.00	\$207.00	None; Respondent accepts citation as issued.
8840723	\$1,203.00	\$842.00	Reduce negligence from "moderate" to "low"; reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840725	\$873.00	\$611.00	None; penalty reduction only.
8840728	\$585.00	\$410.00	Reduce severity of injury from "permanently disabling" to "lost workdays or restricted duty."
8840731	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840735	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840736	\$1,203.00	\$842.00	Reduce negligence from "moderate" to "low"; reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840737	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840740	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840741	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840739	\$1,203.00	\$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840745	\$873.00	\$611.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840746	\$540.00	\$378.00	Reduce negligence from "moderate" to "low."
8840751	\$138.00	\$138.00	Change cited standard from 30 C.F.R. § 56.4402 to 30 C.F.R. § 47.44(a).

8840759	\$460.00	\$360.00	Reduce severity of injury from “fatal” to “lost workdays or restricted duty.”
8840760	\$460.00	\$262.00	Reduce negligence from “moderate” to “low.”
8840765	\$207.00	\$145.00	None; penalty reduction only.
8840767	\$1,026.00	\$718.00	Reduce severity of injury from “fatal” to “lost workdays or restricted duty.” <sup>20</sup>
8840768	\$1,026.00	\$718.00	Reduce severity of injury from “fatal” to “lost workdays or restricted duty.”
8840470	\$1,111.00	\$778.00	None; penalty reduction only.
<b>TOTAL</b>	<b>\$17,437.00</b>	<b>\$12,379.00</b>	

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

## VI. ORDER

The parties’ three settlement motions are hereby **GRANTED**. It is **ORDERED** that the 54 settled citations are **AFFIRMED OR MODIFIED** as set forth in the tables above. Northshore is **ORDERED** to pay the sum of \$30,261.00, in satisfaction of the three settlement agreements, to the extent such amounts have not already been paid, within thirty (30) days of the date of this Decision and Order.<sup>21</sup>

For the reasons discussed in the body of my decision, Citation 8840631 is hereby **VACATED** and Citations 8840455, 8840744, and 8840659 are hereby **AFFIRMED, AS WRITTEN**. In addition, I **AFFIRM** as appropriate the Secretary’s proposed penalties of \$2,678.00 for Citation 8840455, \$540.00 for Citation 8840744, and \$285.00 for Citation 8840659. Northshore is **ORDERED** to pay the sum of \$3,503.00 in penalties for these three violations within thirty (30) days of the date of this Decision and Order.

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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<sup>20</sup> With regard to Citations 8840767 and 8840768, I note that although the parties have agreed to modify the gravity of the violations, the Respondent’s arguments pertained to negligence. However, sufficient facts were presented for me to conclude that the Secretary’s acceptance of this compromise was appropriate.

<sup>21</sup> 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.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

April 11, 2016

UNITED MINE WORKERS OF AMERICA  
(UMWA) on behalf of MARK A. FRANKS,  
Complainant,

v.

EMERALD COAL RESOURCES, LP,  
Respondent,

UNITED MINE WORKERS OF AMERICA  
(UMWA) on behalf of RONALD HOY,  
Complainant,

v.

EMERALD COAL RESOURCES, LP,  
Respondent.

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

v.

EMERALD COAL RESOURCES, LP,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. PENN 2012-250-D  
PITT-CD 2012-04

Emerald Mine No. 1  
Mine ID 36-05466

DISCRIMINATION PROCEEDING

Docket No. PENN 2012-251-D  
PITT-CD 2012-05

Emerald Mine No. 1  
Mine ID 36-05466

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2013-305  
Mine ID: 36-05466

Docket No. PENN 2013-306  
Mine ID: 36-05466

Emerald Mine No. 1

**DECISION ON REMAND**

Before: Judge Miller

These cases are before me on complaints of discrimination brought by the United Mine Workers of America (UMWA) on behalf of Mark A. Franks (“Franks”) and Ronald Hoy (“Hoy”) against Emerald Coal Resources, LP (“Emerald”), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c), and on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), against Emerald pursuant to Sections 105 and 110 of the Act, 30 U.S.C. §§ 815 and 820. Following an evidentiary hearing in this case, I issued a decision on the merits of the discrimination cases. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 35 FMSHRC 1696 (June 2013) (ALJ). The Secretary subsequently filed petitions for assessment of civil penalties. The parties filed joint stipulations addressing the penalty criteria, and I assessed a total penalty of \$40,000 against the mine operator. Unpublished Order dated Oct. 29, 2014.

Emerald petitioned the Federal Mine Safety and Health Review Commission for review of both the decision after hearing and the order assessing penalty. The Commission granted review as to the decision after hearing only, affirming the result. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the Commission's decision and the order assessing penalty to the United States Court of Appeals for the Third Circuit. The Third Circuit consolidated the cases, vacated the Commission's decision, and remanded to the Commission for further analysis. *Emerald Coal Res., LP v. Hoy*, 620 Fed. Appx. 127 (3d Cir. 2015). The Commission in turn remanded the cases to me. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 38 FMSHRC \_\_\_, slip op. at 3, No. PENN 2012-250-D (Feb. 10, 2016). In accordance with the Commission's order, I enter the decision below.

## I. INITIAL DECISION AND REMAND

In the initial decision, I determined that Franks and Hoy had proven a *prima facie* case of discrimination and that the defense set forth by the mine operator was pretextual. 35 FMSHRC at 1697. My finding of discrimination was made under the *Pasula-Robinette* framework for analysis of discrimination claims under section 105(c). *Id.* at 1702-05. On review, the Commission affirmed my decision, but was split as to the rationale. Commissioners Young and Cohen voted to affirm the decision on the grounds that Emerald had *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. 36 FMSHRC at 2103. Chairman Jordan and Commissioner Nakamura voted to affirm the decision after concluding that Emerald had *interfered* with the protected rights of the miners in violation of section 105(c). *Id.* at 2119. On appeal, the Third Circuit held that the Commission had failed to articulate a rationale for its decision, and so vacated and remanded the decision. 620 Fed. Appx. at 129. The Commission then remanded the cases to me "to conduct the interference analysis in the first instance."<sup>1</sup> 38 FMSHRC \_\_\_, slip op. at 3. Franks and Hoy, the Secretary, and Emerald were given the opportunity to submit briefs on the issue of interference, and I considered their arguments. For the reasons set forth below, I conclude that both Franks and Hoy have demonstrated a *prima facie* case of interference and that the defense set forth by the mine operator does not outweigh the harm to the rights of miners.

## II. FACTUAL BACKGROUND

This case involves the Emerald Mine No. 1, an underground coal mine in Green County, Pennsylvania. At the time relevant to this case, July through November 2011, the mine was operated by Emerald Coal Resources, and Mark Franks and Ronald Hoy were employed as beltmen at the mine. Jt. Stips. ¶¶ 1, 3-7.

Franks and Hoy both credibly testified at hearing that they complained of unsafe practices at the mine to a representative of the UMWA safety committee, David Moore, on two

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<sup>1</sup> While the Commissioners did not agree to the basis of the adverse action, four agreed that the mine had violated the Act with regard to Franks and Hoy. My original decision discussed a finding of discrimination, but since the case has been remanded, I now decide the case under the interference provision. See 36 FMSHRC at 2104 (Jordan & Nakamura, Comm'rs); *id.* at 2125 (Althen, Comm'r).

occasions in August 2011. Tr. at 24-25, 36-37, 53, 55-56. The complaints related to inadequate pre-shift examinations by one or more firebosses. Tr. at 24-25, 47, 53, 55-56. Hoy and Franks testified that the conversations took place on August 17 and August 29, 2011. Tr. at 24, 25, 53, 55. David Baer, a UMW member, testified that he overheard Franks and Hoy making the complaints on both days in August. Tr. at 64-65. Hoy's complaint related to a specific instance on July 15, 2011, in which a fireboss failed to walk the length of the beltline during his examination. Tr. at 35; Comp. Ex. 1. Franks's complaint related to a similar issue with an examination conducted on July 27, 2011. Tr. at 47, 61. Franks and Hoy both testified that they told Moore the name of the fireboss and the dates of the examinations when they made their complaints. Tr. at 18-20, 47. Both believed that once they provided the information to Moore, he would investigate the matter and then bring the issue to the attention of the company if necessary. Tr. at 19, 39, 43, 52.

At hearing, Moore agreed that Hoy complained to him about a specific instance of an inadequate belt examination by a fireboss. Tr. at 123. Moore believed the conversation occurred in July rather than August, however, and denied that a second conversation took place in August or that Franks and Baer were present. Tr. at 122-25. On the date when Hoy recalled the conversation happening, August 17, Moore testified that he was at the MSHA academy for safety training. Tr. at 122. He denied that Franks ever brought a complaint to him relating to firebosses. Tr. at 121-23. Regarding Hoy's specific complaint, Moore testified that he had been off the beltline when the fireboss went through on the day Hoy referred to, but that he checked the date board, which indicated that the exam had been performed. Tr. at 123-24. Moore testified that he did not see any evidence that the firebosses were not doing their runs, but he spoke to the firebosses about the issue anyway. Tr. at 124.

The testimony of the witnesses is inconsistent with regard to the complaints made to Moore. I do not find Moore to be a credible witness, and therefore I resolve the conflict in favor of Franks and Hoy. Moore's answers were opaque and evasive. He insisted that he only spoke to Hoy once, yet Franks, Hoy, and Baer remember Franks and Hoy speaking to Moore about the examination issue twice. The fact that Hoy may have remembered or written down the incorrect day in August does not change my assessment. Franks, Hoy, and Baer all agree that Franks and Hoy spoke to Moore twice in August. Both times, the miners expected that the information they provided to Moore would be investigated and passed on to the appropriate safety committee or to management. Both Franks and Hoy believed they were following UMW rules by providing information to Moore as their safety representative, thereby remaining anonymous and protecting themselves from retaliation. Tr. at 43, 52.

On or about September 22, 2011, an anonymous 103(g) complaint was made to MSHA. Jt. Stips. ¶ 12. One of the allegations contained in the complaint was that firebosses had not been conducting adequate inspections of the beltline at the mine. Jt. Ex. 1. In response to the complaint, an MSHA inspector conducted a hazard complaint investigation of the mine. Jt. Stips. ¶ 13; Jt. Ex. 1. During the investigation into the hazard complaint, the MSHA inspector spoke to and took statements from approximately 34 miners and supervisory personnel, including Franks and Hoy. Jt. Stips. ¶¶ 13-15, 29-33, 38.

On September 28, 2011, MSHA inspector Thomas Bochna arrived at the mine as part of the investigation. Jt. Stips. ¶ 13. Bochna approached Franks and questioned him about whether he had observed a fireboss fail to perform a proper pre-shift examination of the belt. Jt. Stips. ¶ 14. Franks responded that he knew of the incident, as well as the name of the fireboss and the date of the inspection. *Id.*

On the same shift, Franks was called into an office with Bochna; a supervisory MSHA inspector, David Severini; Emerald's compliance manager, William Schifko; an Emerald management trainee, Adam Strimer; the UMWA local president, Anthony Swetz; and the miners' representative, Bruce Plaski. Jt. Stips. ¶¶ 15, 16. Inspector Severini informed the group that Franks had spoken to Bochna that day and that he was aware of an incident where a fireboss failed to perform an adequate beltline examination. Jt. Stips. ¶¶ 19, 20. Franks was asked twice and refused to provide the name of the fireboss or the date of the inadequate examination. Jt. Stips. ¶ 22. Later that day, Franks was called into a follow-up meeting. Jt. Stips. ¶ 24. Inspector Severini again asked him to name the fireboss, and Franks again refused. *Id.*

On September 29, 2011, Franks met with inspector Bochna, Emerald compliance manager Schifko, and local president Swetz. Jt. Stips. ¶¶ 26, 27. Franks stated that he had written the name of the fireboss and the date of the inadequate exam in his personal calendar, but that he would not produce the document because it was not "worth it" for him to do so. Jt. Stips. ¶ 27.

On October 4, 2011, Hoy was called into Schifko's office for a meeting that included Schifko, MSHA inspectors Severini and Tony Setaro, Emerald management trainee Strimer, and UMWA mine committeeman Douglas Scott. Jt. Stips. ¶ 33. Severini informed Hoy that the mine could not retaliate against him for meeting with MSHA. *Id.* Hoy admitted that he had observed several occasions when an examiner had not properly examined the conveyor belts, but when asked, he refused to provide the name of the fireboss who had performed the exams. Jt. Stips. ¶ 34; Tr. at 33. Hoy also declined a request to name a foreman he had heard complaining about inadequate belt examinations. Jt. Stips. ¶ 35. He was asked to produce his personal calendar where he had recorded the names of the firebosses and the dates of the examinations, but he refused. Jt. Stips. ¶ 36.

MSHA concluded its investigation into the allegations in the anonymous complaint on October 4, 2011. Jt. Stips. ¶ 37; Jt. Ex. 2. MSHA issued seven citations to Emerald, but did not find evidence of inadequate examinations of the beltline. Jt. Stips. ¶ 38; Jt. Ex. 2.

Following the MSHA investigation, Emerald began its own investigation into the allegations in the 103(g) complaint. Jt. Stips. ¶ 39. On October 20, 2011, Franks and Hoy were called separately into meetings with Emerald human resources manager Christine Hayhurst, UMWA committeeman Douglas Scott, Schifko, and Swetz. Jt. Stips. ¶¶ 40, 42. Franks and Hoy again declined to provide the name of a fireboss or the dates of the examinations or to produce written records. Jt. Stips. ¶¶ 40-42. In a subsequent meeting with Schifko, Hayhurst, and Swetz on October 24, 2011, Franks again declined to name the fireboss or provide the date of the inspection. Jt. Stips. ¶ 43.



On November 9, 2011, Franks and Hoy were each summoned to yet another meeting with Emerald safety manager Joseph Pervola, Hayhurst, and UMWA mine committeeman David Baer. Jt. Stips. ¶¶ 45, 48. Both Franks and Hoy again declined to provide a name of a fireboss or the date of an inadequate inspection. Jt. Stips. ¶¶ 45, 48. They were subsequently suspended from work without pay for seven days. Jt. Stips. ¶¶ 46, 49. Letters provided to Franks and Hoy indicate that the reason for their suspensions was the “failure to provide information you have concerning serious allegations of safety violations.” Jt. Stips. ¶¶ 46, 49.

Franks and Hoy claim that they refused to identify the fireboss at the meetings and during the investigation because they had already provided the information to the UMWA safety representative, David Moore. Tr. 18-22, 47, 49, 50, 52. Hoy informed the MSHA inspectors and Emerald management of his reason for refusing at the October 4th meeting. Tr. at 17-18. Franks and Hoy also believed that Section 103(g) of the Mine Act protected them from having to disclose the names of other miners involved in a safety complaint to management. Tr. 18-20, 38-39, 58. The record also indicates that the mine did know the names of the accused firebosses. Tr. at 22, 81, 95-96.

On November 10, 2011, Franks and Hoy filed separate discrimination complaints with MSHA. The miners stated that Emerald had “targeted” and “harassed” them for participating and cooperating in a 103(g) complaint investigation conducted by MSHA. Compl. of Discrim., Ex. A at 2, 4. MSHA investigated the allegations and determined that no violation of 105(c) had occurred. Compl. of Discrim., Ex. B at 1, 3.

On April 23, 2012, Complainants, through the UMWA, filed a joint complaint of discrimination with the Commission pursuant to 30 U.S.C § 105(c)(3). The complaint alleges and the miners testified that Emerald interfered with the miners’ right to provide information to authorized representatives of MSHA during its investigation of a hazard complaint and discriminated against them for their exercise of that right. Franks and Hoy further allege that Emerald interfered with the miners’ right to make an anonymous complaint about an alleged danger or safety or health violation to MSHA or to a miners’ representative. The miners sought lost wages including regular, overtime, and holiday pay, and to have any reference to the suspensions removed from their personnel files. *Id.* at 10.

### III. ANALYSIS

Section 105(c)(1) of the Mine Act provides that

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 filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by

such miner ... on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1) (emphasis added). This section of the Act is the basis for most discrimination complaints filed by miners. In addition, a majority of the Commission has recognized that this section establishes a cause of action for interference that is separate and distinct from discrimination. *Franks*, 36 FMSHRC at 2103 n.22 (Young & Cohen, Comm'rs); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs); *id.* at 2124 (Althen, Comm'r); *see also Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-10 (Jan. 2005).

The Secretary of Labor has proposed a test for evaluating interference claims that was adopted by two Commissioners in this case. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). Under the Secretary's test, a violation of the interference provision of Section 105(c)(1) occurs if

- (1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
- (2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Sec'y Amicus Br. at 7. The Secretary's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

The first prong of the Secretary's test is derived from cases interpreting Section 8(a)(1) of the NLRA. Sec'y Br. at 7. That section makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in NLRA Section 7. 29 U.S.C. § 158(a)(1). Accordingly, courts analyzing claims under Section 8(a)(1) look to "whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 830 (7th Cir. 2005) (quoting *NLRB v. Gen. Thermodynamics, Inc.*, 670 F.2d 719, 721 (7th Cir.1981)); *see also Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 930-31 (D.C. Cir. 2013); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998); *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982). The Secretary's proposed standard is consistent with the Commission's analysis in *Gray*. *See* 27 FMSHRC at 9 (evaluating "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights" (quoting *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959))).

The second prong of the Secretary's test is also derived from NLRA precedent and examines the mine operator's justification for its action. Sec'y Amicus Br. at 10. In Section 8(a)(1) cases, a court will reject an employer's justification if the court finds that the justification

is pretextual. *See e.g. United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004); *Cannondale Corp.*, 310 N.L.R.B. 845, 849 (1993). Consistent with this, the Secretary's test asks whether the employer's justification is pretextual or "legitimate." Sec'y Amicus Br. at 10. If the justification is legitimate, a court hearing a Section 8(a)(1) case is then directed to "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, (1967); *see also Medeco*, 142 F.3d at 745; *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). Accordingly, the final component of the Secretary's test is a balancing inquiry that assesses whether the mine operator's justification is "substantial" enough to outweigh the harm to the protected rights of miners. Sec'y Amicus Br. at 10-11.

Respondent objects to the use of the Secretary's test, arguing that Section 105(c) should be read as establishing an "anti-retaliation remedy." Resp. Br. at 6. In Respondent's view, to succeed on a claim under Section 105(c)(1), a claimant should be required to demonstrate that he engaged in protected activity and that the operator acted in response with a discriminatory motive.<sup>2</sup> Respondent's argument is based primarily on the text of Section 105(c)(1), which states that it is unlawful for a person to "discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... *because* such miner" has engaged in protected activity under the Act. 30 U.S.C. § 815(c) (emphasis added). Respondent argues that the word "because" indicates that Congress intended to reach only cases where there is a causal connection between the miner's protected activity and the operator's discrimination or interference. Resp. Br. at 5. Respondent argues that the language in the Act, therefore, permits a claim for interference only where a miner engaged in a protected activity and there was an intent on the part of the mine operator to interfere with that activity. Resp. Br. at 12.

A number of factors, however, weigh against the Respondent's reading. First, the interference language of Section 105(c)(1) ("interfere with the exercise of the statutory rights of any miner") is substantially similar to the language in Section 8(a)(1) of the NLRA ("interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7). 30 U.S.C. § 815(c); 29 U.S.C. § 158(a)(1). The Secretary persuasively argues that in drafting the interference language of Section 105(c)(1), Congress would have been aware of Section 8(a)(1), a well-known provision of labor law. Sec'y Amicus Br. at 5. Thus, it is likely that in including the term "interfere" in Section 105(c)(1), Congress intended to employ a term of art from federal labor law. Sec'y Amicus Br. at 5. Interference under the NLRA is a separate concept from retaliation and does not require a showing that the employee actually engaged in protected activity. *Medeco*, 142 F.3d at 745; *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding work rule invalid under Section 8(a)(1) because of its "tendency to inhibit" protected activity without deciding whether protected activity in fact occurred). Further, it is well established under NLRA case law, and was at the time of the drafting of the Mine Act, that unlawful motive is not a necessary element of an interference claim. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). Congress likely intended to incorporate a similar type of claim into the Mine Act when it chose

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<sup>2</sup> In the original decision, I found that Franks and Hoy did engage in a protected activity when they complained about safety and that it was directly related to a retaliatory action. That finding does not change here, but for purposes of discussing the application of the interference provision, I find that it is not necessary that the miners engage in a protected activity.

to use the term “interfere.” See *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”).

Additionally, the legislative history of the Act indicates that Congress’s intent with regard to Section 105(c)(1) was to “protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work as a result of engaging in protected activity, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.” S. Rep. No. 95-181, at 36 (1977). The Secretary notes that while the “common forms of discrimination” mentioned are all actions an employer might take in response to a protected activity by an employee, the “more subtle forms of interference,” promises of benefit and threats of reprisal, are instead actions that would be taken to influence future activity. Sec’y Amicus Br. at 13. While in both cases the concern is that miners will be discouraged from future protected activity, with promises of benefit or threats of reprisal, the effect is the same whether or not the employer took the action in response to past protected activity. Congress’s discussion of both types of activity together suggests that it intended to create more than just a basic anti-retaliation remedy. Protected activity is one of the important elements of a discrimination claim, but it loses its importance in substantiating a claim of interference based upon a threat or promise that may affect future action. Still, the analysis must include the existence of a protected right that was subject of interference.

The Secretary’s approach is also consistent with Commission precedent. In *Moses*, the Commission affirmed a finding of interference with a miner’s exercise of protected rights under 105(c)(1) where the operator believed that the miner had made a safety complaint, but he had not in fact done so. 4 FMSHRC at 1475, 1479-80. In reaching its decision, the Commission acknowledged that a “literal interpretation of [105(c)(1)] might require the actual or attempted exercise of a right before the protection of section 105 comes into play,” but it ultimately rejected that reading. *Id.* at 1480. The Commission noted that Congress intended for Section 105(c)(1) to be “construed expansively to assure that miners will not be inhibited *in any way* in exercising any rights” afforded by the Act. *Id.* at 1480 (quoting S. Rep. 95-181, at 36 (1977)). The Commission also emphasized that 105(c)(1) should be interpreted to “redress or deter situations where an operator, with the intent of frustrating protected activity, takes action against an innocent miner.” *Id.* Both the Commission’s statement and the statement of the Senate committee point to the fact that Section 105(c)(1) prohibits not just retaliatory conduct, but also conduct that frustrates future protected activity. Finally, in *Gray*, the Commission suggested that intent was not a necessary element of an interference case, determining that the judge erred by focusing primarily on the intent behind statements made by a supervisor to a miner who testified against him in a grand jury investigation. 27 FMSHRC at 10. Instead, the judge should have considered the totality of the circumstances, including what meaning the miner could reasonably have inferred from the supervisor’s statements. *Id.* at 10-11.

I find that the Secretary’s proposed test for interference is consistent with the text of the Mine Act and with Commission and other relevant precedent. Accordingly, I apply it here.

*a. Interference with a Protected Right*

An essential right of miners under the Mine Act is the “right to obtain an immediate inspection by giving notice to the Secretary” if the miner believes that a violation of a health or safety standard exists at the mine. 30 U.S.C. § 813(g)(1). The provision reflects Congress’s belief that “mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards.” S. Rep. 95-181, at 30 (1977). The same is true of a miner’s right to make safety and health complaints, not only to mine management, but to a miners’ representative. 30 U.S.C. § 815(c)(1).

Franks and Hoy assert that, in interrogating and suspending them in relation to the MSHA investigation, Emerald interfered with their rights to make a complaint under Section 103(g) and to make a complaint to a miners’ representative. Compl. of Discrim. at 8-9. The Commission has decided that “Whether an operator’s question or comments concerning a miner’s exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act ‘must be determined by what is said and done, and by the circumstances surrounding the words and actions.’” *Gray*, 27 FMSHRC at 8 (quoting *Moses*, 4 FMSHRC at 1479). In *Gray*, which involved potentially threatening statements made by a supervisor to a miner, factors that the Commission considered relevant to the interference analysis were the persistence with which the supervisor raised the subject of the protected activity; the accusatory manner with which the subject was raised; where the statements were made; the nature of the relationship between the supervisor and the complainant; the fact that the statements related to confidential grand jury testimony; and the fact that the supervisor attempted to speak to the complainant alone. *Id.* at 11-12. The Commission examined similar facts in *Moses*, which involved repeated, accusatory questioning of a miner about the reporting of an accident. 4 FMSHRC at 1479. The Commission emphasized that the essence of its inquiry was whether the operator’s conduct “could logically result in a fear of reprisal and a reluctance to exercise the right in the future.” *Id.* Finally, the Seventh Circuit has performed a similar analysis in determining whether an interrogation interfered with protected rights under the NLRA:

Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

*Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001) (citation omitted).

Like *Moses* and *Gray*, this case involves repeated questioning of miners regarding a safety-related enforcement action. In the course of MSHA’s investigation into the complaint made at Mine No. 1, MSHA inspectors learned that Franks and Hoy had made a complaint about safety to their safety representative and knew the identity of a fireboss who had failed to conduct

a proper inspection at the mine. As part of the investigation, Franks was called into three separate meetings with MSHA personnel, Emerald management, and union representatives, where he was asked four times to identify the fireboss. Jt. Stips. ¶¶ 15, 16, 22, 24, 26.<sup>3</sup> After MSHA concluded its investigation and Emerald began its own investigation into the allegations in the complaint, Franks was called into three more meetings with Emerald management and union representatives. Jt. Stips. ¶¶ 39, 40, 43, 45. Each time he was asked to identify the fireboss. Jt. Stips. ¶¶ 40, 41, 43, 45. At the last meeting, Franks was suspended for refusing to provide the information. Jt. Stips. ¶ 46. Hoy's experience was similar to Franks's. He was called into one meeting as part of the MSHA investigation, where he was asked to identify a fireboss but refused. Jt. Stips. ¶¶ 29-34, 36. When Emerald began its own investigation, Hoy was called to two more meetings, where he was again asked to name the fireboss. Jt. Stips. ¶¶ 42, 48. At the final meeting, he was suspended for failing to provide the requested information. Jt. Stips. ¶ 49. Clearly the mine was persistent in accusing both miners of wrongdoing based upon safety complaints. Further, the accusations were made in management offices, with a number of mine management and representatives present and questioning them.

I find that these circumstances were intimidating and coercive from the perspective of a reasonable miner. Franks's and Hoy's behavior throughout the complaint process and subsequent investigations demonstrates the importance to them of confidentiality when making a complaint. Both testified that they chose to bring their complaints to Moore, the safety committeeman, because of their concern for confidentiality. Tr. at 43, 48, 52. Franks explained that he believed that by making the complaint to Moore he would be protected from retaliation by the company and would avoid getting "flack from the other workers." Tr. at 48, 52. Hoy testified that after the meeting during the MSHA investigation, another miner told him he "had a big target on [his] back for talking to the inspectors." Tr. at 33. Both Franks and Hoy clearly believed that they would be put in a precarious position with other miners if it were known that they had reported another miner for safety violations. The meetings with MSHA and Emerald made clear, however, that the miners' right to raise safety concerns directly with their miners' representative would not be respected. Franks and Hoy both indicated at the first meeting with MSHA that they did not wish to disclose the name of the fireboss to MSHA and management, but that they had already provided it to Moore. Tr. at 18, 19. Nevertheless, both were called in for multiple meetings and repeatedly asked to provide the information. A reasonable miner would have understood this as pressure from the company to disclose the information. The presence of multiple management officials at these meetings undoubtedly increased the pressure. See Jt. Stips. ¶¶ 40-43, 45, 46. Finally, the suspensions that Franks and Hoy received were a clear signal that they were not free to make complaints in the manner they wished. Franks and Hoy could reasonably have interpreted this coercive questioning and ultimate suspension to be the result of having made a safety complaint. They reasonably would have believed that in the future they would be subjected to scrutiny if they made safety complaints to their representative or if any of their concerns appeared in a complaint to MSHA, and so would be dissuaded from making future complaints that could lead to MSHA investigations. See *Moses*, 4 FMSHRC at 1479 (finding that interference occurred where conduct "chill[ed] the exercise of protected rights"). I thus find that

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<sup>3</sup> There is some question of the propriety of MSHA's actions in informing the mine that Franks and Hoy were involved in the 103(g) allegations made in this case, thereby removing their right to at least some confidentiality.

the actions of Emerald in this instance interfered with the right of Franks and Hoy to make safety complaints to their union representative or to MSHA under Section 103(g).

*b. Emerald's Legitimate and Substantial Reason*

Under the Secretary's test for interference, once a finding of interference with protected rights is made, the operator has an opportunity to "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." Sec'y Amicus Br. at 7. It is then the court's duty to "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

Emerald asserts as the justification for its actions that it had a responsibility "to provide a safe workplace, a responsibility that necessarily involves investigation of safety issues." Resp. Br. at 11, 17. Indeed, the Mine Act states that "the operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices" in the mines. 30 U.S.C. § 801(e). The Commission has recognized that "[i]n order to carry out this responsibility, mine operators need to know about unsafe conditions." *Swift v. Consol. Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Schifko, Emerald's compliance manager, testified that examinations of conveyor belts are vital to mine safety, and that after MSHA finished its investigation, Emerald felt the need to investigate further to see if there was any merit to the complaints about inadequate inspections. Tr. at 75-76.

I find that Emerald's need to investigate the 103(g) complaint was a legitimate and substantial justification for seeking to learn the identity of the firebosses from Franks and Hoy. I do not find, however, that it outweighed the harm caused to the protected rights of miners. First, while Emerald had a legitimate need to learn the identity of the firebosses, the record shows that the company could have, and in fact did, obtain the information from sources other than Franks and Hoy. Specifically, Franks and Hoy had both provided the name of a fireboss to safety committeeman Moore, and Hoy and possibly Franks informed Emerald of this fact during the MSHA investigation. Tr. at 18, 19, 47. Emerald did interview Moore as part of its investigation, and he stated that he did not know of any problems with belt inspections. Tr. at 80. At that point, though, Emerald could have inquired more deeply into the complaints Moore had received and in order to find out the dates and times of the alleged bad inspections. It is in fact clear from the record that the mine did learn the names of the firebosses mentioned in the complaints of Franks and Hoy. Yet Emerald focused on extracting the identity of the fireboss from Franks and Hoy, even though both had indicated they were unwilling to disclose the information.

Additionally, I find that the impact of Emerald's conduct on the exercise of protected rights at the mine was significant. Franks and Hoy were subject to multiple interrogations in front of a crowd of managers and officials and were ultimately suspended. They were repeatedly asked to provide information related to safety complaints they anonymously made at the mine. These events reasonably could have dissuaded Franks and Hoy from reporting safety violations in the future. Further, other miners at the mine were aware of the treatment of Franks and Hoy during the investigations. *See e.g.* Tr. at 33, 48. It is likely that these other miners could also be dissuaded from reporting safety violations in the future out of a fear of similar repercussions. An

atmosphere where miners are afraid to make safety complaints is directly contrary to Congress's vision of miners actively participating in mine safety enforcement, and can have negative consequences on safety at the mine. Because these effects are directly opposed to the policy of the Mine Act, I find that Emerald's justification for its actions does not outweigh the harm to miners' rights "in light of the Act and its policy." *Fleetwood Trailer*, 389 U.S. at 378. Therefore, I find that Emerald's actions violated Section 105(c)(1).

#### IV. PENALTY

After I issued my initial decision in this case, the Secretary proposed two penalties of \$20,000.00 for the violations in this case. The Secretary based these penalties on my findings of discrimination in the proceeding above. 36 FMSHRC at 2100. I find that the Secretary's proposed penalties are also appropriate for interference violations.

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 duty of proposing penalties is delegated 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 ALJ must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mine has a history of two previous 105(c) violations. Emerald is a large operator and Mine No. 1 is a large mine. Respondent admits that the penalties will not affect its ability to continue in business. Ans. to Pet. for Assessment at ¶ 6. I find that a good faith reduction is not appropriate for these violations. The gravity of the violations is serious in that Respondent compromised the willingness of miners to participate in mine safety enforcement at the mine. Respondent's negligence was significant given the persistence of its conduct in the face of the obvious unwillingness of Franks and Hoy to name the fireboss. Accordingly, I find that the Secretary's proposed penalties are appropriate.



## V. ORDER

Emerald Coal Resources is **ORDERED** to pay back pay to Mark Franks in the amount of \$1,168.68, and to Ronald Hoy in the amount of \$1,963.93, with interest at 8% from the date it was due.<sup>4</sup> Emerald is **ORDERED** to pay the sum of \$40,000.00 to the Secretary of Labor. All payments shall be made within 40 days of the date of this order. Emerald shall, within 40 days of the date of this order, post this decision along with a visible notice on a bulletin board that is accessible to each and every employee, explaining that the company has been found to have interfered with the exercise of protected rights by employees, that such interference will be remedied, and that it will not occur in the future. The notice shall inform all employees of their rights in the event that they believe they have been discriminated against and shall remain posted for 180 days. All reference to the reprimand received by Franks and Hoy, and the reasons therefore, shall, within 40 days of the date of this order, be removed from their respective personnel files or other employment records. Such reprimand shall not be used or considered as a basis for any future action against Franks or Hoy.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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<sup>4</sup> The back pay calculation is based upon the calculations in Respondent's Exhibit 1, agreed to by the parties.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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PITTSBURGH, PA 15220  
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April 18, 2016

NEWMONT USA, LIMITED,  
Contestant,

v.

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

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

v.

NEWMONT USA, LIMITED,  
Respondent

CONTEST PROCEEDING

Docket No. WEST 2010-652-RM  
Citation No. 6482848; 01/26/2010

Mine ID: 26-02314  
Mine: Midas Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2010-1584-M  
A.C. No. 26-02314-224579

Mine: Midas Mine

## **DECISION ON REMAND**

Appearances: Laura C. Bremer, Esq., Office of the Solicitor, U.S. Department of Labor,  
San Francisco, CA, for the Secretary

Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver, CO, for the  
Respondent

Hiliary N. Wilson, Esq., Newmont Mining Corporation, Elko, NV, for the  
Respondent.

Before: Judge Lewis

## PROCEDURAL HISTORY

On January 5, 2012, the undersigned ALJ issued a decision in Docket Nos. WEST 2010-652-RM and WEST 2010-1584-M.<sup>1</sup> In its decision this Court found that the Respondent mine operator, Newmont USA Limited (“Newmont,”) had violated 30 C.F.R. § 57.8528<sup>2</sup>, that the violation was significant and substantial (S&S) in nature, that the violative conduct did not constitute an unwarrantable failure, and that the proposed civil penalty of \$35,500.00 should be reduced to \$5,000.00.<sup>3</sup>

The Secretary and Respondent filed cross petitions for discretionary review, which the Commission granted on February 13, 2012. In its March 31, 2015 remand decision, the Commission affirmed this Court’s finding of violation, vacated and reversed this Court’s S&S finding, and vacated and remanded this Court’s unwarrantable failure finding and penalty assessment.

After holding a telephone conference at which both parties agreed that a supplemental hearing would not be necessary, this Court set a briefing schedule for both parties to address the issues that were subject to the Commission’s remand order. After careful review of the total record and the parties’ briefs, this Court issues the within remand decision.

## SUMMARY OF THE TESTIMONY AND FACTUAL RECORD

The ALJ hereby incorporates the summary of testimony as contained in his January 5, 2012 decision and factual background as contained in the Commission’s March 31, 2015 remand decision as though fully recited herein. *Newmont USA Ltd.*, 34 FMSHRC 146 (Jan. 2012); *Newmont USA Ltd.*, 37 FMSHRC 499 (Mar. 2015).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. Review of Commission Decision

In its March 31, 2015 remand decision the Commission<sup>4</sup> upheld my finding that §57.8528 had been violated in that the operator had failed to barricade the headings at issue and had failed to adequately post signs against entry. *Newmont USA Ltd.*, 37 FMSHRC 499, at 501. The headings were “unventilated” under the language of the standard because the operator had shut down the auxiliary fan and had tied off the ventilation bags in the headings. *Newmont USA Ltd.*, 37 FMSHRC 499, 502 (Mar. 2015).

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<sup>1</sup> This decision is available at 34 FMSHRC 146 (Jan. 2012). The decision incorrectly states the date of issuance as January 5, 2011.

<sup>2</sup> Section 57.8528, in pertinent part, provides that unventilated areas shall be sealed, or barricaded and posted against entry.

<sup>3</sup> The original assessed penalty amount in the January 5, 2012 decision was incorrectly stated as \$35,000.

<sup>4</sup> Neither Chairperson Jordan nor Commissioner Young participated in this decision.

The Commission noted that the term “unventilated” is not defined in the standard and essentially held that the Secretary’s interpretation (and this Court’s finding) that air must sweep the face in a manner that would provide oxygen and clear contaminants was “clearly” reasonable and entitled to deference. *Id.*, 503-5. Noting further that the Secretary’s interpretation of the term “unventilated” was consistent with the standard’s purpose -- “to protect miners from the dangers posed by the headings with inadequate oxygen and accumulations of noxious gases” – the Commission held that the term “unventilated” includes airflow that is insufficient to sweep a heading’s face and that the term “unventilated” in §57.8528 includes the failure to provide sufficient airflow to sweep the face. *Id.*, 504, *see also* Tr. 271.

In considering whether the violation was S&S in nature under the four step analysis in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), this Court found at the second step that the discrete safety hazard contributed to by the violation was that a miner might “access” an unventilated area, that was not properly barricaded, and “be overcome by noxious air or lack of oxygen.” *Newmont USA, Ltd.*, 34 FMSHRC 161 (Jan. 2012), *emphasis mine*.

The Commission expressly upheld my finding that there was a violation of a mandatory safety standard contained in §57.8528. However, it did not explicitly state whether it agreed with my description as to the specific nature of the discrete safety hazard contributed to by the violation.

In his concurring and dissenting opinion, Commissioner Cohen observed that while I had articulated the relevant hazard my description was over inclusive: “it was sufficient to describe the relevant hazard as a danger that a miner will access the area and *be exposed* to noxious air or the lack of oxygen.” *Newmont USA Ltd.*, 37 FMSHRC 499, at 508 (Mar. 2015) (Cohen, Comm’r., concurring in part and dissenting in part).

As set forth herein, this Court has heavily relied upon Commissioner Cohen’s insightful analysis in deciding the within remanded matters.<sup>5</sup>

In its majority decision the Commission referred to my finding that the barricade procedures utilized by Newmont did not reduce the reasonable likelihood of miners suffering exposure to toxic gases or a lack of oxygen. *Newmont USA Ltd.*, 37 FMSHRC at 504. However, in its S&S analysis, the Commission again appears to describe the hazard posed as “the build-up of toxic gases or lack of sufficient oxygen.” *Id.*, at 505.

In hindsight, perhaps a better articulation of the discrete safety hazard posed by the violation – as suggested by Commissioner Cohen – may have compelled a different holding by the Commission as to my S&S determination. However, in following the directives of the Commission in its remand order, this Court shall assume that the discrete safety hazard posed was that of miners being overcome by noxious or oxygen-deficient air.

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<sup>5</sup> In reviewing Commissioner Cohen’s thoughtful opinion, the undersigned is reminded of William O. Douglas’s observation that “the right to dissent is the only thing that makes life tolerable for a judge of an appellate court.” William O. Douglas, *AMERICA CHALLENGED*, at 4 (1960).

It is worth noting that in a recent decision, my distinguished colleague, ALJ William Moran, expressed similar regrets regarding his description of the second *Mathies* element and the Commission's reversal of his S&S determination possibly because of such. *Oak Grove Resources, LLC*, SE 2009-261-R (Apr. 2016), at 4. Like Judge Moran, I believe that the recent holding in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), may have some relevance to the instant matter. In *Knox Creek Coal*, the Fourth Circuit held that “for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.” *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016). The Circuit Court further noted that the legislative history of the Mine Act suggests that Congress did not intend the S&S determination to be a particularly burdensome threshold for the Secretary to meet and that Congress intended all except *technical* violations of mandatory standards to be considered Significant and Substantial. *Id.*, at 163.

I fully recognize that I am bound by the Commission's reversal of my S&S determination. However, I would submit that a *Knox Creek Coal* analysis of the discrete safety hazard contributed to by the violation – whether it be *exposure* to lack of oxygen or noxious gases in unventilated headings or being *overcome* by such – would indicate that the presence of noxious gases or inadequate oxygen in unventilated headings should be assumed and that there was a sufficiently reasonable likelihood that the hazard contributed to would result in an injury so as to support an S&S determination.

As noted in my original decision, by failing to adequately guard unventilated headings the mine operator contributed “to the chance that a miner will underestimate the level of danger, access the area and be overcome by noxious air or a lack of oxygen.” *Newmont USA, Ltd.*, 34 FMSHRC at 161.

The record included evidence submitted by the operator suggesting a danger of noxious gas or oxygen-deficient air in unventilated headings. Multiple slides in the operator's Power Point presentation discuss the risk of spontaneous gas build-up. One slide, titled “Naturally Occurring Contaminants” notes the hazard of “Gases released into the mine *or from rock strata*.” RX-7 (emphasis added). Another slide, titled “Unwanted Mine Atmospheric Conditions” warns specifically against “Stagnate (sic) Air – No Air Flow: ... stratified air, or high gas concentration,” within the Midas Mine. RX-7.

In reversing my S&S determination, the Commission cited testimony of the mine supervisor, Sid Tolbert, and mine manager, Mark Ward: “[f]urther, the operator's witnesses testified that the rock strata of the mine would not allow for any loss of oxygen to occur, a point which the Secretary did not dispute. Tr. 256, 291.” *Newmont USA Ltd.*, 37 FMSHRC at 505. Tolbert asserted at hearing that sufficient air could be circulated through tied off ventilation bags. Tr. 271. However, Tolbert further acknowledged that without fans operating, air will not sweep the face of unventilated headings. Tr. 271. Newmont's policy, in case of auxiliary fan failure, is to evacuate the area until the problem is resolved. Tr. 326. This, I would submit, suggests the operator's materials and practices acknowledged the potential dangers of even a briefly unventilated heading. Further, in assessing the probability of harm under *Knox Creek Coal* such would be supportive of an S&S determination.

Finally, while the Commission left the term “non-gassy” undefined and although I found that the mine itself *may* not have emitted gases, I also found that Respondent ran diesel and other equipment in the mine which did emit combustible gases that could build up over time in unventilated areas. *Newmont USA, Ltd.*, 34 FMSHRC at 162.

Given that Respondent’s own training materials, as well as its company policy, acknowledged the risks of spontaneous gas build-up and oxygen deficiency in unventilated areas, I would further submit that the third element of *Mathies* would be satisfied utilizing the *Knox Creek Coal* approach to likelihood of harm.

*See also* the recent decision of my esteemed colleague, ALJ Thomas McCarthy, at *Northshore Mining Company*, No. LAKE 2015-340-M, slip op. at 1 (April 11, 2016). In his decision Judge McCarthy also perceptively examines how the recent holding in *Knox Creek Coal* appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong. *Northshore Mining Company*, slip op., at 8.

Judge McCarthy observed that under *Knox Creek Coal* the occurrence of the hazard should be *assumed* under the third prong of *Mathies*. Evidence of the likelihood that the hazard will occur should not be considered at the third prong; rather the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.*, 8.

Judge McCarthy further notes a similar *Mathies* analytical approach suggested by the Seventh Circuit in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). In *Peabody Midwest Mining*, the Seventh Circuit held that the “question is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred ‘but rather’ whether, if the hazard occurred (regardless of likelihood) it was reasonably likely that a reasonably serious injury would result.” *Northshore Mining Company*, at 8, citing *Peabody Midwest Mining*, 762 F.3d 611, at 616.

Utilizing the analytical approach to *Mathies* under *Knox Creek Coal* and *Peabody Midwest Mining*, the undersigned submits that once the discrete safety hazard contributed to by violation (miners accessing unventilated headings and being exposed to noxious fumes and/or lack of oxygen) was established at *Mathies*’ second prong, its occurrence should have been presumed under the third prong of *Mathies*, and that further, given the case evidence presented, it was reasonably likely that a reasonably serious injury would result. Thus, the analytical framework within *Knox Creek Coal* and *Peabody Midwest Mining* would appear to support my initial S&S finding.

## II. The Operator's Belief That it Was in Compliance Was Not Objectively Reasonable

In its remand order the Commission found that this Court had erred in vacating the Secretary's unwarrantable failure designation by, *inter alia*, failing to determine whether Newmont's belief that it was in compliance was objectively reasonable:

The Judge erred by failing to determine whether the operator's belief that it was in compliance was objectively reasonable. The Judge found that "Hirsch gave 'operators specific guidance about what the Western District would accept as a barricade,'" but no guidance regarding *when* a barricade must be used. 34 FMSHRC at 164. The Judge therefore concluded that the operator possessed a good faith belief that its policy of roping off headings that were to be worked in the near future in non-working areas complied with the standard. His analysis, however, overlooks the fact that, as a matter of law, an operator's belief that it is in compliance constitutes a defense to an unwarrantable designation only if the belief was objectively reasonable. *See IO Coal*, 31 FMSHRC at 1356-60. The Judge erred by failing to make a finding as to whether the belief was "objectively" reasonable and explaining the reasons for such a finding.

We remand the case to the Judge to make factual findings on the elements of an unwarrantable failure and whether the operator had an objectively reasonable belief that the rope and sign utilized by the operator complied with the regulation.

*Newmont USA, Ltd.*, 37 FMSHRC at 505-6.

The Secretary contends that MSHA had clearly provided notice to the Respondent that its use of roping and sign procedures in headings – where fans were shut down and/or where ventilation bags were tied off – violated §57.8528. Thus, any belief that the Respondent held that such measures complied with the standard was objectively unreasonable. *Pet'r's Opening Brief on Remand*, 11.

This Court found that the Secretary's arguments on this point to be much more persuasive than the Respondent's counterarguments.

Given MSHA's repeated guidance to Newmont regarding the types of barricades permitted in areas where ventilation bags had been tied off, the operator's asserted subjective belief that it was in compliance by using roping and signs cannot be deemed reasonable. *See also New Warwick Mining Co.*, 18 FMSHRC 1365, 1371 (1996) (holding that an operator's efforts at compliance are not reasonable when the operator chose to act in a manner contrary to MSHA's guidance).

The unreasonableness of Newmont's purported subjective belief is further confirmed in light of Assistant District Manager Hirsch's description of a near fatality at Mickle Mine when miners walked into an area where the unventilated tubing had been tied off. The six citations issued in October of 2009 should have dispelled any question in the minds of Newmont's management from the June meeting as to when and what barricades were needed.

In reviewing the record this Court must now conclude that Respondent's failure to erect mandated barricading was very probably due to a "contest of wills" between the mine operator and MSHA rather than any objectively reasonable belief of the Respondent as to its compliance. The confrontation between Inspector Stull and McFarlane regarding the operator's use of a chain across a heading during an earlier inspection in which McFarlane emphasized the operator's intention not to barrier up all headings that were going to be mined soon is revelatory. *See also* Tr. 145-156 and *Pet'r's Opening Brief on Remand* at 15.

In concluding that the operator's belief that it was in compliance was not objectively reasonable, this Court again found the analysis of Commissioner Cohen to be particularly instructive:

My colleagues rightly conclude that the Judge erred by failing to make a finding on whether Newmont's belief was objectively reasonable. However, I would go further and find, under the facts in this case, that any belief which Newmont had that its procedures complied with the regulations was not objectively reasonable.

*Newmont USA Ltd.*, 37 FMSHRC at 510 (Cohen, Comm'r., concurring in part and dissenting in part).

Commissioner Cohen noted multiple instances where MSHA explicitly provided notice to the operator that Newmont's practice of barricading headings with rope and signage was not sufficient and constituted a violation of the Mine Act. First, there was the June 2009 meeting in Elko, NV, where MSHA Assistant District Manager Kevin Hirsh gave specific guidance as to what MSHA deemed to be an acceptable barricade under 30 C.F.R. § 57.8528. *Id.*, at 510-1. Commissioner Cohen notes that this Court did not "take into consideration what occurred between the June 2009 meeting and the issuance of Order No. 6482848 on January 26, 2010." *Id.*

Commissioner Cohen refers, of course, to the six separate citations issued between October 14 and October 22, 2009, five of which concerned either partial or absent barricades in headings. *Id.*, at 511. "Any question in the minds of Newmont's management from the June meeting as to *when* a barricade was needed should have been dispelled by the six citations issued in October." *Id.* Relatedly, Commissioner Cohen recounts the October 20, 2009 confrontation between Inspector Stull and Midas Health and Safety Specialist McFarland. *Id.* McFarland's outburst exclaiming that "they're not going to put a barrier up in all the headings that are going to be mined soon," as well as Stull and his supervisor Jim Fitch's subsequent hour-long meeting and clarification with Midas staff regarding barricading requirements under 30 C.F.R. § 57.8528 is also described. *Id.* As Commissioner Cohen reasons, "[s]urely, any reasonable question of what §57.8528 required was dispelled by the events of October 20-21." *Id.*, at 511.

Commissioner Cohen also examined Newmont's "Updated Barricade Procedure," in detail:

The new policy created three categories of headings - "Active Heading" (headings are presently in production or development or scheduled for production or development within four weeks), which only require a rope barrier; "Short Term Inactive Heading" (headings which are scheduled for production nor development within 4 to 12 weeks, or have been removed from active status due to changes in ground or ventilation), which



require a snow fence barricade or a berm; and “Long Term Inactive Heading” (headings which are scheduled for production or development beyond 12 weeks, or where mining activities are complete), which require a chain link fence. NM Ex. 8. Significantly, while the barricades for Short Term Inactive and Long Term Inactive Headings are “intended to restrict access into the area”, the rope barrier for Active Headings is only “intended to impede access.” *Id.* Moreover, the signage required for Active Headings does not clearly restrict access but only says “Heading Inspection Required.” *Id.*

The distinction in the new barricading policy between areas requiring a snow fence, berm or chain link fence designed to “restrict access,” and areas requiring only a rope barrier designed to “impede access” is keyed to the length of time until production or development - i.e., more or less than four weeks. Although Newmont's new barricading policy explicitly references and quotes §57.8528, it totally ignores the distinction which triggers the need for a barricade - whether an area is “unventilated.” Despite the series of §57.8528 citations and the meeting with MSHA in October, Newmont's new barricading policy simply does not require a barricade for an unventilated area if the area is scheduled for production or development within four weeks.

*Newmont USA Ltd.*, 37 FMSHRC at 511-2 (Cohen, Comm'r., concurring in part and dissenting in part).

Commissioner Cohen mentions that the 1-5301 headings appear to have been left inadequately barricaded even under Newmont’s own Updated Barricade Procedure. *Id.*, at 512.

In his opinion concurring in part and dissenting in part, Commissioner Cohen summarized multiple instances in the record which showed that “it certainly cannot be said that Newmont’s actions constituted objectively reasonable compliance with §57.8528 or suggested good faith”: the six violations in October, 2009; McFarland’s “adamant behavior on October 20,” MSHA’s subsequent meeting to clarify barricading requirements on October 21; the drafting of a new policy that effectively ignored the Secretary’s instructions regarding unventilated headings; Newmont’s own failure to follow its updated barricade policy. *Id.*

The Commission applies a mixed subjective/objective analysis in determining the motivations of parties in taking various actions. For example, in *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000), the Commission held that in determining the propriety of a work refusal the standard required both a subjective element of a miner’s honest belief that a hazard exists as well as the objective requirement that the miner’s belief be reasonable.<sup>6</sup>

As pointed out by the Commission in its remand decision, and so lucidly explained by Commissioner Cohen, this Court failed to employ both a subjective and objective analysis in reviewing the propriety of the mine operator’s decision not to comply with MSHA directives.

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<sup>6</sup> See also *Robinette v. United Castle Coal*, 3 FMSHRC 803 (Apr. 1981) wherein the Commission held that a miner’s honest perception of a potentially hazardous condition must be one made in good faith *and* be reasonable under the total circumstances.

This Court is reluctant to ascribe bad faith motivations to a party's actions when other, less pejorative arguable explanations exist. Thus was reached this Court's finding – which Commissioner Cohen understandably labeled “doubtful” – that Respondent had possessed a good faith belief that it was complying with the regulations when it roped off headings that were to be worked. *Newmont USA, Ltd.*, 34 FMSHRC at 164.

The pertinent question, however, is not the operator's good faith belief in its compliance but rather the objective reasonableness of that belief. The great weight of evidence in this matter, applicable case-law, the Secretary's persuasive arguments, and Commissioner Cohen's valuable insights all support the conclusion that the Respondent could not have held an objectively reasonable belief that it was in compliance with §57.8528.<sup>7</sup>

### **III. The Operator's Conduct Constituted Unwarrantable Failure**

In its remand order the Commission further directed that this Court make factual findings on the elements of an unwarrantable failure pursuant to, *inter alia*, its holding in *Sec. of Labor v. Manalapan Mining Co.*, 35 FMSHRC 289 (Dec. 1987).

In *Manalapan* the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. 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, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving 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, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree 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 had been placed on notice that greater efforts were necessary for compliance. See *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (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 seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular

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<sup>7</sup> As will be discussed *infra*, this Court recognizes that if a mine operator reasonably, but erroneously, believes in good faith that his cited conduct is the *safest* method of compliance with applicable regulations, his actions will not constitute aggravated conduct that exceeds ordinary negligence. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553 (2012). But in the instant matter, if the danger to be avoided was the exposure of miners to noxious air or lack of oxygen in unventilated headings – clearly the *safest* method of compliance was the more substantive barricading procedures directed by MSHA so as to prevent access to unventilated areas.

factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, 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.*; *IO Coal*, 31 FMSHRC at 1351.

*Manalapan Mining Co.*, 35 FMSHRC at 293.

Considering the *Manalapan* factors *seriatim* this Court makes the following findings:

### **1. The Extent of the Violative Condition**

Given Newmont's admission that its procedures required miners to erect rope barriers and "Heading Inspection Required" signs in areas to be mined within four weeks, even if the ventilation bags had been tied shut, the scope of the violative condition was extensive.

The Respondent contends that, because the inspector issued one citation concerning a single area, the violation cannot have been extensive. *Respondent's Response Brief on Remand*, 8. Further, the Respondent argues that this is confirmed by the inspector's failure to cite Newmont's Standard Operating Procedure (SOP) or other policies. *Id.*

This final point by the Respondent fails to persuade. It is unclear to this Court just how Inspector Guardipee would have cited Newmont for its SOP or company-wide policies when he was standing in the 1-5301 North and South headings. There is uncontradicted evidence that the Respondent, as a matter of policy, routinely erected insecure, ineffective barricades that failed to impede miner access. Newmont also routinely failed to warn miners about the dangers of noxious air in unventilated headings by neglecting to post signs to that effect. For these reasons, I find the violation was extensive.

This factor weighs in favor of a finding of unwarrantable failure.

### **2. The Length of Time the Violative Conditions Existed**

The record reveals that the ventilation bag was tied off for at least one month. *Pet'r's Opening Brief on Remand*, 16. The Respondent offers no argument or evidence to the contrary, instead urging this Court to give primary weight to the factor of dangerousness within this unwarrantable failure analysis. *Respondent's Response Brief on Remand*, 7.

Similar to circumstances that obtained in *Excel Mining*, 37 FMSHRC 459 (Mar. 2015), the violative condition here existed for a period of weeks. There the Commission found that the length of time the condition had existed, as well as other factors, proved highly aggravating and inclined toward a finding of unwarrantable failure. *Id.* at 468.

The Secretary also cites numerous Commission cases in his brief supporting an unwarrantable failure designation "where the violative condition existed for a period of time from longer than one shift to several weeks." *Pet'r's Opening Brief on Remand*, at 16. Further, the Secretary argues, "violations have been found to exist over a long period of time where the practice was long standing." *Pet'r's Opening Brief on Remand*, at 16, citing *Lopke Quarries*,

*Inc.*, 23 FMSHRC 705, 711 (Jul. 2001); *Consolidation Coal*, 23 FMSHRC 588, 594 (Jun. 2001); *Windsor Coal*, 21 FMSHRC 997, 1000 (Sept. 1999); *Sierra Rock Prods.*, 37 FMSHRC 647 (Mar. 2015).

Given the lengthy period of time this condition obtained, this factor also militates in favor of a finding of unwarrantable failure.

### **3. Whether the Violation Posed a High Degree of Danger**

The Commission in *Manalapan* reaffirmed that the factor of dangerousness may be so severe that by itself it warrants a finding of unwarrantable failure. *Manalapan Mining Co.*, at 294. However in the case *sub judice* the Commission specifically found that this Court erred in concluding that the violation at issue was S&S and held that there “was no substantial evidence to support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury.” *Newmont USA Ltd.*, 37 FMSHRC 499, at 504.

This Court agrees with the Secretary’s contention, that “although the danger may not have been ‘reasonably likely,’ this does not mean that unventilated underground headings are not dangerous.” This contention has some merit, especially considering, as the Secretary does, that “assuming continued operations, the air quality would continue to diminish.” *Pet’r’s Opening Brief on Remand*, 17.

Given that the Commission’s findings constitute “the law of the case,” this Court is constrained to conclude that the degree of danger posed by Newmont’s violation was *not* high. *Eastern Ridge Lime Co.*, 21 FMSHRC 416 (Apr. 1999) (finding that decision by appellate court obliged lower court on remand to follow appellate court’s decision); *Manalapan Mining Co.*, 36 FMSHRC 849 (Apr. 2014) (finding that judge, on remand, violated law of the case doctrine in FMSHRC context by reversing an initial, uncontested finding).

Nonetheless, while this Court cannot find a high degree of danger in this case, Newmont’s conduct in this instance was unwarrantable. An absence of a high degree of danger does not suggest safety, and leaving headings unventilated and effectively unbarricaded gives rise to some measure of added danger beyond the usual ration of risk offered to a miner. An unventilated heading, left untouched for weeks on end, would naturally see its air quality diminish, perhaps to the point of danger for a nearby miner.

This factor weighs in favor of a finding of unwarrantable failure.

### **4. Whether the Violation Was Obvious**

The condition was also obvious. A rope with an attached sign is obviously not a barricade of snow fence or chain link. More fundamentally, a rope or chain with an attached sign will not deter a miner from entering an unventilated heading as effectively as snow fence or chain link barriers would. As discussed *infra* and *supra*, Newmont could not have had a good faith, objectively reasonable belief that a rope with an attached sign constituted a barricade. Therefore, the violation was obvious.

This factor also weighs in favor of a finding of unwarrantable failure.

## **5. The Operator's Knowledge of the Existence of the Violation**

Newmont admitted knowledge of the violation when it promulgated its "Updated Barricade Procedure" of November 2009. RX-9, *see also* Commissioner Cohen's analysis *supra*. By consciously employing the word "barrier" instead of "barricade," Newmont appeared to both accept the letter of Secretary's interpretation of "barricade" yet still defy the spirit of §57.8528 by ignoring the Secretary's instructions regarding unventilated headings. RX-9. Further, by describing headings that had not seen a working miner in two to four weeks as "active," Newmont tried to write into its "Updated Barricade Procedure" ambiguity to leave headings effectively unbarricaded and unsafe for up to weeks at a time. RX-9. To argue, as Respondent does, that the printing and promulgating of this "Updated Barricade Procedure" is indicative of good faith is gainsaid by this risible "barrier" and "barricade" distinction.

This factor further weighs in favor of a finding of unwarrantable failure.

## **6. The Operator's Efforts in Abating the Violative Condition**

The Operator made no effort to abate the violative condition before Inspector Guardipee issued Order No. 6482838. "The focus on the operator's abatement efforts is on those efforts made prior to the citation or order." *IO Coal*, 31 FMSHRC at 1356. Given the October 2009 inspection should have made clear that Newmont's previous barricading practices were unacceptable, it is problematic why the operator did not do more to abate the violation condition.

In not erecting a snow fence, the Respondent did not contend that it has no snow fence. Indeed the record reveals there was snow fence on site. Tr. 271-2. The Respondent does not contend that it would be onerous to erect these barricades; the time to construct one is less than half an hour. Tr. 251. Removing a snow fence barricade takes only a few minutes. *Id.* The risk contemplated of a miner entering an unventilated heading without proper equipment plainly outweighs the burdens on the Respondent in guarding against this risk. As I noted in my initial decision in this matter, "a time intrusion of less than forty minutes does not seem like such a substantial burden as to outweigh the life or safety of a miner." *Newmont USA, Ltd.*, 34 FMSHRC 146, at 163.

The Respondent's violative conduct and failure to abate such again appear to have been driven not so much by a good faith and reasonable interpretation of §57.8528's requirements -- but rather a "contest of wills" between MSHA and the Respondent which itself appears to have been based upon the Respondent's unwarranted concerns regarding the minimal delays in time and production entailed in following MSHA barricading directives. Such a failure to abate would constitute aggravated conduct supporting a finding of unwarrantable failure.

## **7. Whether the Operator Had Been Placed on Notice That Greater Efforts Were Necessary for Compliance**

In analyzing this factor, I have already cited the numerous instances, as summarized by Commissioner Cohen, *supra*, where the Respondent had actual or constructive notice from MSHA that its barricading practices violated §57.8528. *See supra*. Even subtracting from

consideration the Elko, NV meeting with MSHA officials, Newmont had at least two more warnings regarding its inadequate barricading policy. There was the series of citations issued in October of 2009, most of which concerned inadequate barricading. *Sx. W.* As the Secretary notes in his brief, “[p]rior similar violations put an operator on notice that greater efforts are necessary for compliance with the standard.” *Pet’r’s Opening Brief on Remand*, at 11, citing *Manalapan Mining Co.*, 35 FMSHRC 289, 295-6 (2013).

Further, there was the October 20, 2009 confrontation with Mr. Stull, during which Mr. McFarland expressed unequivocally his desire to disregard or circumvent MSHA barricading instructions. Tr. 145-6. At that meeting, Stull explicitly warned Mr. McFarland that MSHA would continue to issue citations so long as Newmont refused to comply with MSHA instructions. Tr. 146.

This Court must find that a warning from an MSHA inspector that failure to follow that inspector’s instructions will lead to further citations is evidence that Newmont was placed on notice that greater efforts were necessary for compliance.

Finally, Jim Fitch, Mr. Stull’s supervisor, made the trip to the Midas Mine the day after Stull and McFarland’s contentious tête-à-tête, on October 21, 2009, and explained to McFarland and others in a meeting lasting an hour what MSHA would accept as proper barricading under §57.8528. Tr. 155-7. Certainly this meeting itself constituted notice, if the October 20, 2009 confrontation somehow did not.

### **Conclusion**

Considering the above *Manalapan* factors, both individually and *in toto*, in the context of the particular facts of the case *sub judice* and further considering that Respondent could not have held an objectively reasonable belief that its actions were in compliance with §57.8528, this Court finds that the Respondent’s conduct clearly constituted unwarrantable failure.

### **IV. Penalty**

Section 110(i) of the Mine Act establishes the six criteria to be considered in determining the appropriateness of a civil penalty.

Further, the Commission has outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that “the principles governing the Commission’s authority to assess civil penalties *de novo* for violations of the Mine Act are well established.” 22 FMSHRC 598, 600 (May 2000). While the Secretary’s system for points in Part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a Commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de*

*novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).<sup>8</sup>

In this case, the special assessment for Order No. 6482848 was \$35,500. I have considered each of the special penalty factors below:

1. **The operator's history of previous violations.** In the 130 inspection days prior to the issuance of Order No. 6482848, the Respondent was issued 118 citations. Six citations or orders in a previous inspection were violations of 30 C.F.R. §57.8528. *Pet'r's Opening Brief on Remand*, 20.
2. **The size of the operator's business.** The Respondent operates a medium mine, "Midas." Newmont employs roughly 160 employees. *Pet'r's Opening Brief on Remand*, 20.
3. **Whether the operator was negligent.** In its previous decision, the Court did not make a finding as to the level of negligence. As this decision finds the operator's conduct one of unwarrantable failure, the operator was plainly negligent.
4. **The effect on the operator's ability to continue in business.** The Petitioner and Respondent both acknowledge that Newmont's ability to continue in business will not be imperiled by the payment of the penalties in this case. JS-8. As such, I presume there would be no such effect. *Sellersburg Stone Co. v. FMSHRC*, 735 F.2d 1147, 1153 n. 14 (7th Cir. 1984).
5. **The gravity of the violation.** The gravity of the potential harm in this order having been found less than likely by the Commission in its remand order, the Secretary nevertheless argues that the gravity of a violation and its S&S nature are not the same. *Pet'r's Opening Brief on Remand*, 20. This may be true, but a finding of S&S is surely indicative of a grave violation, whereas a finding that a violation was not S&S, then, suggests less seriousness in terms of gravity. Despite the fact that the Respondent's conduct constituted unwarrantable failure, the mixed record concerning the Midas Mine's non-gassiness, as well as the Commission's finding that the violation was not S&S and unlikely to cause harm to a miner, leads me to conclude the gravity of this violation is not an aggravating factor.
6. **The demonstrated good faith of the Respondent in abating the violation.** The Respondent's good faith is not disputed by the Secretary. JS-7.

In recognition of both Newmont's unwarrantable failure to maintain adequate barricades in unventilated headings, as well as the Commission's findings on remand, I conclude that a penalty of \$20,000.00 is appropriate. The lack of an appreciable injury, as well as the

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<sup>8</sup> As Judge Moran observed in *Oak Grove Resources, LLC*, "S&S is not among the identified statutory penalty criteria." *Oak Grove Resources, LLC*, SE 2009-261-R, at 16, *see also* 30 U.S.C. §820(i). This Court analyzes the penalty criteria absent consideration of the now-deleted S&S finding, but aware that the operator's conduct constitutes an unwarrantable failure.

Commission's finding that the violation was not likely to cause harm, suggest a penalty reduction is warranted from the Secretary's proposed amount of \$35,500.00 to \$20,000.00. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

**ORDER**

It is hereby **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of \$20,000.00 within 30 days of this Decision.<sup>9</sup> Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ John Kent Lewis  
John Kent Lewis  
Administrative Law Judge

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<sup>9</sup> 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  
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April 29, 2016

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

v.

CEMEX CONSTRUCTION MATERIALS,  
ATLANTIC, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. SE 2014-328-M  
A.C. No. 40-00840-350438

Mine: Knoxville Cement Plant Cemex Inc.

## DECISION

Appearances: Timothy Turner, Esq., U.S. Department of Labor, Office of the Solicitor,  
Denver, Colorado for Petitioner

Michael T. Cimino, Esq.; Adam Schwendeman, Esq., Jackson Kelly,  
PLLC, Charleston, West Virginia for Respondent

Before: Judge David Barbour

In this civil penalty case arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820, (the “Mine Act”), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) petitions for the assessment of civil penalties of \$1,838 for alleged violations of 30 C.F.R. § 56.18002(a) and 30 C.F.R. § 56.14100(c).<sup>1</sup> The purported violations were cited at the Knoxville Cement Plant (the “Knoxville plant”), a facility owned and operated by Cemex Construction Materials Atlantic, LLC. (“Cemex”).<sup>2</sup> The citations were issued by MSHA Inspector David Smith on March 10, 2014. Inspector Smith found that Cemex did not designate a competent person to

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<sup>1</sup> Sections 56.18002(a) and 56.14100(c) are mandatory safety standards applicable to the nation’s surface metal/non-metal mines. Section 56.18002(a) states that, “A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health” and that the operator “shall promptly initiate appropriate action to correct [any] such conditions.” Section 56.14100(c) requires that when defects on self-propelled mobile equipment “make continued operation [of the equipment] hazardous to persons, the defective items . . . shall be taken out of service . . . or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.”

<sup>2</sup> In addition to the Knoxville plant the company owns several other facilities where cement is produced.

examine the plant's elevators during each shift and therefore that the company violated section 56.18002(a). He believed the alleged violation was reasonably likely to result in a fatality and that the condition was a significant and substantial contribution to a mine safety hazard (an "S&S" violation). He also found the alleged violation was caused by the company's moderate negligence. In addition, while he was inspecting one of the elevators, Smith found the "in-use" lights on two call site stations did not activate when the elevator was moving. Further, the telephone in the elevator's car was missing. Despite these defects, the company kept the elevator in service and thereby, in the inspector's opinion, violated section 56.14100(c). Smith found that the defective lights and missing telephone were not likely to cause injuries, but nonetheless were due to the company's high negligence.

After the citations were issued, the alleged violations were assessed by the Secretary. When the company contested the proposed assessments, the Secretary filed a petition with the Commission seeking an order requiring the company to pay. The company answered the petition challenging the validity of the violations and arguing alternatively that even if it violated one or both of the standards, the assessments proposed by the Secretary were excessive. Upon receiving the answer, the Commission's Chief Judge assigned the case to the court, which ordered the parties to confer to determine if they could resolve their differences. When counsels advised the court they could not agree on a settlement, the court heard the case in Knoxville, Tennessee. At the hearing, counsels presented documentary evidence and the testimony of several witnesses. They subsequently filed helpful briefs.

### **THE ISSUES**

The case presents several issues. One that is central to the alleged violation of section 56.18002(a) is whether the elevators at the Knoxville plant are "working places" and hence come within the standard. Section 56.18002(a) requires the examination of each "working place" and 30 C.F.R. § 56.2 defines "working place" as "any place in or about a mine where work is being performed." The Secretary contends the elevators are working places "because of the simple fact that work takes place on them." Tr. 16. Cemex finds the Secretary's interpretation to be unreasonable and as applied to deprive the company of due process. Tr. 19. Cemex also argues that the Secretary's finding of "high negligence" with regard to the alleged violation of section 56.14100(c) is inappropriate. Resp. Br. 31-33.

### **STIPULATIONS and AGREEMENTS**

The parties stipulate as follows:

1. The [Knoxville plant] is under the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. At the time the citations . . . were issued, products of the . . . mine entered commerce. The operations therefore affected commerce within the scope and meaning of Section 4 of the . . . Mine Act. Tr. 22.

In addition to the stipulations, the Secretary agrees that Cemex's applicable history of previous violations is small. Tr. 24; see Exh. S-1.

**THE SECRETARY'S WITNESSES**  
**and**  
**THE BACKGROUND OF THE MARCH 10, 2014, INSPECTION**

For three years before the hearing Inspector Smith worked at MSHA's Knoxville, Tennessee office. Tr. 25. During that period he conducted 40 to 50 inspections per year at 20 to 30 mines. Tr. 26. Prior to March 10, 2014, Smith inspected the Knoxville plant several times. Tr. 27. At the plant limestone and clay are processed into cement. The cement is bagged and shipped by rail and truck to Cemex's customers. Tr. 27-28. Typically, MSHA personnel inspect the plant twice a year. Tr. 27.

The March 10 inspection took place against the backdrop of the fatal accident that occurred at another Cemex facility. On February 21, 2014, a Cemex contract employee stepped into an open elevator shaft at a cement plant located near Louisville, Kentucky (the "Louisville plant"). The employee survived the fall but shortly thereafter succumbed to his injuries. MSHA investigated the accident and on February 28, 2014, the agency issued a "Fatalgram" to all mine operators.<sup>3</sup> It states:

On February 21, 2014, a 34 year old contract laborer with 6 months of experience was killed at a cement operation when attempting to access an elevator in the finish mill. When the victim opened the elevator door on the fourth floor landing, he stepped into the elevator shaft and fell approximately 51 feet to the top of the elevator car located on the ground floor.

Exh. S-6

The fatalgram lists six "best practices" miners are advised to take when working around elevators:

- Immediately report any elevator problems to management.
- Ensure that any problems affecting the safety of an elevator are reported promptly.
- Ensure the elevator door interlocks that prevent the door from being opened unless the elevator car is present are functional.

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<sup>3</sup> A "fatalgram" is an official publication of the agency that describes a fatal accident and suggests "best practices" to avoid similar accidents. It is sent to mine operators, in this case the operators of all metal/non-metal mines.

- Ensure that the elevator doors will not open unless an elevator car is at the floor landing.
- Install audible signals that sound when the elevator car is at landing prior to the doors opening.
- Train all persons to be aware of their surroundings when entering or exiting an elevator car.

Exh. S-6.

### **THE INSPECTION AND SMITH'S FINDINGS**

Smith traveled to the plant on March 10 to conduct a “spot inspection,” one that focused on the plant’s elevators.<sup>4</sup> The purpose of the inspection, which was triggered by the February 21 fatality, was to ensure that the elevators were in safe operating condition. Tr. 28. Smith was accompanied by Doniece Schlick, the Assistant District Manager of MSHA’s Southeast District, Metal/Non-Metal Division. Tr. 29, 124. At the plant Smith and Schlick were met by Alan Stephens, who at the time was the plant’s safety manager. In addition, from time to time throughout the inspection the party was joined by William McCalla, the pack house supervisor. Tr. 29-30.

Smith stated that MSHA defines a “working place” as, “[Any] area where a miner would perform work.” Tr. 34. He further stated that at one point during the inspection, McCalla told him that the company did not designate a person to perform examinations of those areas where miners worked near or on elevators. Tr. 34-35. Smith also testified that a management official told him the plant’s elevators were used daily by miners, although Smith did not recall seeing any miners using the elevators on the day he conducted the inspection. Tr. 94-95. Smith cited the company for failing to have a designated competent person examine the elevators. Tr. 30; Exh. S-2. Smith believed that all of the elevators were “working places” because they were “used to transport miners and materials from floor to floor on a daily basis.”<sup>5</sup> Tr. 35. In Smith’s view,

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<sup>4</sup> There are five elevators in the cement plant. Tr. 35. Four were in service when Smith arrived at the plant. One, a freight elevator used to move finished product, had been taken out of service because of a problem with the way the elevator’s doors opened. Tr. 36. To correct the defect, Cemex ordered new parts through its elevator contractor, Otis Elevator Company (“Otis”). *Id.*, Tr. 37. Smith stated that the company found the defects because it examined the elevator and its doors after it received the February 28 fatalgram with its listing of the “best practices” to prevent the recurrence of a Louisville plant-like accident. Exh. S-6; Tr. 36-37.

<sup>5</sup> MSHA’s Program Policy Manual (the “PPM”) states as follows:

The phrase “working place” is defined in . . . [section] 56[.2] as ‘any place in or about a mine where work is being performed.’ As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling processes.

(continued...)

failing to designate a competent person and failing to examine the elevators violated section 56.18002(a).<sup>6</sup> Tr. 34-35.

Smith also testified that one of the elevators, the elevator at the preheater tower, moves up and down the tower's nine floors. Workers use the elevator to observe the flow of material being processed ("to make sure the material [is] moving through the process . . . fluidly" (Tr. 38)) and to correct the flow of the material if necessary. *Id.* To do this task workers need access to all nine floors of the tower. *Id.* Although access can be by stairway as well as by the elevator, Smith believed that some materials and tools workers require for the job are too heavy to carry up (and down) the stairs. Tr. 39.

Another of the plant's elevators is located in the area of the kiln. Smith testified that during the kiln's periodic shut down, workers use the elevator to transport insulating bricks from one floor to another. The bricks are loaded on and off the elevator. Tr. 40. According to Smith, there is "someone on each floor to move material in and move material out, [and to] ride the elevator with . . . [the material] if need be." *Id.* In Smith's opinion, moving material in and out of the elevator is "work." *Id.* Further, Smith stated that workers are at times required to repair or correct defects in the operation of some equipment on the upper floor of the kiln (the "burn floor"). Tr. 40-41.

According to Smith, only those parts of elevators to which miners have access must be examined. Tr. 76. Thus, the shafts of the elevators are exempt, but the interlocks (the safety latches) of elevator doors are subject to examination in order to make sure the elevator doors open as they should. Tr. 42, 76. The goal is to prevent the doors from opening "when the car is not in place" and thus to preclude a fall accident. *Id.*; Tr. 91-92. Smith agreed, however, that before March 10, 2014, he never cited an operator for failing to examine safety latches on an elevator door. Tr. 76. He also agreed that when he checked the interlocks on March 10, they functioned properly. Tr. 93-94.

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<sup>5</sup> (...continued)

Resp. Exh. 17 at 1; Tr. 64.

Smith agreed that there is no mention in the PPM that qualifying as a "working place" is related to the frequency with which a miner visits an area or that a "working place" is a location where a miner is exposed to a hazard. Tr. 64-65.

<sup>6</sup> Smith stated that as he understands the standard, an elevator has to be examined if it will be used on a shift. Tr. 86.-87. According to Smith,

once the miner places himself or herself onto the elevator car to perform their duties, whether to transport from one floor to the other floor or that they're bringing tools or their expertise as a person to a different level to perform their duties, they are working [and the elevator has to be examined].

Tr. 88.

Smith found that Cemex's failure to designate a competent person to examine the plant's elevators was reasonably likely to result in a serious injury. Tr. 43; Exh. S-2. He knew about the Louisville accident, but he was not familiar with the circumstances that led to the accident, nor did he know of any other occasion where a violation of section 56.18002(a) caused such an accident. Tr. 92-93. Nonetheless, he emphasized that he was told by employees at the Knoxville Plant that they used the elevators daily and on all three shifts. Tr. 43-44. Frequent use increased the likelihood of an accident. Further, the likely result of an accident was a fatality. ("[I]ndustry history . . . indicate[s] that [the] condition [if] left unabated would cause a fatal accident or injury." Tr. 43.) Smith feared that due to a malfunction of an interlock an elevator's door would open even though the car was not at the landing and an employee would fall down the shaft.<sup>7</sup> Tr. 91-93. The hazard existed despite the fact that when he checked the interlocks on the working elevators, all of the interlocks functioned properly. Tr. 94.

Smith further found that the company was moderately negligent in allowing the violation. Exh. S-2. He recognized that the company and/or its contractor, Otis Elevator Co. ("Otis"), examined the elevators on occasion and tagged them out if they felt such action was needed. The company's intermittent attention to the elevators somewhat mitigated its negligence, but did not overcome the fact that there was no competent person designated by Cemex to perform the required examinations and no policy to ensure the examinations were performed. Tr. 46. Smith was asked if he was familiar with an MSHA document titled, "Metal and Non-metal General Inspection Procedures Handbook." Exh. R 22. Smith stated he was and explained the handbook governs the procedures under which he and other inspectors conduct inspections. Tr. 71. The handbook instructs inspectors in part that, "Documentation such as records of workplace examinations . . . shall be reviewed during the course of the inspection so any questions concerning those records can be resolved at that time." Exh. R-22 at 46. Smith testified that he routinely reviews such records. Tr. 73. Although he reviewed the records at the plant when he conducted inspections in December 2013 and in January 2014, neither time did he ask to see workplace examination records for the elevators. Tr. 74-75. Prior to March 10 he never asked anyone at Cemex about the company's elevator inspection records. Tr. 75. His citation was a first for the company. *Id.*

The citation was terminated when Cemex trained and then designated competent persons to perform the examinations. Tr. 46-47. As part of the training Cemex created an eight point list of things to check inside and outside all elevator cars and specified "serious issues" that would require the shift supervisor to discontinue use of an elevator and block access to it. Tr. 47; Exh. S-10. The list helped assure MSHA that the company was checking for hazards as required. Tr. 47. The company also provided MSHA with copies of its training records for each shift. The records listed the persons on the shift who were trained to conduct the elevator work area examinations. Tr. 48; Exh. S-10 at 2-4.

Smith also cited the company for a violation of section 56.14100(c) for failing to correct two hazards relating to the burn floor elevator. Smith found that the "in-use" lights for the elevator (one at the first floor call station and one at the second floor call station) did not activate

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<sup>7</sup> However, Smith also agreed that all of the elevators' landing doors have windows, and if a person is going to use the elevator and wants to see if the car is at the landing, he or she can simply look through the window. Tr. 107.

when the elevator was in motion. Tr. 55, Exh. S-3. He also found that the telephone inside the elevator car was missing.<sup>8</sup> *Id.* Smith explained that an “in-use” light lets a worker know when an elevator car is in motion and when the car stops. *Id.* Smith speculated that if the light is not working, a worker may think the car is at his or her floor ready for use when in fact it is elsewhere. When the worker tries to open the elevator door to access the car, the interlock safety system, if it is working properly, will prevent the door from opening, and tugging on the door can cause the worker to sprain or strain his or her back resulting in lost workdays or restricted duties. Tr. 55, 56, 58. However, the elevator door has a window, and Smith agreed a worker can look through the window to determine if the car is at the landing before he or she attempts to open the door. Tr. 58.

Removing the telephone from the car created the danger that a worker or workers trapped in the car are unable to call for help. Tr. 43, *see also* Tr. 44. Smith noted, however, that he saw management employees and “a few miners” who carried radios underground and many miners who carried cellular telephones. Both types of devices can be used to communicate with those outside the car. Tr. 45-46, *see also* Tr. 57.

Smith considered the alleged violation of section 56.18002(a) to be directly connected to the alleged violation of section 56.14100(c). Smith stated, “Management did not have an examination program in place concerning elevator defects.” Tr. 55-56. Smith implied that had the company complied with section 56.18002(a) it would have observed and corrected the burn floor elevator’s defects or would have taken the elevator out of service. Tr. 56.

Smith found that the alleged violation was caused by the company’s high negligence. Tr. 58-59; Exh. S-3. Cemex did not require a workplace examination of the burn floor elevator, an examination that most likely would have resulted in the defects being reported and corrected or in the elevator being tagged out of service. Tr. 58-59. However, he agreed that if the “in use” lights had been defective and the telephone had been missing on February 26, the conditions would most likely have been fixed by the Otis employee who examined the plant’s elevators on that date. Tr. 104. Moreover, he acknowledged that on March 4 Leroy Lockett, an MSHA supervisor, inspected the plant and that Lockett issued no citations concerning the elevators. Tr. 98-99. If the defects existed on March 4 Lockett most likely would have found them and had them corrected. Tr. 104-105. Therefore, Smith thought that the defects probably came into being between March 4 and March 10. Tr. 105. Nonetheless, Smith stated he and other MSHA personnel were told by both supervisors and rank and file miners that the elevators were “used daily per shift” and thus that management officials should have been aware of the defects. Tr. 113; *see also* Tr. 102, 105. To correct the alleged conditions, Cemex called Otis who sent employees to the plant to fix the defective lights and to reinstall the telephone. Tr. 59.

### **DONIECE SCHLICK’S OBSERVATIONS**

Doniece Schlick has been employed by MSHA for 24 years, and she has served as an MSHA assistant district manager for four years. As an assistant district manager she has been involved in enforcement of the Act and metal non-metal safety regulations promulgated pursuant to the Act. Tr. 124. Prior to becoming an assistant district manager she worked as an inspector at

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<sup>8</sup> The telephone is similar to a home wall telephone. Tr. 101

the agency's Macon, Georgia office where she had experience inspecting cement plants. Tr. 125. Ms. Schlick holds a B.S. degree in mining engineering from the University of Alabama. Tr. 126. As an assistant district manager one of her duties is to observe how MSHA's inspectors conduct inspections and how operators relate to inspectors. Pursuant to this duty she accompanied Smith to the Knoxville plant on March 10. Tr. 126-27.

Schlick was clear that the Louisville accident heightened MSHA's emphasis on the need to inspect elevators. She was asked by her counsel why MSHA "was . . . so intent on inspecting [the plant's] elevators?" Tr. 127. She responded: "After a fatality, it is our duty to make sure that not just at Cemex, but [that] all cement plants in the southeast are following the best practices to . . . keep another accident from happening like that in the industry." *Id.* Her counsel then asked, "So a fatality can change the way that MSHA does its job?," and she responded, "Well, I would expect that a fatality . . . or . . . serious accident would be a wake-up call for us to look at things differently." Tr. 128.

Schlick testified regarding her understanding of the accident at the Louisville plant:

A . . . worker was looking for a bucket . . . and someone told him they were on the fourth floor. He rode the elevator up to the fourth floor. He got the bucket. He [tried to go] back on the elevator. When he opened . . . the doors to the elevator and stepped on the elevator, the vehicle was not at that floor. It was [at] a lower floor.

Tr. 129; *see also* Tr. 130.

Schlick understood that prior to the accident the victim was "manually moving" rocks. Tr. 130. In her opinion when he stopped and started looking for a bucket, he was still "in the process of doing his work and trying to perform it better." *Id.* He was, she stated, "looking for additional tools to help to perform that task." *Id.* She believed the victim was working because "[h]e was going from one floor to another to obtain tools to perform the task that he was doing better, safer, more efficiently." Tr. 131. She added the Louisville plant is similar to the Knoxville plant. *Id.*

When asked what she regarded as an effective workplace examination of an elevator, Schlick stated that at "a minimum" the elevator's safety features should be checked. Such features include the inside light, the inside communication system, and the "in-use" lights. Tr. 132. In addition, the elevator's doors should be checked.<sup>9</sup> Tr. 132-133. In Schlick's opinion, a workplace examination should follow the best practices concerning elevators, practices that are set forth in the February 28, 2014, fatalgram. Tr. 134; Exh. S-6.

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<sup>9</sup> According to Schlick, a majority of elevator doors are operated manually. Tr. 133. Schlick testified that it is important during the examination to try to open the doors when the cars are not at the landings to make sure the doors' interlocks work properly. Tr. 144-145. Schlick did not dispute that all of the landing doors at the plant have windows and that workers are supposed to look through the windows to determine if the car is present, but Schlick observed that the victim at the Louisville plant was not tall enough to see through the window. Tr. 142.



Although Schlick visited the Louisville plant several times during MSHA's 19 day investigation of the accident, she did not lead the investigation team, and the investigation was ongoing when Smith and Schlick were at the Knoxville plant. Tr. 134-135. Schlick agreed that she and Smith were not the first MSHA personnel to inspect the Knoxville plant's elevators following the accident. Lockett inspected the plant and the elevators on March 4, six days before she and Smith arrived. Tr. 138.

Schlick stated that before the accident, "some inspectors were asking for workplace examination [records] of elevators" (Tr. 139), but she confirmed that before March 10 Cemex never received a citation for failing to designate a competent person to examine the elevators at its Knoxville plant. Tr. 139, 140. Schlick also stated that she was aware that a few days after the accident, Cemex asked Otis to come to the Knoxville plant and check all of the doors on all of the elevators. Tr. 140-141. She stated that she and Smith looked at the Otis service records. She recalled Lockett telling her that he too looked at the Otis records and that he checked all of the elevators' doors. Despite the fact that Otis's personnel inspected the elevators on occasion, Schlick believed a daily shift inspection conducted by a person designated by the operator was important because, "[m]ining is a dynamic and rugged environment that requires more inspections of elevators" than those provided by a contractor like Otis.<sup>10</sup> Tr. 143.

### **THE COMPANY'S WITNESSES**

#### **ALAN STEPHENS AND CEMEX'S PRACTICES REGARDING ELEVATORS**

Alan Stephens is the maintenance manager at the plant. Tr. 150. Prior to assuming the position of maintenance manager, he worked as the safety manager. Tr. 151. Stephens began his career with Cemex at the Louisville plant before transferring to the Knoxville plant. *Id.* At the time of the hearing, Stephens had worked in the cement industry for 34 years. *Id.* On March 10 Stephens traveled with the inspection party. Tr. 152.

Stephens explained the procedures Cemex has in place for detecting and correcting elevator defects. Stephens stated that pursuant to a contract with Otis, it is primarily Otis's personnel who inspect and test the elevators and perform needed repairs and maintenance. Tr. 155. Stephens stated that Otis's employees come each month to inspect the plant's elevators [<sup>11</sup>],

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<sup>10</sup> Schlick testified that there are competent people that make workplace examinations at the plant on every shift. "They do the stairs. They do the walkways. They do the tow boards. So we are only asking that they also look at the general safety features of an elevator." Tr. 147.

<sup>11</sup> In practice, the purported monthly inspections of the elevators may not be as regular as Stephens implied. Stephens agreed the service report for the plant's kiln elevator shows Otis examined the elevator in October 2013 but not in November or December 2013. Tr. 188; Exh. S-4.

and they come when Cemex requests they fix a particular problem.<sup>12</sup> Tr. 154-155, 190. Stephens maintained he has seen Otis's personnel at the plant, "many times." Tr. 158. Moreover, as the safety manager at the plant he reviews all copies of Otis's maintenance records. Tr. 160. Prior to March 10 the last time Otis personnel were at the plant was February 26 when they inspected the plant's elevators at Cemex's request. Tr. 161-162. Stephens remembered that after the February 21 accident the employees at the Knoxville plant were asked to check all of the doors on the elevators, which they did. Among other things they made sure that the doors remained closed when the cars were not at a landing. Tr. 163.

Stephens testified that he traveled with Lockett on March 4 and that Lockett did not find anything wrong with the elevators. Further, Stephens recalled that Lockett reviewed Otis's maintenance records and did not ask if Cemex designated a person to examine the elevators on each shift pursuant to section 56.18002(a). Tr. 164-165. Indeed, although he always traveled with MSHA's inspectors, before March 10 Stephens never was asked about Cemex's examinations of the plant's elevators. Tr. 165-166. Further, before March 10 Stephens never saw MSHA's inspectors check the elevators' doors to see if they would open when the cars were not at the landings. Tr. 166.

On March 10 Stephens did not see anyone working in the area of the kiln elevator. Tr. 167- 168, Exh. R-13 at 1, 2. In fact, on March 10 no work of any kind was performed on or around the kiln elevator. Tr. 174. The kiln elevator was used so infrequently Stephens did not know when it was used last. Tr. 168. Stephens was surprised by the March 10 citation. He stated he did not know MSHA would apply section 56.18002(a) to the plant's elevators. Tr. 175. Stephens identified a photograph of the landing door of the mill room elevator. Resp. Exh. 13 at 3-5; Tr. 168-169. The door has a small window, as do all of the landing doors. Tr. 169. The company has never been cited because a window is too high and prevents a short person from looking to see if the car is at the landing. *Id.*

Stephens could not recall if Lockett checked the burn floor elevator on March 4. Tr. 176. In any event, Stephens stated that six days later, on March 10, he was unaware the "in-use" lights for the burn floor elevator were not working and that the telephone in the car was missing. Tr. 173.

Stephens was adamant that he did not consider an elevator is not a "working place." He testified, "We do not perform work in elevators[.]" (Tr. 177), and he was certain that no work was done on any of the elevators on March 10. Tr. 193.

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<sup>12</sup> According to Stephens, employees who travel in the elevators report any defect to "someone in supervision. And then we call Otis, and they come and repair it." Tr. 153. He was asked if employees "observe the areas [of the elevators] for hazards" when they use the elevators, and Stephens replied, "If we were to get on an elevator and there was something wrong just as you got on, yes. I mean . . . we would check and make sure the elevator was safe to ride." *Id.* However, he agreed that no one from Cemex is performing workplace examinations and having the results of the examinations recorded. *Id.* Asked why, he stated that it "was not anything we'd ever been asked to do. We didn't consider [an elevator to be] a workplace." *Id.*

## **WESLEY WADDINGTON AND OTIS'S PRESENCE AT THE PLANT**

Wesley (“Wes”) Waddington is an elevator mechanic who is employed by Otis. He has installed and repaired elevators for 27 years. Prior to working for Otis, he worked for Westinghouse for three years. He has 30 years of experience in the elevator business. Tr. 199-200. Waddington testified that in February and early March 2014 he made inspection and maintenance visits to the Knoxville plant. Tr. 200-201. He visited the plant in February and March at Cemex’s request because, “[T]here was some concern . . . [because Cemex] had . . . a fatality at another plant and [Cemex] wanted us to come to make sure everything was up to par with their elevators.” Tr. 203. He added, “And we did perform maintenance as well as other tasks that were due at the time on those elevators.” *Id.* His duties at the plant included inspecting the elevators and providing maintenance services. He testified that during his visits to the plant he examined all of the components of the elevators’ doors. One aspect of his work is to make certain the doors do not open when an elevator’s car is not at a landing. *Id.* For a door to open under such circumstances the door’s interlock mechanism has to malfunction. Tr. 205. To check the mechanism Otis personnel must climb on top of the elevators’ car. In Waddington’s opinion, tugging on a door from the landing, a safety check advocated by MSHA, is unsafe, because if the door opens and the car is not at the landing, the person tugging on the door can fall down the shaft. Tr. 206; *see also* Tr. 216. In addition, too much tugging can bend and break the interlock mechanism. Tr. 206-207, 218. In general, Waddington believed workers should not pull on an elevator’s doors unless “they see the elevator through the door’s window.” Tr. 207.

Waddington added that if he saw a burned out light or a similar problem on any of the elevators he would fix what was wrong or he would advise Cemex that the problem needed to be fixed. Tr. 209. If he found that a telephone inside a car was missing, he “would . . . tag . . . out [the elevator] and notify [Cemex] not to use . . . [the elevator] until it had two way communication.” Tr. 210. During his February and March visits to the plant he did not see a missing telephone, and although there were burned out “in-use” lights, he fixed them. Tr. 210-211. In Waddington’s opinion, burned out “in-use” lights should not be replaced by the company; rather, they should be replaced by Otis’s technicians because they pose a hazard of electrocution to those who are unfamiliar with the electrical system of an elevator. *Id.*

## **THE CITATIONS**

Citation No. 8733024, states:

The mine operator failed to designate a competent person to examine the elevators for hazards each shift at this operation. Defects affecting the safe operation of the elevator car and hoistway doors, at each floor, exposed miners to fatal injury when using the elevator and/or working near the hoistway doors on a daily basis.

Exh. S-2.

Citation No. 8733025 states:

The IN USE light[s] provided for the [b]urn [f]loor [e]levator were not burning when the elevator was in motion. The defective lights were located on the 1st and 2nd floor call stations. ‘The lights, when working, let the miner know when the car is in motion and [the lights] go out when the car stops. Should a miner attempt to open the door when the car is not at their floor, provided the hoistway door safety interlock is working properly, the door would not open and strain and sprain type injuries would occur. Also[,] the supplied communication phone had been removed and not replaced inside the car. The phone is to be maintained to allow miners to make contact with the operator in the event the car becomes inoperable entrapping the miner[s] inside. Management did not have an examination program in place concerning elevator defects.

Exh. S-3.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>
8733024	3/10/14	56.18002(a)

### **THE VIOLATION**

There are five elevators at the plant, the pack house elevator, the mill room elevator, the preheater tower elevator, the burn-room/kiln elevator, and the TBA-tower elevator. The testimony reveals that Cemex did indeed “[fail] to designate a competent person to examine the elevators [at its plant] for hazards each shift.” Exh. S-2. Smith credibly testified that he was told as much by a Cemex supervisor, and Smith’s testimony was not rebutted.<sup>13</sup> Tr. 34. Cemex goes to some length to argue that “although the miners at the Knoxville . . . [p]lant did not intend to complete an official working place examination of the elevators . . . their actions nevertheless met the requirements of the standard. The miners . . . were deemed competent and trained by the operator to observe the elevator car for defects or issues involving lights, communication systems, and the general condition of the elevator prior to and during use in order to make sure it was safe to ride.” Resp. Br. 27. The company’s argument fails to address one of the central contentions of the Secretary, that the company failed to designate a competent person to conduct

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<sup>13</sup> See also the following exchange between counsel for the Secretary and the inspector:

Q. So how did you discover that the operator was not conducting workplace exams on the elevator?

A. With discussion of the management stating that they did not.

Tr. 41. (Although counsel used the singular, “elevator,” it is clear in the context of the questioning that he meant to use the plural (“elevators”).

the working place examinations. The standard contemplates the operator's designation of a specific person and the designated person's accountability for the required examination. As Smith was told, Cemex did not designate a person to examine its elevators and whatever its employees did with regard to the elevators did not overcome Cemex's failure to meet the "designation" requirement of section 56.18002. However, this only establishes a violation if at least one of the elevators at the plant comes within the standard.

Section 56.18002(a) applies if an area is a "working place." As noted previously, when used in Part 56, a "working place" is defined as "any place in or about a mine where work is being performed." The definition is expansive ("any place in or about a mine"). It also is written using the present progressive tense, which means that work has started but has not yet finished. If read strictly, the definition means that a "working place" does not come into existence until work is actually performed at the cited place. Cemex points out that where a regulation is clear and unambiguous, effect must be given to its plain language. Resp. Br. 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984; *United States Lines, Inc. v. Baldridge*, 667 F.2d 42, 45 (D.C. Cir. 1982); *Cyprus Emerald Resources Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1982)). Thus, in the company's view "a 'working' place encompasses only those distinct areas of a mine where miners are engaged in actual work." Resp. Br. 7. Within the context of section 56.18002(a) giving effect to the "plain meaning" of the regulation means that a competent person is required to examine an area once work is underway. This is a permissible reading of the standard and an examination conducted while miners are working undoubtedly complies with section 56.18002(a). However, it is not the only permissible reading of the standard. If it were, it would leave an unacceptable "safety gap" in that workers could be exposed to potential hazards because although they were assigned to work in an area, the work had not yet started and the examination had not yet been conducted thus exposing the workers to potential hazards before the examination was conducted.

The Secretary also recognizes this "safety gap." In what is essentially an appeal for second step *Chevron* deference, the Secretary asks the court to find the standard applicable "if there is a reasonable expectation of work taking place" or, "if there is a reasonable expectation of a miner engaging in an activity where he exerts himself to perform some task, duty, function, or assignment as part of a greater phase or larger task." Sec. Br. 16-17. The court agrees with the Secretary to this extent because the court finds extension of the standard to areas where there is "a reasonable expectation of work" (Sec. Br. 16) to further the purpose of the standard whose goal is not only to protect those who are engaged in present work, but also to offer protection to those who soon will be engaged in work in order to prevent them from encountering working place hazards in the first place. Therefore, as the court understands the standard, it applies to places where work is being performed during a shift, where work is assigned to be performed during a shift, or where work can reasonably be expected to be performed during a shift. Under this reading of the standard an operator may time its examination of a working place in one of three ways. It may have a designated competent person examine an area where work is being performed during a shift while the work is being performed; or, it may have a designated competent person examine an area where work is assigned to be performed during a shift but where the work has not yet started; or, it may have a designated competent person examine an area where it is reasonable to expect work will be performed during the shift. To prove a violation the Secretary must show that a designated competent person did not conduct any such

examinations either on the shift during which the inspection was conducted or did not perform any such examinations during a specifically identified prior shift.

Turning to the wording of the citation, the court notes it charges Cemex with failing to examine “the elevators.” Exh. S-2. This broad brush wording implies a duty on Cemex’s part to examine all of its elevators simply because they are elevators. However, the standard must be applied individually, not to the elevators as a unit. Section 56.18002(a) is directed at the examination of “each working place” not at a generic type of working place, i.e., “the elevators.”

Further, an elevator is composed of many parts. According to the Secretary some of the parts, i.e., the elevator’s “internal workings,” -- are not subject to examination by Cemex. *See* Sec. Br. 14 n.5. Under the Secretary’s interpretation of the standard, “MSHA expects the contractor servicing the elevator to conduct necessary workplace exams of the . . . internal mechanics of the elevator . . . [and] the operator to conduct workplace exams on only those areas accessible by miners – the elevator car and the elevator landing.” *Id.* Indeed, while the citation seems to limit the charge of a violation to Cemex’s failure to have a competent person examine its “elevator car and the hoistway doors, at each floor” for “defects affecting the safe operation” of the elevators (Exh. S-2), the Secretary makes clear on brief that the alleged violation also includes the failure of a designated competent person to examine areas of the landings adjacent to the doors, presumably because work projects requiring the opening and the shutting of the doors and passage into and out of the cars must necessarily also involve the landings providing access to and egress from the cars. *Id.*

To sum up its interpretation of the standard, it is the court’s opinion that to establish a violation of section 56.18002(a) in this particular case, the Secretary must show that on the shift when the inspection took place or on a specifically identified prior shift, a designated competent person did not conduct an examination of areas of a specific elevator where a work-related task involving the elevator’s car or landing doors was being performed, was assigned to be performed but not yet started, or where such a task reasonably could be expected to be performed.<sup>14</sup>

### **THE INDIVIDUAL ELEVATORS**

With regard to the pack house elevator, the testimony reveals that at the time of Smith’s inspection, the elevator was shut down, locked and tagged out. Tr. 36, 46. No evidence was presented as to how long the elevator was out of service and when it would be returned to

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<sup>14</sup> While the court believes this is a permissible reading of the standard, it is a circuitous way to reach the undoubtedly salutary goal of requiring the examination of elevators. Rather than “squeeze” the requirement for elevator examination out of section 56.18002(a), the court believes the Secretary is well advised to promulgate a standard specifically directed at the mandatory examination of all elevators, much as he has done with regard to surface coal mines and surface areas of underground coal mines. *See* 30 C.F.R. §77.1430. Cemex argues at some length that notice and comment rulemaking is in fact **required** (Resp. Br. 22-26), but the court disagrees. While rulemaking may well be preferable, the fact is that section 56.18002(a) as presently written may be read to apply to the plant’s individual elevators in certain circumstances.

service. Cemex cannot have violated the regulation by failing to have a competent person examine the car, doors and landings of an elevator Cemex already had taken out of service. This leaves the question of whether the Secretary proved that on a prior shift the car, doors and landings of the pack house elevator had been used as a working place and Cemex failed to designate a competent person to examine those parts of the elevator during the shift when it was so used. The Secretary did not establish what type of work was done in connection with the pack house elevator and did not point to a shift in the past when the company used the pack house elevator as a workplace but failed to examine its parts as required. In fact, the Secretary's allegations regarding the pack house elevator are vague to a fault. They seem to consist of the assertion that "at some time or another" in the past a violation must have taken place. *See e.g.*, Tr. 46. This is too slender a reed to support a violation, and the court concludes that as far as the pack house elevator is concerned, the Secretary did not prove the company violated section 56.18002(a).

With regard to the mill room elevator, Smith testified that it is a "personnel elevator which transports . . . miners from floor to floor." Tr. 37. Smith stated that he found no deficiencies when he inspected the mill room elevator. Tr. 93-94. Smith estimated that in general five or six miners work in the mill on any given shift. Tr. 112. Stephens testified that some elevators are used daily at the plant (Tr. 176), but that on March 10 he saw no one working near the mill room elevator. Tr. 169. Stephens disagreed with Smith's testimony that the mill elevator is used only to transport personnel. He stated that it is also used to convey materials and equipment (Tr. 183) ("[h]ot hand tools . . . tool bucket, stuff like that" *Id.*). The court accepts Stephen's testimony. Tr. 182-183. Stephens was more familiar than Smith with operations at the plant and he was a credible witness. Use of the elevator to convey materials and equipment means that when it was so used the items had to be gathered on the landing, the doors had to be opened and the various items had to be loaded into the car and then unloaded. Loading and unloading the materials and equipment made the car, doors and landings for the mill room elevator a working place (i.e., "a place . . . where work is being performed." 30 C.F.R. § 56.2). Therefore, the car, doors and landings were subject to examination by a competent person designated by Cemex on the shift when the inspection took place if work involving the car, doors and landings was being performed, was assigned to be performed or reasonably could have been expected to be performed or if such work took place during a prior identifiable shift.

As the court noted, there is no evidence any of the five elevators were in use during the shift when Smith and Schlick were at the mine on March 10.<sup>15</sup> Nor is there sufficient evidence for the court to conclude it was reasonable for Cemex to expect the mill room elevator would be

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<sup>15</sup> The court recognizes Smith credibly testified he was told there were elevators at the plant that were used daily and that Stephens' testimony corroborated that of Smith. Tr. 41, 95. But even if the Secretary had offered testimony of actual use this alone would not bring an elevator within the standard. The pertinent question is how and why an elevator is used. Tr. 35, 43, 95. If it is used only to transport plant personnel, the court believes the elevator does not come within the standard. The court fully agrees with Cemex that use of an elevator solely to move personnel from one level to another to get them to a working place does not in and of itself mandate an elevator's examination. *See Resp. Br. 16.* (To hold otherwise would make modes of transportation to, into and out of the plant also subject to examination under the standard.)

used to convey materials and equipment or to transport workers carrying work-related materials or equipment before the March 10 shift ended. Further, the evidence of prior use offered by the Secretary is too vague to support finding a violation. At most, the evidence leads to the conclusion that the mill room elevator may have been used to convey work-related materials, equipment, or employees transporting such equipment in the indeterminate past. The Secretary does not offer evidence as to when and on what shift this occurred, and the court concludes that as far as the mill room elevator is concerned, the Secretary did not prove the company violated section 56.18002(a).

With regard to the preheater tower elevator, Smith described it as a “personnel floor to floor” elevator. Tr. 37. The preheater tower has nine floors. Smith estimated that four or five employees work on or near the preheater tower. Tr. 113. According to Smith, workers use the preheater tower elevator to go from floor to floor to provide maintenance and to observe the processing of material. Tr. 38. At the top floor of the tower, workers sometimes use a tape measure to check the depth of material that is being processed. They also use compressed air or water to help the material move through the processing system. Tr. 38-39. Although workers could use stairs to reach the landings, Smith thought the weight of materials and tools the miners often carry made use of the stairs unlikely. Tr. 39. The court agrees and finds it highly unlikely miners would walk up the stairs rather than use the elevator. The court further finds that loading equipment onto and off the elevator car to facilitate the processing of plant material makes the landings, doors, and car of the preheater tower elevator working places within the meaning of section 56.18002(a).<sup>16</sup>

The court finds it significant that the purpose of the work conducted at the preheater tower is to maintain the smooth processing of material at the plant. While there is no evidence the preheater tower elevator was in use while Smith was at the mine (Tr. 95, 169), the court infers from the fact the task to be accomplished is production-related and from the fact production was and had been ongoing (the plant was not shut down), that it is reasonable to conclude the preheater tower elevator was used on the most recent production shift to move workers and their equipment to the top of the tower to monitor and expedite the processing of material. The loading and unloading of the necessary equipment and materials by the employees made the elevator’s car, doors and landings working places and, in the court’s view, brought the preheater tower elevator within the standard on the production shift most recent and prior to the March 10 inspection when it was so used. For these reasons the court concludes the evidence supports finding a violation of section 56.18002(a) regarding the preheater tower elevator.

With regard to the burn room/kiln elevator, Smith testified that it is used to transport both personnel and materials from floor to floor. Tr. 37. Smith remembered seeing plant personnel walking around the burn floor, but he could not recall what they were doing and no one was

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<sup>16</sup> The court rejects Cemex’s argument that the transportation of miners does not make the mill room elevator a working place. Resp. Br. 16. More than just transporting employees from one place to another is involved. The employees themselves are transporting work-related equipment from the landing, through the door and into the car of the elevator and reversing the process at another landing and this work is part of the process of production at the plant. In the court’s view, when the preheater tower elevator is so used, the work of the employees makes the car, doors, and landings a working place subject to the standard.



working in the area of the elevator's first and second floor landings on March 10. Tr. 167-168. In fact, Stephens testified he did not know the last time the elevator was in operation. He stated that based on the company's records the elevator had not been operated two months before March 10 and two months after March 10. Tr. 168. He described the elevator as "hardly ever use[d]." *Id.*

The court finds that record confirms the burn room/kiln elevator was not in use during the shift when Smith conducted the inspection and there is no evidence it was going to be so used if the shift continued after the inspection ended. In the court's view, Stephens' un rebutted testimony that he could not recall when the burn room/kiln elevator was last used, that its use was infrequent, and the lack of any testimony as to when it was last used in the performance of work-related activities means that as far as the burn room elevator is concerned, the Secretary failed to prove the company violated section 56.18002(a).

There is very little evidence regarding the TBA tower elevator. Smith described it as a "personnel elevator." Tr. 37. There is no evidence of the elevator's other use or uses, if any. As the court stated, using an elevator solely to transport workers does not, in and of itself, make the elevator a "working place" and bring the elevator's car, doors, and landings within the strictures of section 56.18002(a). The court therefore finds the Secretary did not prove a violation regarding the TBA tower elevator.

For reasons set forth above the court finds that the Secretary established that Cemex violated section 56.18002(a), but only with regard to the preheater tower elevator.

### **S&S AND GRAVITY**

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. §814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). 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, 2-4 (Jan. 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The S&S nature and the gravity of a violation are not synonymous. "[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 court concludes the Secretary established that the violation was of an S&S nature. The first *Mathies* element has been established in that the court finds that Cemex violated the standard when it failed to designate a competent person to examine the preheater tower elevator. To prove the second element, the Secretary needs only to identify a discrete safety hazard

associated with the S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n.5 (Dec. 2012). The possibility that a defective locking mechanism on the preheater tower elevator's doors would not be detected and corrected because a section 56.18002 examination was not conducted presented the associated hazard that an unsuspecting worker, mistakenly thinking the elevator car is at the landing, would open the elevator's door and would slip or fall into the empty shaft. This happened at the Louisville plant and by applying the standard to the elevator in question, the Secretary hoped to prevent the hazard's recurrence. With regard to the third element of the *Mathies* formula, the Secretary established that the hazard contributed to by the violation was reasonably likely to result in an injury. The issue must be viewed in the context of continuing operations at the plant. Use of the preheater tower elevator was related to production, which on March 10 had been and was ongoing, and which means the elevator had been and would continue to be regularly used. When regular use is coupled with the fact the locks on an elevator's door can malfunction and the door can be opened without the car being present (*see* Tr. 51), the court finds that as mining continued, it was reasonably likely a malfunctioning elevator door would not be detected and a worker, mistakenly thinking the car was at the landing, would open the door and fall into the shaft. Any resulting injury was reasonably likely to be at least of a reasonably serious nature.

There is no doubt that the violation was serious. The "effect of the hazard" assuming it occurred was at least a serious injury. *Consolidation Coal Co.*, 18 FMSHRC at 1550.

### **NEGLIGENCE**

Smith found that Cemex was moderately negligent. The court disagrees and concludes the company was not negligent. The Secretary's definitions of negligence (30 C.F.R. §100.3(d)) are not binding on the Commission. *See Brody Mining, LLC.*, 37 FMSHRC 1687, 1701-02 (Aug. 2015). The Commission has stated, "In determining whether an operator met its duty of care, we consider what actions would have been taken under the circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining* at 1702 (quoting *Jim Walter Resources*, 36 FMSHRC at 1975). The Commission also has stated that the court should "consider the totality of the circumstances holistically" (37 FMSHRC at 1702) and that in doing so it should take account of "the actions that a reasonably prudent operator would or would not have taken under the circumstances presented." *Id.* at 1703. As set forth more fully in its discussion of due process, the court finds that while application of the standard to one of the elevators at the plant is a permissible way to read section 56.18002(a), given the broad wording of the standard and the Secretary's consistent failure to apply the standard at the plant, Cemex reasonably could have read the standard as inapplicable to its elevators, and the company cannot be held to have failed to meet a standard of care it was reasonable to conclude did not exist.

## DUE PROCESS

Cemex would have the court vacate the citation on due process grounds. It contends the Secretary violated its Constitutional rights by failing to provide it with fair notice of his interpretation of the standard. *Id.* 17.

The Commission has held:

Where an agency imposes a fine based on its interpretation [of a standard], a separate inquiry may arise concerning whether the respondent has received “fair notice” of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). . . . The Commission has not required that the operator receive actual notice of the Secretary’s interpretation. Instead, the Commission uses an objective test, i.e., “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

*Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998).

But this does not end the matter because an agency’s interpretation may be reasonable and nevertheless fail to provide the notice required in some circumstances to support the imposition of a penalty. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995). There is no doubt that the Secretary’s application of the standard to the plant’s elevators was a “first” at the plant. Tr. 139; *see also* Tr. 140. Before March 10 the company relied on its contractor, Otis, to examine all of its elevators and to correct reported elevator defects on an “as needed” basis. Tr. 96, 141. Stephens testified that when a defect was reported by an employee, the company “would call Otis, and they would come and repair it.” Tr. 153. He added, “We relied on Otis[.]” Tr. 154, *See also* Tr. 179. In December 2013 and again in January 2014, Smith reviewed workplace examination records at the plant. Tr. 74. Although at the time a designated person was not conducting workplace examinations of the elevators, Smith did not cite the company for a violation of section 56. 18002(a) and did not ask the company about its policy and practice with regard to elevator workplace examinations. Tr. 74-76, 166. Moreover, on March 4, 2014, Lockett, who was conducting a spot inspection at the plant that included the elevators, did not issue any elevator related citations Tr. 98-99, 164. Nor did Lockett ask Stephens if Cemex had designated an individual to examine the elevators. Tr. 165. Smith’s and Lockett’s lack of action in December 2013, January 2014 and early March 2014 reflects either the agency’s lack of concern with elevator inspection at the plant, its uncertainty as to whether the standard applied, its conviction the standard did not apply to any of the elevators, or its determination that the

company's reliance on Otis provided its employees with adequate protection.<sup>17</sup> Not until sometime after the February 21, 2014, accident and Lockett's March 4 inspection did MSHA decide to apply section 56.18002(a) to elevators at metal/non-metal facilities. Once the decision was made, it was announced to Cemex not through a program policy letter or through the February 28, 2014, "fatalgram" (Gov't Exh. S-6), but through the agency's issuance of the subject citation. Gov't Exh. S-2. No prior notice was given to Cemex that MSHA would apply the standard to the plant's elevators. Indeed, if anything, Lockett's "citationless" inspection on March 4 reasonably could have been interpreted by Cemex to signal that the then *status quo* complied with the Act. By issuing the citation without prior notice on March 10, the agency effectively "sandbagged" the company. This does not mean, however, that Cemex necessarily was deprived of fair notice. Another analytical step is required.

When an agency uses a citation as the initial means for announcing a particular interpretation, the court must "ask whether the regulated party received . . . notice of the agency's interpretation in the most obvious way of all; by reading the [regulation]." *General Electric*, 53 F.3d at 365. The court has concluded that it is permissible to read section 56.18002(a) to require a designated person to examine a particular elevator car, doors and landings on each shift when an operator's employees will be conducting work-related activities (e.g. the transportation of work-related equipment or materials) on, in, or through an elevator's car, door or landing on or during a shift when such work is or will be conducted or when such work reasonably can be expected to be conducted. The court also concludes that the Secretary's total lack of prior enforcement, the broad wording of the definition of "working place" and the fact that elevators are not specifically mentioned in the regulations for surface and underground metal and non-metal mines<sup>18</sup> means that Cemex reasonably could have read section 56.18002(a) as not applying to its elevators. Therefore, even though the court finds Cemex violated section 56.18002(a) with regard to one of its elevators and that the violation was S&S, the court's findings are a nullity, because in the court's view, Cemex was not provided with constitutionally adequate notice of the Secretary's interpretation of section 56.18002(a), and the citation must be vacated.<sup>19</sup>

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<sup>17</sup> Given the documented history of Secretarial non-enforcement at the plant, the Secretary's assertion that "MSHA simply expected the elevator car and the surrounding landing area to fall under the exam umbrella" rings hollow. Sec. Br. 22. A far more likely scenario is that MSHA never gave a thought to the inspection of elevators under any standard until after the February 21, 2014, accident and then decided that section 56.18002(a) could be stretched to fit the need. As Schlick put it, "[A] fatality . . . would be a wake-up call for us to look at things differently." Tr. 128.

<sup>18</sup> In contrast, see the detailed regulation of hoists, equipment that like elevators, is raised and lowered by cables. 30 C.F.R. § 56.19045 - § 56.19083; 30 C.F.R. § 57.19.000 – 57.19135.

<sup>19</sup> The Secretary's arguments to the contrary are not persuasive. The Secretary states that Cemex's contract with Otis put the company on notice that areas not listed in the contract are Cemex's responsibility subject to inspection by the company. Sec. Br. 23. However, a more reasonable conclusion is that the long standing nature of the contract, which went into effect in 1977, and the lack of any indication from MSHA that Cemex's practice of relying on Otis

(continued...)

**CITATION NO.**  
8733025

**DATE**  
3/10/14

**30 C.F.R. §**  
56.14100(c)

### **THE VIOLATION**

Section 14100(c) requires that when defects make continued operation of self-propelled mobile equipment hazardous to persons, defective 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.” The Secretary charges that the “in-use” lights on the first and second floor call stations of the burn floor elevator did not activate when the elevator car was in motion or go out when the car stopped. As a result a worker might think the car was at the first or second floor when it was not. The worker might try to open the door of the elevator and because the interlock prevented the door from opening, might strain his or her back. Exh. S-3, Tr. 55-56. In addition, the telephone inside the elevator car was missing. Workers could not communicate over the phone with rescuers if workers became trapped in the elevator. Exh. S-3, Tr. 55-56.

Based on Smith’s undisputed testimony, the court finds both conditions existed as alleged in the citation. Tr. 54-55. The court agrees with Smith that each condition posed a hazard to persons. The fact that the “in-use” lights were not working means a worker might think the car was at either the first floor or second floor call station when it was not, might try to open the locked door, and in the process might injure himself or herself. Further, as Smith implied, lack of working “in-use” lights created the possibility, if coupled with a failure of the interlock mechanism, for another Louisville-type accident. Tr. 56. In addition, the lack of a telephone in the elevator car clearly deprived workers of a way to call for help should they become trapped in the car. Tr. 57. The court agrees with Smith that the cited defects made operation of the elevator hazardous to persons riding in it or working on the landings near it. Smith testified, and Cemex does not dispute, that the elevator was not taken out of service and the court finds, in the words of the standard, that the elevator was not marked “to prohibit further use until the defects [were] corrected.” For these reasons, the court concludes that Cemex violated section 56.14100(c) as charged.

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<sup>19</sup> (...continued)

violated any regulatory provision, led the company logically to conclude its practice did not run afoul of the Act and Part 56. The Secretary also argues the accident at the Louisville plant should have alerted the company to “[bring] the elevator cars and landing areas under the workplace exam umbrella.” *Id.* However, rather than alert the company to the fact it was in violation of a regulation because of its adherence to a contractually based practice, a practice for which it never had been cited, a more logical conclusion for the company to draw was to request its contractor ensure the interlock mechanisms on the plant’s elevators doors were properly functioning. This is exactly what Cemex did. Finally, the Secretary states that the “clear mandate” of the standard should have alerted Cemex to its duty to comply. *Id.* But, as noted above, the standard is open to interpretation to say the least. The Secretary failed to apply it prior to the accident and reversed its course after the accident. If the standard provided a clear mandate it is logical to assume the Secretary’s actions would have been consistent.

## **GRAVITY and NEGLIGENCE**

The court concurs with Smith's finding that the violation was not serious and that it was unlikely to result in an injury producing more than lost workdays or restricted duty. First, as Smith noted, the doors of the elevator were provided with windows. Tr. 58. Thus, a worker could see if the elevator car was at the landing before he or she tried to open the door. Moreover, Smith checked the interlocks during the course of his inspection and found they functioned properly. *Id.* The court concludes that it was therefore unlikely the non-functioning "in-use" lights would lead to any injury. The court also concludes, given the presence in the mine of other communication devices, namely portable radios and cellular phones (Tr. 57), it was highly unlikely that an injury would result from the fact the car's telephone was missing.

While the court agrees with the inspector regarding the gravity of the violation, it takes issue with the inspector's finding of high negligence. Exh. S-3; Tr. 58-59. The finding is based upon the fact that Cemex had not conducted a workplace examination of the elevator. "A workplace exam being performed daily on the elevator would have addressed the defects when observed." Tr. 59. Rather than high negligence, the court concludes the company's negligence was moderate. While the cited conditions were visually obvious and should have been detected and corrected, as the court has found, it was reasonable for the company to conclude section 56.18002(a) did not apply to its elevators and thus not to designate a competent person to examine their car, doors and landings on a shift when they were or would be used for work-related activities. Further, while section 56.14100(a) requires that when self-propelled mobile equipment is used during a shift, the equipment be examined before it is placed in operation, there is no evidence the cited elevator was used during the shift on which the inspection took place or on a prior identifiable shift. Nor is there certainty as to how long the cited conditions existed. The most likely implication is that they occurred sometime between Lockwood's and Smith's inspections, a not inordinately long period. Tr. 105. The court therefore finds that Cemex's negligence was moderate.

## **OTHER PENALTY CRITERIA**

The burden of establishing that any penalty assessed will affect the company's ability to continue in business is born by Cemex. The company did not offer evidence or make an argument on the issue, and the court finds that the penalties it assesses will not affect Cemex's ability to continue in business. The parties stipulated that Cemex has a small history of previous violations. Tr. 24; *see* Exh. S-1. The parties did not stipulate or present evidence as to the size of the operator, but the court notes that when proposing penalties, the Secretary based the proposals in part on the fact that the plant is of a medium size, but that Cemex's controlling entity is large. Petition for Assessment of Civil Penalty, Exh. A. The court therefore finds that Cemex is large in size. Finally, when proposing penalties the Secretary gave the company a 10 percent reduction because of its abatement efforts. The court therefore finds that Cemex exhibited good faith in seeking to rapidly abate the violations.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8733024	3/10/14	56.18002(a)	\$1,530	\$0

The court has found that the Secretary's application of the standard deprived Cemex of fair notice. The citation must be vacated. A penalty cannot be assessed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8733025	3/10/14	56.14100(c)	\$308	\$208

The court has found that the violation was not serious and was due to Cemex's moderate negligence. The Secretary proposes a penalty of \$308. Given the court's gravity and negligence findings and the civil penalty criteria discussed above, the court finds that a penalty of \$208 is appropriate. The court departs from the Secretary's proposed penalty because it finds the negligence of the company to be less than the Secretary alleges.

### **ORDER**

Citation No. 8733024 **IS VACATED**. Citation No. 8733025 **IS MODIFIED** by reducing the Secretary's negligence finding from "high" to "moderate." Within 30 days of the date of this decision, Cemex **SHALL PAY** a civil penalty of \$208.<sup>20</sup> Upon payment of the penalty this proceeding **IS DISMISSED**.

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

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/db

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<sup>20</sup> 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





# **ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

April 1, 2016

GINA HACKING,  
Complainant,

v.

STAKER & PARSON COMPANIES,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-931-DM  
RM MD 14-11

Mine: Lehi Point East  
Mine ID: 42-02130

## **ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Complainant, Ms. Gina Hacking, worked as an equipment operator at the Respondent's Lehi Point East mine from September 2004 to April 2011. After formally informing the Respondent that she was suffering from back pain in September 2010, the Complainant began leave in April 2011 under the Family and Medical Leave Act (FMLA) to undergo back and neck surgery.<sup>1</sup>

Hacking's allowable FMLA leave expired in August 2011 when her doctor cleared her to return to a "light duty" position. However, she was not cleared to work with heavy equipment. Glassford Medical Order, August 10, 2011. The Respondent subsequently informed the

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<sup>1</sup> Ms. Hacking filed a workmen's compensation claim with the Utah Labor Commission on January 25, 2011 while she was still working for Staker & Parson Companies. The Respondent contested this claim and argued that Ms. Hacking had not provided timely notification of her injuries and that her injuries were not work related. Following a decision by the Utah Labor Board and multiple appeals, the Complainant and Respondent eventually settled the workmen's compensation claim in December 2013. December 12, 2013 Settlement Order.

Complainant that they did not have any light duty positions<sup>2</sup> available for her and terminated the Complainant's employment on August 11, 2011.

Hacking first filed a section 105(c) complaint with MSHA on May 1, 2014, two years and nine months after her discharge, alleging that the Respondent had terminated her employment based upon her workplace injuries, gender, and safety complaints. MSHA May 1, 2014 Complaint, 2. On July 11, 2014, MSHA notified Hacking that "MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred." July 11, 2014 MSHA Notification Letter. Hacking then filed a 105(c)<sup>3</sup> complaint with the Commission on August 13, 2014 and the Chief Judge assigned this matter to the court on June 9, 2015.

Following further discovery, this matter must be dismissed as the Complainant has not offered a justifiable excuse for the extremely late filing of her complaint and the delay has prejudiced the Respondent's ability to defend itself. 30 U.S.C. 815(c)(2) (requiring miners to file discrimination claims with the Secretary of Labor within sixty days of the date of discrimination); see also *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (affirming ALJ dismissal of 105(c) claim filed four months late and stating that Congress did not intend to "excuse a miner's late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act").

#### Commission Procedural History<sup>3</sup>

Hacking initially filed a discrimination claim with MSHA on May 1, 2014. The complaint alleged that the Respondent failed to adequately respond to Hacking's complaints regarding a faulty haul truck seat, bad haul roads, and treated her differently as a woman. MSHA

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<sup>2</sup> The Respondent does not offer light duty to workers with off-duty injuries but does offer light duty positions to workers injured on the job. *Wilson Aff.*, 2. In August 2011, the Respondent considered Hacking's injuries non-work related based upon the evaluation of the company physician. *Thackery Aff.*, 2.; Oct. 2, 2012 ULB Decision, 4. Even if this matter were to proceed to hearing, the dispute regarding the cause of the Complainant's injuries and the Respondent's response to those injuries is not one this court could resolve. *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act."); *Jason Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 133 (ALJ Manning) (March 2003) (operator's refusal to offer miner light duty position after suffering workplace injury was not governed by section 105(c) of the Mine Act).

<sup>3</sup> Both parties submitted numerous documents and records concerning Hacking's employment with Staker & Parson Companies. The court has reviewed all documents submitted but has only referenced those relevant to the threshold issue of timeliness under section 105(c)2 of the Mine Act.

May 1, 2014 Complaint, 2. MSHA notified Hacking it did not find sufficient evidence to pursue the claim on July 11, 2014.<sup>4</sup>

Hacking filed a 105(c)3 complaint with the Commission on August 14, 2014, restating the allegations contained in her initial complaint to MSHA. The Respondent failed to answer the Complaint and the Chief Judge ordered the Respondent to submit an answer on April 10, 2015. The Respondent filed a response on May 11, 2015, moving to dismiss the complaint on jurisdictional, timeliness, and factual grounds. The Respondent specifically objected to the Complainant's two and a half year delay in filing her initial complaint. Resp. May 11, 2015 Mot. to Dismiss, 1. The Respondent also cited Hacking's failure to file her 105(c)3 complaint with the Commission within 30 days after receipt of the Secretary's decision as additional grounds to dismiss the complaint for timeliness concerns. *Id.* at 2.

On June 1, 2015, the Chief Judge denied the Respondent's Motion to Dismiss. The Chief Judge directly addressed and excused Hacking's failure to file with the Commission within thirty days of receiving notice that MSHA would not pursue her claim, stating,

Although it is not clear when Complainant actually received the Secretary's July 11, 2014 letter, I do not consider a three day delay to be prejudicial. Delays much greater than this have been approved by the Commission.

Chief Judge June 1, 2015 Order, 2.

However, the cases cited by the Chief Judge dealt with delays caused by the Secretary after the miner filed their claim with MSHA within the statutory period. The Chief Judge did not appear to specifically address Ms. Hacking's failure to initially file her claim with the Secretary within sixty days of the alleged discrimination. Chief Judge June 1, 2015 Order, 2, citing *Sec'y Labor ex rel. Hale v. -I-A Coal Co.*, 8 FMSHRC 905, 909 (June 1986)(reinstating 105(c) complaint when miner filed complaint with MSHA 5 days after alleged discrimination and Secretary delayed filing a discrimination complaint with the Commission for over two years); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994)(excusing Secretary's four month filing delay when miner submitted discrimination complaint to MSHA approximately forty days after alleged discrimination occurred).

The Chief Judge stated that all other matters were "factual in nature and should be remanded to the Judge." Chief Judge June 1, 2015 Order, 2. The Chief Judge subsequently

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<sup>4</sup> MSHA did issue Citation No. 8824803 to the Respondent on July 31, 2014, for failure to report an injury pursuant to 30 CFR 50.20(a). *Staker & Parson Companies*, 37 FMSHRC 2099, 2100 (September 2015) (ALJ Gill). Citation No. 8824803 alleged that the Respondent failed to report Hacking's injuries as a workplace injury after being given official notice on July 2, 2013 by the Utah Labor Board that her injuries were workplace related. *Id.* The ALJ affirmed Citation No. 8824803 and assessed a penalty of \$100.00 after the Respondent failed to respond to a motion for summary judgment submitted by the Secretary. *Id.* at 2101-2102.

assigned this matter to me on June 9, 2015. After conducting a teleconference call with the parties, the court permitted the Complainant to respond to the Respondent's Motion to Dismiss. Hacking submitted a response on July 20, 2015 restating many of her initial complaints to MSHA, but also alleging that she complained to her supervisor about unsafe haul road and pit conditions. Hacking July 20, 2015 Response, 2.

On August 17, 2015, the court denied the Respondent's Motion to Dismiss. Within, the court restated the Chief Judge's initial findings regarding timeliness without further analysis. August 17, 2015 Order, 2. The court also rejected the Respondent's objection that Hacking's pleading failed to properly allege a prima facie case of discrimination. The court noted that the Commission maintains a lenient pleading standard for pro se discrimination complainants and determined that the Complainant's supplemental answer satisfied the minimal pleading burdens of 30 CFR 2700.42. *Id.* at 4.

The court then scheduled this matter for hearing in December 2015 and subsequently rescheduled the hearing to permit further discovery. Following the close of discovery, the Respondent submitted a motion for summary judgment on February 16, 2016. The Respondent stated within the motion that the Complainant's claim should be dismissed for the following reasons:

- 1) A claim waiver in a December 2013 settlement agreement executed by the parties barred claims arising from Hacking's employment with Staker-Parson from 2004 through 2011.
- 2) The claim was time-barred by section 105(c)2 of the Mine Act as Hacking filed more than two years past the 60 day statutory filing period and has not provided a justifiable excuse for the delay.
- 3) The claim failed to provide any evidentiary link between Hacking's safety complaints and Respondent's management decision to terminate her employment in August 2011.
- 4) The Complainant is unsuited for backpay or reinstatement as she continues to suffer from significant back pain and requires prescription medication during work activities.

February 16, 2016 Resp. Mot., 6, 9, 11, 17.

The court again postponed the hearing and allowed the Complainant three weeks to respond with instructions to answer the specific issues outlined above. Hacking filed a response on March 8, 2016 and the court reviewed all submissions at length before issuing this decision. After careful review, the court finds that the Complainant has not provided a justifiable explanation sufficient to excuse the nine-hundred day initial filing delay. Having made this determination, further analysis of the Respondent's alternate grounds for dismissal is unnecessary.

### Section 105(c)2 Discrimination Claim Filing Requirements

Under 30 U.S.C. § 815(c)(2), “Any miner ... who believes that [s]he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination.” (emphasis added). After a miner files a complaint, the Mine Safety and Health Administration (MSHA) investigates it on behalf of the Secretary of Labor. See, e.g., *Simpson v. Fed. Mine Safety & Health Review Comm'n*, 842 F.2d 453, 456 n. 3 (D.C.Cir.1988). If the Secretary finds that a violation occurred, the Secretary may pursue the claim on the miner's behalf before the Commission. 30 U.S.C. § 815(c)(2). If not, the miner may file a claim with the Commission on her own behalf under 30 U.S.C. § 815(c)(3).

The Mine Act’s legislative history relevant to the 60–day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60–day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Accordingly, the Commission does not consider the 60–day limit of § 815(c)(2) to be jurisdictional. See *Morgan v. Arch*, 21 FMSHRC 1381, 1386 (1999) (“Commission case law is clear that the 60–day period for filing a discrimination complaint under section. . . § 815(c)(2), is not jurisdictional.”). It will hear cases in which a complaint's untimely filing is due to “justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921–22 (1996).

On the other hand, “[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” *Id.* at 1922. The Commission places the burden of proving justifiable circumstances on the miner, and places the burden of demonstrating material legal prejudice on the mine operator. See *id.*; *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (1984).

### Analysis

The Respondent terminated Hacking’s employment on August 11, 2011 and Hacking did not file a claim with MSHA until over two years and nine months later on May 1, 2014. February 16, 2016 Resp. Mot., 9; March 8, 2016 Hacking Ans., 3; August 11, 2011 Wilson E-Mail. Thus,

the Complainant must demonstrate that justifiable circumstances explain the nine hundred day delay that occurred after the 60 day filing period expired on or about November 11, 2011.

The court is sympathetic to Hacking's contention that she was suffering from complications from surgery, undergoing a divorce, and caring for her son during the two plus years that elapsed between her termination and her claim filing. March 8, 2016 Hacking Ans., 3. However, less than a month after being terminated by the Respondent, Hacking testified at length on September 8, 2011 before the Utah Labor Board (ULB).

Following a ULB decision on October 2, 2012 and multiple appeals proceedings, Hacking, with aid of counsel, later negotiated a settlement agreement finalizing all issues related to her workmen's compensation claim. December 12, 2013 Settlement Agreement. Hacking has stated that she took a very active stance during those settlement negotiations, refusing to sign an expansive liability waiver presented by the Respondent when the parties reduced their agreement to writing. March 8, 2016 Hacking Ans., 2.

Thus, Hacking's personal affairs did not prevent her from participating in work-related legal action in a different jurisdiction from September 2011 through December 2013. Accordingly, this court cannot accept Hacking's personal affairs as a legitimate excuse for the lengthy delay that occurred in this matter.

Furthermore, the workmen's compensation claim did not serve as a substitute for filing a complaint with MSHA, as the workmen's compensation claim centered on the cause of the Complainant's injury rather than on the Complainant's protected safety activities. October 2, 2012 ULB decision. As such, the Complainant cannot rely on the ULB proceedings to toll or extend the section 105(c) filing deadlines. *Hollis*, 6 FMSHRC 25 (affirming ALJ dismissal on timeliness grounds when miner filed a 105(c) complaint with MSHA four months late after first pursuing a claim before state agency alleging racial discrimination).

The Complainant has not claimed that she was ignorant of her rights under the Mine Act. Hacking has readily acknowledged that the Respondent provided yearly refresher training on miner's safety rights. March 8, 2016 Hacking Ans., 5-6. Hacking has specifically confirmed that this training covered protection from discrimination, stating "I know that in MSHA training we learned that we are supposed to be able to make a complaint without fear of being terminated." *Id.* at 5.

Hacking does contend that the Respondent failed to instruct on her how to file a discrimination claim during miner training and was unaware of the 60 day filing requirement. March 8, 2016 Hacking Ans., 6; Hacking Admission Response No. 5. Even accepting these contentions as true, this rather bare explanation is insufficient to explain the nine hundred day delay that occurred after her termination. As an initial matter, Hacking had clear notice that MSHA was the governing regulatory agency in regards to her discrimination claim. The training documents submitted by the Respondent and acknowledged by the Complainant clearly outline MSHA's authority to issue fines for various infractions and list discrimination against safety activities as prohibited conduct. Resp. Miner Training Outline, 4; March 8, 2016 Hacking Ans., 5.



Neither the Commission nor MSHA have ever required an operator to give miners explicit step-by step instructions on how to file a discrimination claim. *Hollis*, 6 FMSHRC 24 (holding that miner's regular participation in safety committees and MSHA meetings indicated that miner was sufficiently aware of his 105(c) rights to enforce filing requirements); *Sinott v. Jim Walter Resources, Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994)(ALJ Maurer)(holding that section 105(c)2 does not require operators to notify discharged miners that discrimination may have occurred). Furthermore, the court is not persuaded that the lack of specific instructions regarding filing requirements is in fact the actual reason for more than two years of delay in filing. *Olson v. FMSHRC*, 381 F.3d 1007, 1012-1013 (affirming Commission ALJ finding that Complainant's alleged fear of retaliation was not, under the circumstances, a credible explanation for filing delay).

In fact, Hacking states in her answer that she "had other things to deal with that took time and money and had the need of my immediate attention." *Id.* at 3. While the Commission has listed "excusable neglect" as a justifiable circumstance that may excuse a late filing, the Commission has clarified that "the fair hearing process does not allow us to ignore serious delay." *Hollis*, 6 FMSHRC 25. Indeed, a fellow ALJ has previously characterized a claim filed three years and three months after the alleged discrimination as "extra-ordinarily late" and "inherently prejudicial." *Sinott*, 16 FMSHRC 2447-48.

In this matter, one potential witness who appears to have worked closely with Hacking died in October 2015. Thackeray Aff., 3. The court notes that transcripts and recordings of Utah Labor Board proceedings on July 7, 2011 and September 8, 2011 are available, including testimony from Hacking's deceased co-worker. March 8, 2016 Hacking Ans., 5. However, upon review, the testimony in these proceedings centers almost exclusively on the condition of the haul truck seat beginning as early as 2006 and whether or not Hacking notified her supervisors of her back pain in a timely fashion. July 7, 2011 Hacking Deposition; September 8, 2011 ULB Hearing. The circumstances and possible motivations surrounding Hacking's dismissal in August 2011 were not detailed during either of these hearings.<sup>5</sup> As such, transcripts and recordings of those hearings offer this court little relevant evidence regarding a possible connection between Hacking's safety complaints and the Respondent's decision to terminate her employment in August 2011.

Hacking has indicated that she intends to call a number of Staker & Parson Companies employees to testify at hearing. The court does not doubt that these witnesses would attempt to

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<sup>5</sup> Hacking testified in the Utah Labor Board proceedings that she had recently been terminated due to her inability to work in a loader pursuant to the company's policy regarding light duty positions and off-duty injuries. The manager responsible for her termination, David Wilson, did not testify at the September 8, 2011 ULB Hearing as it does not appear he was involved with her injury report. Wilson Aff., 2.

describe events from early 2011 and earlier to the best of their ability. However, a fellow Commission ALJ has noted in similar circumstances arising from a three year delay,

it is highly questionable whether the other company employees who might have had some knowledge of the events surrounding (the) termination would have a present recollection of those events.

*Sinott*, 16 FMSHRC 2448.

Indeed, Hacking's own testimony during a recent deposition indicates that she has difficulty remembering the details and sequence of her alleged safety complaints and termination. February 11, 2016 Hacking Depo., 65, 92, 94, 109. As such, the quality of testimony that would be produced at hearing is likely to prejudice the Respondent's ability to defend itself.

The court notes that the Respondent's failure to timely answer the Complainant's 105(c)3 filing with the Commission added seven months to the delay present in this case. June 1, 2015 Chief Judge Order, 1. The court is also aware that this matter has proceeded for an additional ten months after being assigned by the Chief Judge. Nevertheless, the Respondent has never waived their timeliness objection and the court has only considered the thirty-one month delay attributable to the Complainant.

To this court's knowledge, a thirty-one month filing delay is more than three times longer than any similar initial filing delay previously excused by the Commission. *Morgan*, 21 FMSHRC 1386 (excusing claim filed by miner nine months late when miner initially lodged complaint with union). Furthermore, there has been no showing that the Respondent, MSHA, or any other agency or entity is responsible for the initial thirty one month filing delay. Thus, the Complainant's individual delay is unlike lengthy delays caused by the Secretary that have been previously excused by the Commission. *Hale v. -I-A Coal Co*, 8 FMSHRC 909 (reinstating 105(c) complaint when miner filed complaint with MSHA 5 days after alleged discrimination and Secretary delayed filing a discrimination complaint with the Commission for over two years); *Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2214-15 (excusing Secretary's four month filing delay when miner submitted discrimination complaint to MSHA approximately forty days after alleged discrimination occurred).

Therefore, allowing the Complainant to proceed without a justifiable excuse would exceed the limits of delay permissible under the Mine Act. *Sinott*, 16 FMSHRC 2447, (stating that, “At some point there has to be an outer limit, if the 60 day rule contained in the statute has any meaning at all”).

### **ORDER**

The Respondent’s Motion to Dismiss is **GRANTED**. Accordingly, this matter is **DISMISSED** with prejudice. The Complainant may appeal this matter to the Commission within 30 days of the date of this order.

/s/ David P. Simonton

David P. Simonton

Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 7, 2016

JONATHAN BETHEL WOODWARD,  
Complainant,

v.

CARMEUSE LIME AND STONE,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. SE 2016-59-DM  
SE-MD-15-23

Mine: Filled Products – North Mill  
Mine ID: 09-01094

## ORDER

This proceeding is before me upon a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3). The complaint was initially filed with the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA), which conducted an investigation pursuant to section 105(c)(2) but declined to pursue the matter through litigation. The Complainant subsequently initiated this case before the Commission on his own behalf pursuant to 105(c)(3).

### *Procedural Background*

In February 2016, the Respondent requested a subpoena to compel MSHA to produce its investigative file in the matter of *Woodward v. Carmeuse Lime & Stone*, MSHA Case No. SE-MD-15-23. The Respondent had previously filed a FOIA (Freedom of Information Act) request for the investigative file. MSHA had replied with a letter stating that the statutory time limits for processing the request could not be met due to “unusual circumstances.” The delay would have made production untimely for litigation purposes, as a hearing is scheduled for May 9-12, 2016. In order to protect the rights of both parties to this litigation, on February 24, 2016, I issued a subpoena to MSHA under Rule 60(a) of the Commission’s procedural rules, 29 C.F.R. § 2700.60(a), and section 113(e) of the Mine Act, 30 U.S.C. § 823(e), and ordered MSHA to submit the entire investigative file to the Court within thirty days for *in camera* review and distribution of properly releasable documents to the parties.

On March 24, 2016, the Secretary of Labor filed a letter asserting he “cannot comply” with my order, citing FOIA (5 U.S.C. § 552), the Privacy Act (5 U.S.C. § 552a), and the Secretary’s own regulations at 29 C.F.R. Part 2, Subpart C (“Employees Served with Subpoenas”). The Secretary did, however, produce a redacted version of the investigative file in

response to the Respondent's FOIA request.<sup>1</sup> Claiming exemptions under subsections (b)(7)(C) and (b)(7)(D) of FOIA, the Secretary withheld two documents identified in his disclosure as Exhibits 3 and 8 containing statements of interviews with two unnamed individuals.

The Respondent has now filed a letter asking me to enforce my February 24 subpoena and order and compel the Secretary to produce the two withheld interview statements. The Respondent argues that such action is necessary so that the parties may have access to the factual material gathered by the Secretary during his investigation of the discrimination complaint.

### *Discussion*

The sole issue before me is whether the Secretary must release for *in camera* review the two withheld interview statements, Exhibits 3 and 8, sought by the Respondent.

My February 24 subpoena and order directing MSHA to produce the entire investigative file, including the two withheld interview statements, were issued under the authority of section 113(e) of the Mine Act, which provides in pertinent part:

In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses *and the production of books, papers, or documents, or objects*, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence ... In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States ... within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as contempt thereof.

30 U.S.C. § 823(e) (emphasis added). Thus, Congress has expressly authorized Commission ALJs to compel the production of documents by issuing a subpoena or order that is enforceable in the federal district courts. *See, e.g., Justice v. Gateway Eagle Coal Co.*, 2014 WL 4491138 (Aug. 22, 2014) (ALJ) (unpublished order requesting enforcement of subpoena); *Justice v. Gateway Eagle Coal Co.*, 36 FMSHRC 2371 (Aug. 2014) (ALJ) (order compelling Secretary to

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<sup>1</sup> The Respondent submitted a copy of the file to this Court. The Secretary still has not submitted any documents to the Court and maintains that he is barred from doing so for the reasons set forth in his March 24 letter, which was submitted after he had responded to the FOIA request.

produce documents for *in camera* review); *Olson v. Triton Coal Co.*, 25 FMSHRC 649 (Oct. 2003) (ALJ) (same).

Consistent with this Congressional authorization, the Commission's procedural rules provide that the "Commission and its judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence." 29 C.F.R. § 2700.60(a). A person served with a subpoena may move to revoke or modify it within five days of service. *Id.* § 2700.60(c). The judge should grant the motion if the subpoena seeks information outside the proper scope of discovery, does not describe with particularity the evidence sought, or for any other reason is found to be invalid or unreasonable. *Id.* Neither the Mine Act nor the procedural rules contain any other limitations on the Commission's or Commission ALJs' subpoena authority.

In refusing to comply with my subpoena and order, the Secretary contends that this matter involves "an intersection between the *Touhy* regulations, the Privacy Act, the Freedom of Information Act (FOIA), issues of privilege, and the scope of subpoenas." Sec'y Resp. at 2. However, the Secretary has failed to identify any privileges or exemptions that excuse him from producing the subpoenaed documents for *in camera* review.

The *Touhy* regulations are set forth in 29 C.F.R. Part 2, Subpart C. These regulations were promulgated by the Secretary to implement internal procedures for Department of Labor employees to follow when responding to subpoenas. *See* 29 C.F.R. §§ 2.20 to 2.25; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (upholding authority of head of Department of Justice to promulgate similar rules). As explained in one of the cases cited by the Secretary in his subpoena response, these are intra-agency "housekeeping rules" promulgated under the authority conferred by 5 U.S.C. § 301. *Herr v. McCormick Grain-The Heiman Co.*, No. 92-1321-PFK, 1994 WL 324558, \*1 (D. Kan. June 28, 1994). The enabling statute provides, in full:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301. The statute does not authorize the Secretary to refuse to comply with a court order or subpoena, and the Secretary's *Touhy* regulations do not and cannot create such a privilege. The regulations merely delegate exclusive authority to one of the Secretary's high-ranking subordinates to respond to subpoenas after being furnished with a written summary of the information sought and its relevance to the proceeding. In this case, the Secretary is aware which documents are sought and why they are relevant to this proceeding. He cannot hide behind his own intra-agency procedures as a rationale for refusing to comply with the subpoena and order.

The Secretary asserts that the Privacy Act, 5 U.S.C. § 552a, prohibits disclosure of the investigative file without the permission of the individual to whom the file pertains – in this case,

the Complainant. However, this prohibition is expressly inapplicable to disclosures that are made “pursuant to the order of a court of competent jurisdiction.” 5 U.S.C. § 552a(b)(11). The Secretary cites *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985), as standing for the proposition that “a routinely issued subpoena does not overcome the Privacy Act’s prohibition on disclosure without consent.” Sec’y Resp. at 4. However, that case concerned a grand jury subpoena. As explained by the D.C. Circuit, that particular type of subpoena does not fall under § 552a(b)(11) because it does not necessarily originate with a court of competent jurisdiction, as it can be issued by a prosecutor without an agency head, grand jury, or judge reviewing it to ensure that the relevant privacy interests are being carefully considered and weighed against the need for information. 779 F.2d at 79-85. By contrast, the subpoena in question here was issued by this Court with the stated intent of reviewing the subpoenaed records *in camera* before distributing the releasable portions. The Privacy Act does not bar disclosure under these circumstances.

The Secretary also references FOIA in its response to the subpoena and cites FOIA Exemptions 7C and 7D, 5 U.S.C. § 552(b)(7)(C)-(D), as justification for refusing to produce the two interview statements identified as Exhibits 3 and 8 in its FOIA response to the Respondent.

To the extent that the Secretary relies on the FOIA exemptions to establish a discovery privilege, this reliance is misplaced. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984). FOIA was enacted to require agencies to disclose records to the public, not to create new privileges for agencies to withhold information in contexts where a privilege would not otherwise exist. As the D.C. Circuit explained in *Friedman v. Bache Halsey Stuart Shields*, information unavailable under FOIA is not necessarily unavailable through discovery, in which context the litigant’s need is a key factor that must be weighed against the government’s interest in confidentiality. *Id.* In addition to litigants’ needs, discovery implicates the court’s interest in developing a complete and accurate record. Courts have the ability to pursue this interest while still protecting confidential information by conducting *in camera* review and sealing records upon request.

Although the FOIA exemptions are not discovery privileges, they are relevant to this case in that they reflect a Congressional preference for cautious treatment of certain types of sensitive government information. Exemptions 7C and 7D provide that the following documents need not be disclosed in a FOIA response:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis.

5 U.S.C. § 552(b)(7).

Presumably, the two documents that the Secretary has refused to release are the memoranda of interviews of the Complainant and either a confidential miner informant or an MSHA employee. Both interviewees have a privacy interest in nondisclosure of personal

information such as addresses and phone numbers, and any interviewee other than the Complainant has an interest in nondisclosure of his identity and his connection with the investigation. However, this does not provide a basis for the Secretary to withhold the documents in their entirety. *See Justice v. MSHA*, Civil Action No. 2:14-14438, slip op. at 30-31 (S.D.W. Va. July 31, 2015) (unpublished order) (citing *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995)). In *Justice v. MSHA*, which concerned a FOIA suit filed by a coal miner to compel MSHA to release the entire investigative file related to his discrimination complaint, MSHA withheld several memoranda of interviews under color of Exemptions 5 and 7C. In discussing Exemption 7C, the District Judge weighed MSHA's interest in maintaining the privacy of the individuals mentioned in the file against the public interest in disclosure, which he characterized as an overriding interest in shedding light on MSHA's performance of its statutory duties. *Id.*, slip op. at 27-32. He concluded that MSHA's general claim of exemption under 7C failed to meet the agency's burden of justifying its wholesale withholding of the interview memoranda, and the appropriate resolution was to submit the documents to the court for *in camera* review and release of segregable non-exempt information. *Id.* at 32-33. This makes sense, because withholding entire documents "reach[es] far more broadly than is necessary to protect the identities of individuals mentioned" therein, and is "contrary to FOIA's overall purpose of disclosure." *Nation Magazine*, 71 F.3d at 896. Personally identifying information should be redacted from FOIA-responsive documents under Exemptions 7C and 7D. However, segregable factual information within the documents is not subject to those exemptions and must be disclosed.

This case, unlike *Justice v. MSHA*, is not a FOIA case. Exemptions 7C and 7D identify relevant privacy interests. However, because this is a discovery matter, these privacy interests must be balanced against the litigants' and the Court's strong interest in developing a complete record in this particular case. When a dispute arises over the balancing of these interests, as it has in this case, the appropriate remedy is *in camera* review. If there are overriding privacy concerns or the identity of a miner witness is protected under 29 C.F.R. § 2700.62, I will make that determination after reviewing the documents and will release the miner's identity at the appropriate time as prescribed by that rule. If the Complainant's interview statement is one of the withheld documents, there is nothing that prevents the disclosure of this document under the rules of evidence and the Respondent is entitled to it.

The Secretary of Labor is hereby **ORDERED** to produce the two interview statements for *in camera* review by submitting them directly to me by mail marked "Private, Judge's Eyes Only" within ten (10) days of the date of this order.

/s/ Priscilla M. Rae  
Priscilla M. Rae  
Administrative Law Judge



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April 8, 2016

DANIEL B. LOWE,  
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM  
WE-MD 14-04

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

## **ORDER ON COMPLAINANT'S MOTION TO AMEND TO ADD VARIOUS WHITEBOX ENTITIES AS PARTIES**

Before: Judge Moran

Complainant Daniel Lowe has filed a motion to amend his original complaint “so as to join ‘Whitebox Entities’ to include Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Jerritt Canyon Gold, LLC,<sup>1</sup> Sprott Mining Inc., and Eric Sprott as successors in interest to Veris Gold USA Inc.” Mot. to Deny “Whitebox Entities” Contest of Jurisdictional Authority and Mot. to Deny “Whitebox Entities” Mot. Regarding Compl’t’s Mot. to Amend at 1 (“Lowe Response”); *see also* Mot. to Amend and Mot. for Expedited Consideration at 1.

Following that motion, on February 16, 2016, counsel on behalf of the Whitebox Entities (“Whitebox Counsel”) filed a Special Limited Appearance to contest this Court’s jurisdiction and to challenge whether the Court can attach liability against the parties Lowe wishes to join for the acts of discrimination against Lowe committed by Veris Gold USA, Inc. (“Veris Gold”). The Court actually received Lowe’s response on February 8, 2016, prior to receiving Whitebox Entities’ response. Thereafter, on February 19, 2016, Whitebox Counsel also filed a sur-reply. Lowe then filed a response to the sur-reply.

For the reasons which follow, the Court holds that it has jurisdiction to determine if other entities may be added as successors in interest, but that there is insufficient information in the

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<sup>1</sup> Lowe’s Motion to Amend asserts that Jerritt Canyon Gold, LLC, Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Sprott Mining Inc., and Eric Sprott are the purchasers of Veris Gold Inc. and the successors in interest to Veris and that the three principals of Jerritt Canyon Gold LLC are Gregory Gibson, Jacob Mercer, and Erik Sprott, as its managers. Mot. to Amend 3.

record to make such a determination and that discovery may be had in furtherance of resolving those issues.<sup>2</sup>

### **Successorship Basics**

The Commission has recognized that, in certain cases, the imposition of liability on a successor is appropriate. *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463 (1980), *aff'd in part, rev'd in part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983); *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom. Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987).

In *Secretary of Labor on behalf of Keene v. S&M Coal Company, Inc.*, 10 FMSHRC 1145 (Sept. 1988), the Commission noted that in

the cases in which the Commission and the courts have found successorship liability there has been some type of transaction (a “transactional element”) with respect to the business between the predecessor and the entity against which liability is being asserted and/or there has been a continuation of activity at the predecessor’s site. In *Munsey*, *supra*, for example, the company that was held liable as a successor had acquired leases and mining equipment from the former employer, substantially replacing the predecessor’s operation. Similarly, in *Terco*, *supra*, successorship liability attached because there was substantial continuity of business interests at the same site.

*Id.* at 1152.

The Commission then observed that

[a]ssumption of the predecessor’s position by the successor underlies the successorship cases. For example, in *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), successorship was found where the predecessor company was merged into the acquiring company, a process that also involved the wholesale transfer of the predecessor’s employees to the successor. The Court observed that for an employer to be considered a successor, there must be a substantial continuity in the identity of the business enterprise before and after a change. *Wiley*, *supra*, 376 U.S. at 551. Another example of the acquisition element underlying these cases can be found in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, (1973) which involved a bona fide purchase of a company that had committed an unfair labor practice. Issuance of a reinstatement and back-pay order was upheld against the

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<sup>2</sup> This Order parallels the March 21, 2016, Order issued by this Court in Matthew Varady’s discrimination complaint against Veris, WEST 2014-307-DM. Lowe and Varady, both non-attorneys, with each presently proceeding *pro se*, have assisted one another in their respective filings. In this instance their motions to amend, seeking to add Jarrett Canyon Gold as a party were nearly identical submissions. Accordingly, except for minor adjustments, this Order tracks the substance of Varady Order.

acquiring company, which occupied the site where the unfair practice had occurred.

*Id.*

Clearly, the “transactional element,” at least as to Jerritt Canyon Gold, LLC, (“JCG”) has been conceded. This led to the Court’s determination adding that entity as a Respondent in its March 14, 2016, Order. *See* Order on Compl’t’s Mot. to Amend, Mar. 14, 2016. Whether other entities may be shown to have such transactional elements, and therefore be added as successors, is a subject of this Order, though, as explained below, conclusions about the status of those entities are not presently possible.

Apart from determining if a company occupies the position of a successor is the separate issue of determining whether such a successor should be liable to remedy the unlawful discrimination of its predecessor. For that determination, the Commission has followed the courts and has approved consideration of nine specific factors:

(1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

*Keene*, 10 FMSHRC at 1153 (quoting *Munsey*, 2 FMSHRC at 3465-66).

The Commission has further noted that

the key factor for determining successorship liability is whether there is a substantial continuity of business operations. This question is fact intensive and must be resolved on a case-by-case basis. *Howard Johnson, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256 (1974). In *Sugartree*, 9 FMSHRC at 398, the Commission emphasized that factors (3) through (9) provide the framework for analyzing whether there is a continuity of business operations and work force between the successor and its predecessor.

*Id.* (citing *Munsey*, 2 FMSHRC at 3467; *Sugartree*, 9 FMSHRC at 398).

Similarly, in *Secretary of Labor on behalf of Zambonino v. Colonial Mining Materials, LLC*, 36 FMSHRC 1239 (May 2014) (ALJ), an administrative law judge determined a mine operator was a successor and liable for the complainant’s termination. That judge noted that in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court determined that

the successor company acquired the predecessor *with notice of unfair labor practice litigation*, and continued the business without substantial interruption or

change in operations, employee or supervisory personnel, [and then] upheld the Board's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award.

*Zambonino*, 36 FMSHRC at 1259 (emphasis added).

The judge took note that the Supreme Court also expressed that

[t]o further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

'In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'

*Id.* at 1260 (quoting *Golden State Bottling*, 414 U.S. at 171 n.2 (quoting *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967) (footnotes omitted), *enforced sub nom.*, *U.S. Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968))).

## **The Motion and Responses**

Lowe's Motion to Amend<sup>3</sup> states that Veris Gold began its bankruptcy proceeding in June 2014, which was after Lowe had filed his discrimination complaint in November 2013. Mot. to Amend 1-2. Lowe asserts that

Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott had knowledge of the Complainant's discrimination action before the Commission because Jerritt Canyon Gold LLC . . . [was] represented by the same law firm as Veris Gold USA Inc., Goicoechea, Di Grazia, Coyle and Stanton, Ltd., and in particular both were represented by Attorney David M. Stanton.

*Id.* at 4. Lowe adds that "[a] business filing with the State of Nevada – Secretary of State's Office filed on June 9, 2015 states that the age of the company, Jerritt Canyon Gold LLC., was 4 months old," and Lowe therefore contends that "Jerritt Canyon Gold LLC., had been [in] operation since March of 2015 and that the Registered Agent was the law firm of Goicoechea, Di Grazia, Coyle and Stanton, Ltd." *Id.* at 4-5.

The motion asserts that

[t]here has been a 100 % continuity of business operations between Veris Gold USA Inc. and Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. The same surface mill has operated without any hiatus by Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott are engaged in all of the exact same operations (crushing, screening and processing gold ore) as Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott use the exact same equipment.

*Id.* at 5.

As to this assertion, the Court would observe that Complainant is making *allegations* in support of his claim that the parties he wishes to add are successors. The Court notes that with its previous order, issued March 14, 2016, Jerritt Canyon Gold, as the acknowledged new owner of the Jerritt Canyon Mill, has been added as a party. However, as to the other entities and individuals Complainant seeks to add, Complainant apparently does not realize that his assertions about their involvement with Jerritt Canyon Gold, and previously with Veris Gold, are not evidence of such claims. Instead, evidence to support Lowe's claims about the relationship of those other entities and individuals with Veris Gold and JCG must be established. Discovery is the initial means to learn about the nature of the relationship of those other entities and individuals with Veris Gold and JCG. Discovery vehicles include official records, requests for admissions, interrogatories, stipulations, and depositions.

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<sup>3</sup> Complainant Lowe's motion also requests expedited consideration. As this case is one of many dockets before the Court and as the Court has already issued many rulings regarding Lowe's Complaint, the request to expedite is DENIED.

Complainant also asserts that

[t]he vast majority of Jerritt Canyon Gold LLC's employees are all former Veris Gold USA Inc.'s employees and are engaged in the same types of job classifications as they were when they worked for Veris Gold USA Inc. The transfer from one company to the other is likened to flipping a light switch at the time of the sale date. At the stroke of midnight all to the Veris Gold USA Inc.'s employees became Jerritt Canyon Gold LLC's employees with a very minor exception of less than approximately five employees. According to a local newspaper article the number of employees effected [sic] in the transfer of ownership was approximately 400 employees.

Mot. to Amend 5-6. This assertion is also not evidence.

The same deficiencies exist with regard to items 6 through 9 of Complainant's Motion; they are assertions of the claims made in those items, not evidence thereof.<sup>4</sup> *See id.* at 6.

The Court has urged Complainant, following the determination that he was discriminated against by Veris Gold, to make efforts to find legal counsel in support of his efforts to establish that these various entities should be determined to be successors and to present a well-founded claim for his submission of damages. It again urges Complainant to make efforts to secure legal counsel. While retaining counsel would not assure a successful outcome, it can be stated with some confidence that continuing to proceed without such counsel, in these complex legal matters, presents a disadvantage. The Court will not, and cannot, act as if it were Complainant's attorney in fact, as the Court cannot operate in such dual, and conflicting, roles. Discovery and how to conduct it effectively are Complainant's burdens.

Further, it is difficult for the Court to appreciate why such efforts to obtain legal counsel have apparently not been made, as Complainant has a judgment of discrimination in hand and attorney's fees would be recoverable for the efforts to hold a successor liable, if such attorney is successful in that effort. Such attorney's fees would not diminish the recovery of the respondent's damages at all, as they are a separate line item for a respondent's damages in discrimination claims. However, the Court is *not* suggesting that Complainant retain an attorney on a fee basis, as the cost would be prohibitive and the final outcome remains uncertain. Another arrangement would be on a contingency basis under which the attorney would be able to file for such attorney's fees plus be entitled to a share of any damages. These are matters for Complainant and an attorney to work out, not the Court. The benefit for Complainant would be having the expertise and skill provided by legal counsel.

The Court will now address the responses from "the Whitebox Entities," as provided through the limited appearance of its counsel, the law firm of Fennemore Craig, P.C.

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<sup>4</sup> The motion concludes with Complainant's citation to case law, which he maintains support his claim that these entities should be deemed successors. Such legal conclusions cannot come about until the facts supporting such a claim have been adduced.

The “Whitebox Entities,” which are defined in counsel’s response as Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, and any other Whitebox entity or individual including Jacob Mercer and Jeff Sterling, assert that the Whitebox Entities did not purchase any of assets of Veris Gold, and do not operate the Jerritt Canyon Gold mine or mill. Special Limited Appearance on Behalf of Whitebox Entities to Contest Jurisdiction in Resp. to ALJ’s Order Regarding Sec’y’s Mot. for Reconsideration and Compl’t’s Mot. to Amend at 1 (“Whitebox Response”).

The Response maintains that the Whitebox Entities had no involvement with Debtor Veris Gold entities<sup>5</sup> prior to filing of bankruptcy proceedings on June 9, 2014; were not creditors or equity holders of Veris Gold entities; and were not officers, directors, or control persons of Veris Gold entities. *Id.* at 2. Jerritt Canyon Gold, LLC, was the purchaser of Veris Gold’s assets. *Id.* However, the Response relates that “WBox 2014-1 Ltd.” loaned \$12 million to Veris Gold for “their post-petition operations.” *Id.*

The Response then identifies Deutsche Bank as the “first position secured creditor” of the debtors, and informs that the bank declined to advance funds to keep the debtors in business, post-petition.<sup>6</sup> *Id.* The Response then asserts that post-petition financing was approved by bankruptcy courts around October 6, 2014, with WBox 2014-1 Ltd. loaning \$12 million to the debtors, then increasing that loan to \$15 million in May 2015, secured by a “first position priming lien” on all of debtors’ assets. *Id.* The recounting of events by the Response then informs that the sale process was approved in November 2014, but no buyer was found. *Id.* Following that, the Response advises that WBVG LLC, *an affiliate of WBox 2014-1 Ltd.*, made an offer to purchase Veris Gold assets and *after notice and hearing*, that sale was approved. *Id.* at 2-3. Thereafter, WBVG LLC changed its name to Jerritt Canyon Gold LLC. *Id.*

The Response further asserts that Complainant had notice of Veris Gold’s bankruptcy, both actual and constructive. *Id.* at 3. The Response states written notice was given in the Sale Motion and hearing and also in the notice of entry of sale order in June 2015. *Id.* As to the written notice given in the Sale Motion and hearing, the Response, pointing to Paragraph G of the Sale Order, advises that the order found that “the Secretary of Labor, Inspector of Mines, EEOC, MSHA and OSHA and any known claimants that have asserted Claims against the

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<sup>5</sup> The bankruptcy proceedings concerned not only Veris Gold USA, Inc., but also Veris Gold Corp., Queenstake Resources, Ltd., and Ketz River Holdings, Ltd. (collectively, “Veris Gold entities”). *See* Whitebox Resp. Ex. A, at 1.

<sup>6</sup> The Response also asserts that Deutsche Bank, with \$80 million in secured claims, and Small Mine Development, with an asserted \$40 million of secured claims, and various unidentified “environmental creditors,” asserting \$20 million in penalties, all received no funds for the payment of their claims from the sale of the assets. Whitebox Resp. 3. This seems unimaginable, if the Response is suggesting that two significant creditors, with \$120 million in secured claims, walked away from the bankruptcy proceeding with nothing. **Whitebox Counsel is directed by the Court to address this issue.**



Debtors were given actual notice of the Sale Motion and hearing.” Whitebox Resp. 3. It is not clear that Complainant was one of those known claimants given actual notice.<sup>7</sup>

The Response then points to the Sale Order and its statement that

[t]he transactions contemplated under the Agreement do not amount to a consolidation, merger or de facto merger of the Purchaser and the Debtors and/or the Debtors’ estates, there is not substantial continuity between the Purchaser and the Debtors, there is no common identity between the debtors and the Purchaser, there is no continuity of enterprise between the Debtors and the Purchaser, the Purchaser is not a mere continuation of the Debtors or their estates, and the Purchaser does not constitute a successor to the Debtors or their estates.

Whitebox Resp. 4 (quoting Sale Order at 9, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318 [hereinafter “Sale Order”]).

Thus, the Purchaser and Debtors happily agreed that none of the factors which would point toward a successorship were present. This Court would be surprised to learn that the bankruptcy courts engaged in any detailed review of those claims. Rather, they more likely accepted in good faith that those representations were made to them in good faith and grounded in fact, as opposed to being mere assertions. As mentioned in its Order of March 14, 2016, it is this Court’s understanding that bankruptcy courts of necessity rely upon the representations of the parties and the monitor. Depending upon what is learned about the relationships between Veris Gold, Jarrett Canyon Gold, the Whitebox Entities, and the various individuals who may have commonality among those enterprises, the bankruptcy courts may have been misled.<sup>8</sup>

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<sup>7</sup> It does appear to be admitted that the Complainant filed a Motion to stay the Sale on June 15, 2015, that the motion was denied and that Complainant did not appeal the Sale order. Whitebox Resp. 3-4.

<sup>8</sup> In the Court’s estimation, some aspects of the bankruptcy proceeding involving at least the monitor, Veris Gold, and Jerritt Canyon Gold are disconcerting. The Court’s concerns, which are not yet conclusions or findings, stem in part from yet another discrimination action against Veris in which there was a settlement agreement between Veris and discrimination complainant Jennifer Morreale. A Commission Order involving that case informs there was a settlement agreement in February 2015 with Morreale within which agreement “Veris Gold represented that it had received *approval from a bankruptcy monitor* to make the [settlement] payment, as the operator had previously filed U.S. Chapter 15 bankruptcy proceedings concurrent with Canadian bankruptcy filings and was subject to the financial oversight of a bankruptcy monitor.” *Sec’y of Labor on behalf of Morreale v. Veris Gold USA, Inc.*, 38 FMSHRC \_\_\_, slip op. at 2, No. WEST 2014-793-DM (Mar. 8, 2016) (emphasis added). However, Morreale was never paid, the settlement agreement never lived up to, and in June 2015, the presiding judge in that case learned “that the bankruptcy monitor overseeing the bankruptcy proceedings had withheld payment to both the Secretary [of Labor] and Ms. Morreale pending the resolution of an asset sale of the mine by the operator to a separate entity, Jerritt Canyon Gold, LLC.” *Id.* Given the above-

(continued...)

Further, a case such as this lays bare the problems identified by the law review commentaries when 11 U.S.C. § 363(f) proceedings supplant those brought under § 1141(c), despite the former's narrower language and the absence of the procedural protections which are available under the latter, all as cited in the Court's previous Order on Complainant's Motion to Amend, issued March 14, 2016. For example, if through discovery, it is shown that there are individuals who had financial or management interests in Veris, Jarrett Canyon Gold and/or the Whitebox Entities, such linkage could be troublesome and point to the appropriateness of holding others accountable as successors.

As if the foregoing proclamations advanced by the Response were not enough, the Response then lards:

*Furthermore*, Paragraph 38 of the Sale Order *concludes* that there is no "successor" liability as to the Purchaser. The sale was free and clear of any successor liability. [The Sale Order] expressly *rules*: . . . The Purchaser is not a "successor" to the Debtors or their estates by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume, or in any way be responsible for any liability or obligation of any of the Debtors and/or their estates including, but not limited to, any bulk sales law, successor liability, transferee liability, derivative liability, vicarious liability or any other liability or responsibility of any kind or character for any Liens, Claims, or Interests against the Debtors or against an insider of the Debtors, or similar liability except as otherwise expressly provided in the Agreement, whether known or unknown as of the Closing, now existing or hereafter arising, fixed or contingent, asserted or unasserted, or liquidated or unliquidated.

Whitebox Resp. 4 (emphasis added) (footnote omitted) (quoting Sale Order at 21).

Though the above language crafted by the purchaser and debtor would seem to have created an insurmountable barrier to successorship claims, that is, if one accepts the lawyering employed and disregards due process concerns and the issues concerning the propriety of using § 363, instead of § 1141(c), additional barriers were nevertheless employed. Paragraphs N and Q of the Sale Order provide that the term "claims" captures successor or transferee liability and that

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<sup>8</sup> (...continued)

mentioned dates, it can be stated with some confidence that the bankruptcy monitor must have been fully aware of Matthew Varady's discrimination complaint in Docket No. WEST 2014-307-DM, and been aware of, and likely approved, Veris' employing legal counsel to defend that complaint during the June 8 through 10, 2015, hearing held before this Court in Elko, Nevada. Similarly the monitor was likely fully aware of the present complaint brought by Lowe against Veris, which was heard by this Court on June 18, 2015, and that the monitor approved the legal defense fees associated with that matter as well, until it became clear that Veris would not prevail in either matter. Thus, it seems reasonable to conclude that money was flowing freely for the legal defense of Veris in both the Varady and Lowe matters, but stopped once it became clear that Veris would be held accountable for its discrimination against those miners. The Court doubts that the bankruptcy courts were fully apprised of these doings.

the parties would not have entered into their agreement if the purchaser acquired the property with such claims. *Id.* at 5.

Even with that, more efforts to protect against such claims were layered onto those already described, as the Response then points to Paragraph 39 of the Sale Order. That paragraph lists, in the fashion employed by the other provisions, just discussed, any other conceivable soul<sup>9</sup> as being “forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests . . . against the Purchaser or any affiliate, successor or assign thereof, or the Assets.” *Id.* at 5 (quoting Sale Order at 21).

The Response concludes with the assertion that *only* the U.S. Bankruptcy Court can address the issues raised by the Complainant and that this Court has no jurisdiction over the Whitebox Entities. Yet, while asserting that this Court has no jurisdiction, Whitebox simultaneously requests attorneys’ fees and costs for having to file its response. *Id.* at 6. The request for attorneys’ fees is DENIED.

Subsequent to its Response, the Whitebox Entities then filed a Special Limited Appearance on Behalf of Whitebox Entities for Sur Reply to Complainant’s Motion to Amend (“Whitebox Sur-reply”). For the most part, the Sur-reply reasserts its previous arguments or those made by Jarrett Canyon Gold in its responses. These include the claim that this Court has no jurisdiction over successorship vis-à-vis findings of Mine Act discrimination. Whitebox Sur-reply 1-2. Again, the Sur-reply from the Whitebox Entities points to the Order Approving the Sale. However, regarding that Order Approving Sale, through the process of discovery, as conducted by Complainant, not the Court, it is necessary to learn who drafted the Order

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<sup>9</sup> Displaying lawyering that frequently causes public revulsion, in stating that “to make sure the Purchaser [is] protected from further actions,” the Whitebox Entities Response points to this passage from Paragraph 39 of the Sale Order which provides:

Except to the extent expressly included in the Assumed Liabilities or to enforce the Agreement or Permitted Encumbrances, pursuant to Bankruptcy Code Sections 105 and 363, all persons and entities, including but not limited to, the Debtors, the Monitor, all debt security holders, equity security holders, the Debtors’ employees or former employees, governmental, tax and regulatory authorities, lenders, parties to or beneficiaries under any benefit plan, trade and other creditors asserting or holding Liens, Claims, or Interests of any kind or nature whatsoever against, in or with respect to any of the Debtors or the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way related to the Debtors’ business prior to the Closing Date or the transfer of the Assets to the Purchaser, shall be forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests whether by payment, setoff, or otherwise, directly or indirectly, against the Purchaser or any affiliate, successor or assign thereof, or the Assets.

Whitebox Resp. 5 (quoting Sale Order at 21-22).

approving the sale, the date that order was presented to the court(s), the circumstances of that presentation, including the party or parties who presented the Order to such bankruptcy court(s), the parties present at that presentation, the record, including any transcripts, of any inquiry between the bankruptcy court(s) and those presenting the Order for the courts' approval, whether this occurred only by written submissions or through a hearing, if any hearing in fact occurred, and the date the Order was approved.

The Whitebox Entities repeat that they are not “miners, operators, or employers that fall within the definitions and jurisdiction of FMSHA.” Whitebox Sur-reply 2. But, they admit that “WBox 2014-1 Ltd. owns 20% of the membership interest [which the Sur-reply characterizes as analogous to 20% shareholder of a corporation] in Jerritt Canyon Gold, LLC, not the assets.”<sup>10</sup> Whitebox Sur-reply 3. In this regard, the Sur-reply contends that

the Whitebox Entities did not purchase, do not have title to and do not own any of the assets previously owned by Veris Gold, do not operate the mine or mill previously operated by Veris Gold and do not employ any employees previously employed by Veris Gold at the mine or mill [and that] . . . **[t]here are no facts or law that could be used to find or conclude that any of the Whitebox Entities are the successor of Veris Gold.**

*Id.* at 2 (emphasis added). The Court agrees with the last quoted statement but adds the important qualifier, “at least for now.” This is because, until discovery occurs, a definitive statement about that claim cannot be made.

The Sur-reply then speaks to the role of Jacob Mercer, described as a manager of Jerritt Canyon Gold, LLC, and states that being a manager or a member of a limited liability company does not make such a person liable for the debts or obligations of such a company. *Id.* at 3-4. The balance of the Sur-reply repeats previous contentions and concludes with the assertion that Nevada common law is to be applied to determine successor liability and that such state law does not speak to the issue of whether a member or manager of a purchaser would be subject to such liability as a successor.<sup>11</sup> *Id.* at 4-5.

Lowe filed a short response to the Whitebox Sur-reply, asserting that the Mine Safety and Health Review Commission has the final jurisdictional authority in this matter, not the United States Bankruptcy Court. Lowe's response admits that he did not appeal the bankruptcy court's adverse ruling to his motion to stay the sale, but stated that “[o]nce denied there was nothing new to provide to the Bankruptcy Court where a reasonable and prudent person could believe that

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<sup>10</sup> The Sur-reply adds that it is not correct that “one of the Whitebox Entities purchased purchased 20% of the assets and that Jerritt Canyon Gold LLC purchased 80%.” Whitebox Sur-reply 3. Instead, it is stated that WBox 2014-1 Ltd. owns 20% of the *membership interest* in Jerritt Canyon Gold LLC, which it characterizes as akin to 20% of the stock of a corporation. *Id.*

<sup>11</sup> As with its Response, the Whitebox Entities' Counsel seeks attorney's fees and costs for filing its Sur-reply. Consistent with the Court's ruling in the Whitebox Entities' Counsel seeking such fees for its Response, this request is similarly DENIED.

they could reasonably prevail and therefore no appeal was made.” Compl’t’s Reply to Resp’t’s “Sur Replay” at 3 (“Lowe Resp. to Sur-Reply”).

## **Discussion**

In order to determine the appropriate parties potentially to be added as successor entities and to determine if liability as successors is warranted, it is necessary to pull back the covers, so to speak, in order to fully understand the relationship(s), if any, between Jarrett Canyon Gold, the “Whitebox Entities,” Veris Gold, and the owners of those entities, in order to determine if they share common identities. This is a purpose of discovery, which the complainant is entitled to utilize.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence *or appears likely to lead to the discovery of admissible evidence.*” 29 C.F.R. § 2700.56(b) (“emphasis added”). That provision allows parties to use depositions, written interrogatories, requests for admissions, and requests for documents or objects to obtain such information. A party served with interrogatories and requests for production must answer within 25 days of service and must state the basis for any objections in its answer. 29 C.F.R. §§ 2700.58(a), (c).

In addition, it has also been observed that:

[f]or procedural questions not regulated by the [Mine] Act, [the Commission’s] Procedural Rules, or the Administrative Procedure Act,” the Federal Rules of Civil Procedure guide Commission Judges as “far as practicable.” 29 C.F.R. § 2700.1(b). Guidance, though, does not require strict adherence. See *Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989) (observing “[Commission] Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be ‘guided’ by a particular Federal Rule of Civil Procedure.”)

Like the Commission's rules, the Federal Rules of Civil Procedure establish a broad discovery regime. See *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (“We enter upon determination of this construction with the basic premise ‘that the deposition-discovery rules are to be accorded a broad and liberal treatment’ to effectuate their purpose that ‘civil trials in federal courts no longer need to be carried on in the dark.’”) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). Notwithstanding recent changes intended to involve courts’ fine tuning of overabundant discovery, Federal Rule 26(b)(1) continues to authorize parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). Like the Commission’s rules, the Federal Rules’ regime also specifies that “[r]elevant information need not be admissible at the trial if the

discovery appears reasonably calculated to lead to discovery of admissible evidence.”

*Greyeagle Coal Co.*, 35 FMSHRC 3321, 3324 (Oct. 2013) (ALJ).

### **The Way Forward**

The information provided by both sides on the issue of determining which entities, (beyond Jarrett Canyon Gold, which was added as a party pursuant to the Court’s March 14, 2016, Order),<sup>12</sup> may be considered as successors, has largely consisted of assertions. Complainant, it would seem, has two options. One is to pursue only Jarrett Canyon Gold to establish that entity as a successor to Veris Gold. The other would be to learn more about the various other entities Complainant believes should also be deemed as successors. Under both approaches, discovery needs to occur, beginning with the basics by Complainant seeking information from those entities, to include the identification all the owners of Veris Gold, its officers, the management individuals running that mine, and stockholders, and then seeking the same identifying information from each of the Whitebox Entities, including WBVG LLC, an affiliate of WBox 2014-1 Ltd, which later changed its name to Jerritt Canyon Gold LLC. There needs to be a full understanding of the various entities, including the individuals which embody and comprise them, all with the purpose of ascertaining if there are threads of commonality between some or all of those entities as, for example, if names associated with Veris Gold reappear with Jarrett Canyon Gold and the Whitebox Entities. If such commonalities appear, this would tend to show that the sale of Veris was not an arms-length transaction. If present, given that Veris was trying to avoid being saddled with a pattern of violations designation by MSHA not long before opting for bankruptcy and was also facing multiple discrimination claims, *see Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037, 2050 (Sept. 2015) (ALJ), such relationships could be considered in evaluating successorship claims.

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<sup>12</sup> Complainant Lowe has provided business records from MSHA showing Jerritt Canyon Gold LLC as beginning operations at the Jerritt Canyon Mill on the day following the cessation of Veris Gold USA, Inc.’s operation at that Mill, with Veris Gold’s operation at that Mill ending on June 23, 2015, and Jerritt Canyon Gold LLC’s operation starting on June 24, 2015. Current Mine Information, Mine Safety and Health Administration, <http://arlweb.msha.gov/drs/drshome.htm#MID> (input “2601621” in the MSHA Mine ID searchbox). The same MSHA records list “WBOX 2014-1 LTD; Eric Sprott” as the “Current Controller.” *Id.* Although Lowe also listed other sources as associated with Whitebox entities, including <http://www.corporationwiki.com> and LinkedIn, which list Jacob Mercer as the Senior Portfolio Manager at Whitebox Advisors LLC, and Greg Gibson and Eric Sprott, as managers for Jerritt Canyon Gold LLC, and <http://www.bloomberg.com>, which lists other information about executives for Whitebox Advisors, LLC, these sources and others of that ilk (e.g., Bizapedia, <http://www.foxrothschild.com>) are insufficient to establish the information contained in them for purposes of this proceeding.

Based upon the Court's comments to the Response, *supra*, one would anticipate that Complainant would also want to discover a host of details such as the dates of bankruptcy court hearings, the participants in such hearings, the parties given notice of such hearings, and the transcripts of such proceedings before any bankruptcy court involved with this matter and the aforementioned relationships, if any, between Veris Gold, and the Whitebox entities, including Jarrett Canyon Gold LLC, formerly known as WBVG LLC.<sup>13</sup>

To that end, the Court **ORDERS and DIRECTS** Fennemore Craig, P.C., Whitebox Counsel, as the representative for the Whitebox Entities, including Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, to provide the service address for those entities to the Court and Complainant within 10 days of the date of this Order to enable Complainant to pursue discovery of Jarrett Canyon Gold, the Whitebox Entities, and such individuals related to those entities.

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

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<sup>13</sup> Failure to respond to discovery requests may have consequences. The Commission's rules require that discovery requests be responded to fully and in writing within 25 days of service unless the party initiating discovery agreed to a longer time. 29 C.F.R. § 2700.58. While that procedural rule does not itself deem unanswered requests as admitted, an order to compel discovery may follow and Federal Rule of Civil Procedure 36(a) provides additional guidance on this issue. *See, e.g., Gray v. North Fork Coal Corp.*, No. KENT 2010-430-D, 2013 WL 4648492 (FMSHRC Aug. 22, 2013); *Sw. Quarry & Materials*, 26 FMSHRC 116 (Feb. 2004) (ALJ); *Hamilton v. Stone Mountain Trucking Co.*, 6 FMSHRC 2300 (Sept. 1984) (ALJ).

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 11, 2016

HUNTER SAND & GRAVEL, LLC,  
Contestant,

v.

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

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

v.

HUNTER SAND & GRAVEL, LLC,  
Respondent.

## CONTEST PROCEEDINGS:

Docket No. KENT 2014-391-RM  
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM  
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM  
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM  
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM  
Citation No. 8728541; 2/25/2014

Mine: Dredge IV  
Mine ID: 15-17687

## CIVIL PENALTY PROCEEDINGS:

Docket No. KENT 2014-566-M  
A.C. No. 15-17687-350333

Docket No. KENT 2015-75  
A.C. No. 15-17687-362767

Mine: Dredge IV

## **ORDER DENYING SECRETARY'S MOTION TO ADMIT INVESTIGATION REPORT**

Before: Judge Barbour

The issues in these consolidated contest and civil penalty proceedings arise out of an accident and presumed fatality that occurred on December 10, 2013, when an employee of Hunter Sand and Gravel, LLC ("Hunter" or "the company") disappeared in the middle of the night from a dredge on the Ohio River. The employee was working on the dredge. He was last seen beginning a transfer from the dredge to a barge located immediately adjacent to the dredge.



No one observed the employee fall into the river. However, the employee was wearing a cap lamp and a light was seen moving downstream from the dredge. A “man overboard” call was given and the operator of a tug that had pulled up to the dredge backed away and headed downstream toward the light. As the tug neared the light, it disappeared beneath the water. Neither the employee nor his body were found, and he has been declared dead.

Following the disappearance, inspectors from the Secretary’s Mining Enforcement and Safety Administration (“MSHA”) conducted an investigation. The investigation resulted in the issuance of two citations and three orders to Hunter. One citation (No. 8728537), issued pursuant to section 104(d)(1) of the Federal Mine (the “Act”), 30 U.S.C. § 814(d)(1), states that the employee slipped and fell into the water while walking on the deck of the barge and charges the deck was covered with snow and ice and that Hunter did not sand, salt or clear the deck of the snow and ice in violation of 30 C.F.R. § 56.11016, a standard requiring regularly used walkways and travelways to be sanded, salted, and cleared of snow and ice as soon as practicable. Another citation (No. 8728540) issued pursuant to section 104(d)(1), charges that Hunter violated 30 C.F.R. § 46.7(b) in that the snow and ice on the barge deck affected the safety of the employee and changed the nature of the task the employee was assigned, but that the company did not provide new task training to the employee to account for the changed conditions. An order issued pursuant to section 104(d)(1) (No. 8728538) asserts that the employee was not wearing a life jacket and charges the company with violating 30 C.F.R. §56.15020, a standard requiring the wearing of life jackets where there is a danger of falling into water. Another order (No. 8725539) issued pursuant to section 104(d)(1) asserts the company violated 30 C.F.R. § 56.15005 in that it failed to provide safety belts and lines for employees working on the barge where there was a danger of falling into the water.<sup>1</sup> Finally, in a citation issued pursuant to section 104(a) of the Act (No. 8728541), Hunter is charged with violating 30 C.F.R. § 56.18002(a) in failing to have a competent person examine a working place (presumably the barge) for conditions affecting miners’ safety and to do so at least once each shift.

After the citations and orders were issued, the company contested the validity of each. MSHA then proposed aggregate civil penalties in the amount of \$152,820 for the violations alleged in the contested citations and orders.<sup>2</sup> Hunter contested each of the proposed penalties.

An extensive hearing followed on January 6 and 7, 2016, at which the issues before the court included the validity of the contested citations and orders, the existence of the alleged violations, the validity of the inspector’s findings relating to the alleged violations and the appropriateness of the proposed penalties. During the hearing the court listened to the testimony of four witnesses, two for each side. The court also admitted into evidence 22 documents and copies of photographs offered by the Secretary, including the report of MSHA’s investigation of the presumed accident and 16 documents offered by the company.

During the first day of the trial Mr. Ed Jewell, an MSHA inspector who testified on behalf of the Secretary, was asked by the court whether to his knowledge any other government

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<sup>1</sup> The order was subsequently vacated by the Secretary. Tr. 290.

<sup>2</sup> A penalty of \$5,645 was proposed for the violation of section 56. 15005 alleged in Order No. 8725539. Vacation of the order means that the total of the proposed penalties is \$147,175.

agency investigated the purported accident and if so whether the agency issued a report. Mr. Jewell stated he did not know. Tr. 104-105. The following day, counsel for the Secretary advised the court that she spoke with representatives of the Coast Guard (“USCG”) several times and that she understood a report of the incident authored by the USCG was “forthcoming” but that the report “ha[d] not yet been finalized.” Tr. 292. The following exchange then took place:

Attorney for the Secretary: I would be happy to provide a copy of [the USCG report] to everyone when [it is finalized].

Attorney for Hunter: I know there is in . . . civil court proceedings a federal statute that provides that Coast Guard reports of investigations are not admissible. Whether there is some exception that would apply here . . . I really don’t know.

The court: Well . . . I only expect that I would see it or get it if both of you agree.

Attorney for Hunter: Right. That’s right.

The court: And we’ll see how that develops down the road.

Tr. 293-294.

At the close of the hearing the court advised counsels that, “[T]he record is . . . complete with the possible exception of the [USCG] report, should that be an issue.” Tr. 489. The eventuality of which the court spoke became a reality when the Secretary received a copy of the report, moved for its admission and inclusion in the record (Motion to Admit [USCG] Report of Investigation (March 8, 2016)), and Hunter lodged objections. (Response to the Secretary’s Motion to Admit [USCG] Report of Investigation (March 29, 2016)).

The Secretary argues that the report is relevant and, as such, should be admitted. The Secretary notes that he contends the victim slipped on the snow, and possible ice, present on the walkways of the adjacent barge and fell to his death and that the conditions cited in the citations and orders “contributed to the fatality.” Motion 3. According to the Secretary, the report “is a publically available summary of the USCG’s investigation findings and, as such contains the USCG’s final conclusions as to the cause of the accident and what happened to [the victim]. As such, it makes the determination of a fact more probable than it would be without the evidence and is of consequence in a determination of the action.” *Id.* The Secretary also notes that as an official government document, the report is self-authenticating. *Id.* 3-4. Further, the Secretary cites the liberal nature of admissibility in administrative law cases, and argues that, “another agency’s perspective is relevant to the determination of the facts at issue in this matter.” *Id.* 5. Finally, the Secretary advises the court that it may take judicial notice of the facts contained in

the report as they are, according to the Secretary, “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id.*

Hunter disagrees with the Secretary on every point. The company also asserts it is prejudiced by the delay in the issuance of the report which, although it is dated well before the hearing, was not available to Hunter until seven weeks after the hearing, thus preventing the company from making the report the object of discovery.<sup>3</sup> Response 2-3. Hunter points out that it has had “*no opportunity* to submit rebuttal evidence or conduct cross-examination of the Coast Guard personnel responsible for investigating and issuing [the] Report.” *Id.* 3 (*emphasis in original*). Thus, Hunter has been unable to gauge the accuracy and reliability of the report, the details of the Coast Guard investigation, the credibility of the investigators and explore the differences between MSHA’s and the Coast Guard’s findings. Finally, Hunter raises other objections disputing the fact that the report is self-authenticating and challenging the assertion that the court may take judicial notice of the report’s contents. Response 6-7.

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<sup>3</sup> The Secretary replies that despite the April 16, 2015, date on the report, the report was not available until January 7, 2016, the last day of the hearing, and the Secretary’s counsel did not become aware the report had been issued until after the hearing. Secretary’s Reply to Hunter Sand & Gravel, LLC’s Response to the Secretary’s Motion to Admit [USCG] Report of Investigation (March 31, 2016) at 2.

## **RULING**

While the report may contain relevant information, this does not automatically render it admissible. Admission is not a right but rather is the result of a court's exercise of its discretion. Courts often deny admission to relevant evidence as they balance the interests of the parties, the public and the judicial system in the development of cogent, concise records and seek to render timely decisions.

Here, the court concludes the balance tips in favor of Hunter. Were the court to grant the motion, it is likely the company would be severely prejudiced unless the court also afforded the company the opportunity to apply the mechanics of discovery to the report, procedures that would inevitably delay a decision. Following such discovery, the court also might be required to reconvene the hearing to take additional testimony relating to the report, which would engender further delay. The parties had a full and fair opportunity to present their cases at the hearing. It is doubtful that at this juncture admission of the report would add information that is necessary to an accurate and legally correct resolution of the issues before the court, issues which center on the existence of alleged violations of mine safety standards, not violations of marine safety standards and procedures. Moreover, since no one saw the assumed accident or found the body of the assumed victim, admission of the report is likely only to augment already extensive speculation as to what may have happened.

The motion **IS DENIED**.

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 15, 2016

SECRETARY OF LABOR, MSHA,  
On behalf of **JENNIFER MORREALE**,  
Complainant,

v.

VERIS GOLD U.S.A., INC.,  
Respondent.

## DISCRIMINATION PROCEEDING

Docket No. WEST 2014-793-DM  
MSHA Case No.: WE MD 14-13

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

### **ORDER DENYING COMPLAINANT'S "PRO SE" TEMPORARY REINSTATEMENT APPLICATION**

Before: Judge Simonton

This motion is before me under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Complainant, Ms. Jennifer Morreale, first filed a discrimination complaint against Veris Gold U.S.A with the Mine Safety and Health Administration (MSHA) on March 18, 2014. On June 23, 2014, the Secretary of Labor filed a formal 105(c)2 complaint with the Commission, seeking civil penalties and personal damages on behalf of the Complainant. The Secretary did not file an application for temporary reinstatement on behalf of the Complainant at any point. Following protracted motions practice, the parties submitted a joint settlement motion to this court on February 20, 2015. In critical part, the Respondent agreed to pay the Secretary a civil penalty of \$1,000 and an undisclosed monetary payment to the Complainant within 30 days of the final order. The Respondent specifically stated within the settlement motion that,

Respondent's counsel has petitioned and secured approval from the bankruptcy monitor to approve this settlement in the ordinary course of business and allow payment to be made outside of the general unsecured creditor process.

February 20, 2015 Settlement Agreement, 2.

Relying on these representations, the court approved the joint settlement motion on February 27, 2015. However, on May 27, 2015, Morreale filed a "Motion to Compel" on her own behalf with this court. Morreale stated within her motion that the Respondent had not made any payment to her and requested that this court enforce the terms of the settlement agreement. Through a series of conference calls with the Secretary of Labor, the Complainant, and the Respondent's counsel, the court confirmed that the Respondent had not made any payments to the Complainant or the Secretary. The court also learned that the Respondent did not plan to

honor the agreement pursuant to a pending asset sale in which the Jerritt Canyon Mill mine would be sold free and clear of all interests. June 3, 2015 Notice Reserving Judgment.

On June 19, 2015, Morreale filed a joint motion with several other 105(c) complainants in the District of Nevada U.S. Bankruptcy court, seeking to stay the pending asset sale to Jerritt Canyon Gold (JCG). Although the Secretary continued to officially represent Ms. Morreale and another 105(c)2 complainant with a claim against Veris before the Commission, the Secretary did not join the complainants' motion to stay the asset sale. The bankruptcy court denied the complainants' stay motion that same day and the asset sale was finalized on June 24, 2015. On July 8, 2015, this court issued an order denying the Complainant's motion to compel payment as the court had released jurisdiction upon issuing the final settlement order.

On October 14, 2015, Morreale petitioned the Commission to reopen this matter for further proceedings in aid of compliance. On February 3, 2016, Morreale filed a formal motion to amend with the Commission, naming JCG and its controlling entities as liable successors in interest. On March 8, 2016, the Commission reopened and remanded this matter for further proceedings, including consideration of Morreale's motion to add JCG, Eric Sprott, and Whitebox Asset Management as successors in interest.

That same day, Morreale filed a "Motion for Temporary Reinstatement and Financial Reinstatement" with this court. Within, Morreale requested reinstatement to her former environmental technician position at the Jerritt Canyon Mill Mine and requested "temporary financial reinstatement, including interest, from March 2014 until (the conclusion of this case)." Morreale TR Motion, 2. The Secretary did not sign or appear to join Morreale's request for temporary reinstatement and backpay.

### ANALYSIS

The Mine Act sets forth clear procedural requirements for temporary reinstatement applications, stating that,

Upon receipt of (a discrimination) complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis *upon application of the Secretary*, shall order the immediate reinstatement of the miner pending final order on the complaint.

30 U.S.C. 815 (c)2 (emphasis added).

Thus, a complainant is not eligible for temporary reinstatement unless the Secretary has submitted an appropriate application to the Commission. The Secretary has not filed an application for temporary reinstatement at any time during these proceedings. Solicitor Doherty

February 26, 2015 E-Mail. The Secretary did not join Morreale in submitting her March 8, 2016 motion for temporary reinstatement. Thus, I must deny Complainant's application for temporary reinstatement at the Jerritt Canyon Mill mine.

With this finding in mind, the court notes that it is the Secretary that brought this matter before the Commission in June 2014, seeking both civil penalties and personal damages on behalf of the Complainant. As such, the court is perplexed that after obtaining a final settlement agreement, the Secretary failed to aid Morreale in her efforts before the U.S. bankruptcy courts and the Commission. However, the court is well aware that the Commission cannot order the Secretary to pursue enforcement of monetary judgments in the federal courts. *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618. The court is also aware that the Secretary has previously informed the Commission that it does not act as a legal representative for discrimination complainants in section 105(c)2 proceedings. *Disciplinary Proceeding*, 24 FMSHRC 28, 34 (January 2002). The Commission in that case found nothing in the manner in which the Solicitor of Labor handles section 105(c)(2) discrimination cases that indicates to miners that counsel in the Solicitor's Office are not their attorneys. I note this is also true of the way the Solicitor of Labor enters their representation on the record before the Commission. I echo the Commission's view as applied in this case.

However, now that the Commission has reopened this matter, the Secretary has not withdrawn their initial 105(c)2 complaint or released their claim for the agreed upon civil monetary penalty.<sup>1</sup> As such, the Complainant and Secretary are **ORDERED** to jointly submit all future filings in this section 105(c)(2) proceeding.

Furthermore, Morreale's request for reinstatement and backpay would in effect void the terms of the parties' prior voluntary settlement agreement. Although the listed Respondent has failed to honor the terms of the settlement agreement to date, the court currently considers the February 20, 2015 settlement agreement to be in full effect. What is at issue is whether JCG, Eric Sprott, and Whitebox Asset Management should be added as successors in interest parties.<sup>2</sup> As such, even if the Secretary were to submit an application for temporary reinstatement on behalf of Ms. Morreale, it is unlikely that the court would grant such a request.

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<sup>1</sup> The court does not suggest that the Secretary withdraw from this matter. The Secretary may, as it has in *Garcia v. Veris* WEST 2014-905, submit filings detailing the Secretary's position on the successorship issues raised by the Complainant.

<sup>2</sup> The court could, if appropriate, ultimately award additional damages such as interest or incurred legal expenses to the Complainant due to the Respondent's failure to timely honor the settlement agreement. However, the court does not intend to reopen the substance of this case or the primary terms of the parties' final settlement agreement.

## **ORDER**

The Complainant's application for temporary reinstatement is **DENIED**. The Complainant is directed to submit all future filings jointly through the Secretary of Labor. As directed by the Commission, the court will promptly issue further direction on the outstanding question of successorship liability.

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

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April 21, 2016

SECRETARY OF LABOR, MSHA,  
on behalf of **JENNIFER MORREALE**,  
Complainant,

v.

VERIS GOLD U.S.A., INC., and its  
successors,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-793  
MSHA Case No.: WE MD 14-13

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

## **BRIEFING ORDER**

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).<sup>1</sup> On March 8, 2016 the Commission reopened and remanded this matter to the court for further proceedings and stated that,

The Judge shall consider Morreale's motion to amend her complaint to add Jerritt Canyon Gold, LLC; Eric Sprott; and Whitebox Asset Management as successors in interest.

March 8, 2016 Commission Order WEST 2014-793, 5.

Jerritt Canyon Gold (JCG) has previously noted that they acquired the Jerritt Canyon Mill mine from Veris Gold U.S.A (Veris) under section 363(f) of the U.S. Bankruptcy Code. 11 U.S.C. 363(f) (mandating that, under certain conditions, a bankruptcy trustee may sell property of a bankrupt corporation "free and clear of any interest in such property.") As such, JCG has argued that the "free and clear" provisions of section 363(f) asset sales completely bar recovery attempts against JCG vis a vis successorship liability. See *Garcia v. Veris*, WEST 2014-905 Stay Order, 2 (March 4, 2016) (ALJ Simonton). The Secretary of Labor has joined JCG in this

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<sup>1</sup> The court detailed this docket's protracted procedural history in a recent order denying the Complainant's self-filed application for temporary reinstatement. In summary, the parties reached a finalized settlement agreement on February 20, 2015 in which the Respondent agreed to pay a civil monetary penalty and separate personal payment to the Complainant. The court approved the settlement agreement on February 27, 2015. However, the listed Respondent failed to honor the agreement and the Jerritt Canyon Mill mine was sold to Jerritt Canyon Gold (JCG) in a section 363(f) asset sale free and clear of all liabilities in June 2015. The Complainant filed a motion to reopen with the Commission and subsequently filed a motion to amend, formally naming JCG, Eric, Sprott, and Whitebox Asset Management as successors-in interest.

position. *Id.* The complaining miner in this matter, Ms. Jennifer Morreale, does not. The court acknowledges that the correct interaction of bankruptcy law and the Commission's successorship doctrine must be definitively answered at some point. However, the Commission declined to address this issue of first impression in their remand order above. Additionally, in a detailed decision that named JCG as a *potential* successor in interest to Veris, a fellow Commission ALJ has recently held that section 363(f) asset sale protection should not necessarily bar recovery of section 105(c) discriminations claims against bona-fide successors in interest. *Varady v. Veris*, WEST 2014-307, 17 (March 4, 2016) (ALJ Moran).

With this present legal ambiguity in mind, the most prudent course of action is to first resolve the factual question of JCG's successorship status before proceeding to potential bankruptcy protection issues. *Varady*, WEST 2014-307, 17 (stating that successorship findings should precede consideration of enforcement issues); See also *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1528-30 (August 1990) (holding that section 362(b) of the U.S. Bankruptcy code permits the Commission to make liability determinations separate and apart from enforcement concerns governed by other jurisdictions).

In her self-filed motion to amend before the Commission, the Complainant alleged that the primary controller of JCG, Eric Sprott, also controlled Whitebox Investments, the DIP lender that approved the parties' February 20, 2015 settlement agreement. Morreale Motion to Amend, 5. Morreale has also stated that news reports indicate that JCG has maintained the same on-site personnel, equipment, and operation methods since it assumed control of the Jerritt Canyon Mill mine in June 2015. *Id.* at 6-7. In a separate docket, JCG has argued that it does not meet the Commission's successorship test, relying primarily on JCG's newly formed corporate identity and changes in upper level management at the Jerritt Canyon Mill mine. JCG March 1, 2016 Response, 13-14, *Garcia v. Veris* WEST 2014-905. The Secretary has to date declined to provide any input on JCG's successorship position. Sec'y March 1, 2016 Response, 7, *Garcia v. Veris* WEST 2014-905. Veris has not responded to any of this court's orders since June 17, 2015.

Thus, further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine is necessary to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris. Accordingly, the Complainant<sup>2</sup>, Veris, and JCG (as well as Eric Sprott and Whitebox Asset Management) are directed to promptly begin discovery regarding JCG's, Eric Sprott's and Whitebox Asset Management's relationship to Veris.

No later than June 1, 2016, the parties shall file briefs regarding JCG's, Eric Sprott's and Whitebox Asset Management's relationship to Veris as successors in interest under the Commission's successorship test. See *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980) (adopting a nine factor successorship test), *aff'd* in relevant part sub nom. *Munsey v.*

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<sup>2</sup> The court has recently directed the Complainant to submit all filings through the Secretary pursuant to the normal operation of section 105(c)(2) proceedings.

*FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). Within their responses, the parties shall also respond to the following questions:

- 1) Did JCG management learn of the finalized settlement agreement between the Secretary, Ms. Morreale, and Veris prior to JCG's purchase of the Jerritt Canyon Mill mine?
- 2) Did JCG management learn of any pending 105(c) discrimination claim against Veris Gold USA prior to JCG's purchase of Veris?
- 3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine?
- 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control?
- 5) What percentage of Veris employees employed at the Jerritt Canyon Mill mine did JCG rehire following their assumption of mining operations in June 2015?
- 6) What percentage of Veris supervisory agents at the Jerritt Canyon Mill mine were retained by JCG? In addition to senior management personnel, the Commission generally considers supervisors with production and safety responsibilities agents of the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who conducted safety examinations and assigned tasks were agents of the operator).
- 7) Has JCG substantially altered production methods at the Jerritt Canyon Mill mine?

The parties are strongly encouraged to submit supporting documentation and/ or affidavits to substantiate their positions. The parties are directed to reserve arguments concerning the correct application of bankruptcy law for future proceedings.

### **ORDER**

The Complainant, Veris Gold U.S.A., and JCG<sup>3</sup> are **ORDERED** to submit briefs on the successorship issues outlined above no later than June 1, 2016.

/s/ David P. Simonton

David P. Simonton

Administrative Law Judge

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<sup>3</sup> Briefs may also be submitted by Eric Sprott and Whitebox Asset Management at their election as necessary.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

April 25, 2016

BHP COPPER, INC.,  
Contestant,

v.

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

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

v.

BHP COPPER, INC.,  
Respondent.

TETRA TECH CONSTRUCTION SERVICES,  
Contestant,

v.

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

## CONTEST PROCEEDINGS

Docket No. WEST 2013-189-RM  
Citation No. 8751238; 10/18/2012

Docket No. WEST 2013-190-RM  
Order No. 8751239; 10/18/2012

Mine: Pinto Valley Operations  
Mine ID: 02-01049

## CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-636-M  
A.C. No. 02-01049-315370

Mine: Pinto Valley Operations

## CONTEST PROCEEDINGS

Docket No. WEST 2013-187-RM  
Citation No. 8751236; 10/18/2012

Docket No. WEST 2013-188-RM  
Order No. 8751237; 10/18/2012

Mine: Pinto Valley Operations  
Mine ID: 02-01049 A0380

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

v.

TETRA TECH CONSTRUCTION SERVICES,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-587-M  
A.C. No. 02-01049-315369

Mine: Pinto Valley Operations

**ORDER GRANTING IN PART AND DENYING IN PART**  
**THE SECRETARY'S MOTION TO COMPEL**

The Secretary of Labor filed a motion to compel BHP Copper ("BHP") and Tetra Tech Construction Services ("Tetra Tech") to produce their Fatal Accident Report ("ICAM") concerning the September 22, 2012 death of Jon Vanoss in the Pinto Valley Mine, and related investigation documents, including photographs and a videotape. BHP and Tetra Tech refused to produce these materials, and contend that they are protected under the work product and attorney-client privilege doctrines. BHP and Tetra Tech argue that because an attorney directed and participated in the investigation process, the accident report and related documents are protected.

On September 22, 2012, Jon Vanoss, a contract employee with Tetra Tech with six days of experience, began work at Pinto Valley Operations at his normal 6:00 a.m. start time. Tetra Tech was hired by BHP as a Contractor to provide rehabilitation services for the mill and processing equipment. The mine ceased production in February 2009 and began rehabilitation operations in February 2012. On the day of the accident, Vanoss and a co-worker, Edwards, were sent to the fourth floor of the secondary crusher building to perform fire watch duties while welders worked on the chute above them. As a part of the rehabilitation of the building, certain equipment and screens had been removed from the building, leaving a number of large gaps in the floor. Sometime, after lunch, when Vanoss returned to the building alone, he fell through one of the floor openings and was found several hours later 30 feet below. As a result of the fatal accident, MSHA conducted an investigation and issued two citations each to BHP and to Tetra Tech.

MSHA conducted an accident investigation at the site shortly after the incident, as did BHP with the cooperation of Tetra Tech.<sup>1</sup> During the investigation, both MSHA and the mine operator photographed the scene and took witness statements. MSHA issued a report, and that report, along with photographs and other materials have been released to both BHP and Tetra Tech. BHP also drafted a report, along with photos, videotapes and witness statements, but has refused to provide the bulk of that report and its accompanying emails and photos, to the Secretary. On March 22, 2016 the Secretary filed a motion to compel the production of the mine's investigation report and all documents, witness statements, emails and photographs that

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<sup>1</sup> There have been some allegations that the accident scene had been altered between the time of the accident and the time MSHA arrived to conduct its investigation.

were a part of that investigation. Both BHP and Tetra Tech responded by arguing that the documents are subject to the work product and attorney client privilege. For the reasons set forth below, I find that the factual information contained in the files must be released to the Secretary, but that any attorney thoughts, advice, or opinions are protected and should not be produced.

### Work Product Privilege

Work product privilege protects materials prepared by an attorney in anticipation of litigation from discovery by the adverse party. *See Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). The doctrine is codified in section 26(b)(3) of the Federal Rules of Civil Procedure. Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b) incorporates the Federal Rules of Civil Procedure, as is practicable, on any procedural question that is not regulated under the Mine Act or the Commissions Procedural Rules. *See Secretary v. Consolidation Coal Co.*, 19 FMSHRC 1239, 1242 (July 1997). As the party invoking the privilege, BHP Copper bears the threshold burden to prove that the requested materials are (1) documents and tangible things (2) prepared in anticipation of litigation or trial (3) by or for another party or by or for that parties' representative. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

Here, the Secretary seeks an accident investigation report, referred to as an ICAM, along with all witness statements and emails that relate to the investigation. With regard to accident or investigation reports, the dispositive question is whether the material at issue was prepared in anticipation of a trial or litigation. If the documents serve dual purposes, work product privilege applies to materials that were prepared *because of* the prospect of litigation. *United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998) (emphasis added). BHP asserts that the report and its accompanying documents were prepared at the direction of an attorney and for the purpose of defending both a wrongful death action and any regulatory action taken by MSHA. The Secretary argues that ICAM documents are routine at this mine, and are prepared in most instances where litigation is not anticipated.

If the invoking party demonstrates that the materials qualify as work product, the requesting party bears the burden to justify production of the privileged documents. *See Hickman v. Taylor*, 329 U.S. 495, 512. Two categories of work product require different thresholds of proof. "Core" work product consists of "mental impressions, conclusions, opinions, or legal theories concerning the litigation" and may only be compelled in the rarest of circumstances. *National Union Fire Insurance Company v. Murray Sheet Metal Company Inc.*, 967 F.2d 980, 984 (4th Cir. 1992). "Ordinary" work product consists of facts, and the requesting party may compel discovery through showing (1) a substantial need for the material and (2) an inability to produce the substantial equivalent of the material without enduring undue hardship. *See Hickman v. Taylor*, 329 U.S. 495, 509 (1947); *In Re Grand Jury Proceedings, Thursday Special Grand Jury Term*, 33 F.3d 342, 348 (4th Cir. 1994).

The Secretary argues that BHP's ICAM report does not qualify as work product because BHP and Tetra Tech had a legislative duty under 30 C.F.R. § 50.11(b)<sup>2</sup> to perform an accident report for Vanoss' death. In addition, the Secretary points to the internal procedures that BHP

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<sup>2</sup> Section 50.11(b) states: "Each operator at a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation."

and Tetra Tech have had in place since at least 2008. These prior obligations, the Secretary argues, indicate that the accident report withheld was not created because of the prospect of litigation. BHP argues that the investigation was initiated by an attorney and that the report was not one that BHP would do in its normal course of business. However, the depositions testimony attached to the Secretary's motion gives a contrary impression that in fact a similar report is and has been prepared by BHP for a number of incidents at the mine, and they routinely conduct an investigation into an accident in order to prevent future injuries and deaths. While the mine may not have a statutory duty to create the exact report that it did, it does have the duty to investigate any accident or incident at the mine: In this case, the report was a result of that investigation and therefore I find it is not subject to the work product privilege.

BHP argues that the report has two purposes, but that the primary purpose is to prepare for litigation. The mine argues that since BHP contacted its attorney to investigate the accident, it was in anticipation of litigation not only concerning any MSHA citations, but the wrongful death action that was sure to follow. Counsel for the mines directed the investigation and was an active participant. Further, BHP argues that the investigation is separate and apart from its duty to investigate the accident because it was directed by an attorney for the company. However, even if the materials generated serve a function that is separate and apart from litigation, they should only be withheld if they reveal the mental impressions or opinions of an attorney who prepared them. *United States v. Adlman*, 134 F.3d 1194, (2nd Cir. 1998).

BHP's mandatory ICAM procedures have existed since 2008. Moreover, both BHP and Tetra Tech have provided their accident review guidelines in Exhibits 5 and 6. These indicate that both entities have accident reporting procedures in place regardless of whether litigation is anticipated. In addition, BHP has conducted ICAM investigations without the request of counsel for much less serious accidents. The ICAM procedures focus on gathering information to explain technical problems that caused the accidents. Robert Krohn, the mine operations manager, testified that the ICAM practice is a "normal company process" and that anyone receiving it "would know what to do without advice from anybody." (*Secretary's Motion to Compel*, at 9). *National Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980 (4th Cir. 1992). "Materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3)." See also *Secretary v. ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) where the Commission found that an investigation report was work product because the Secretary produced it to determine whether to commence litigation, and therefore was in anticipation of litigation. "If, on the other hand, litigation is contemplated but the document is prepared in the ordinary course of business rather than for purposes of litigation, it is not protected." (*Id.*)

Thus, without a substantial showing otherwise, the ICAM does is not eligible for work product privilege. The emails and other documents associated with the ICAM are also not subject to the work product privilege since they are intimately tied to the investigation and also contain factual information that was incorporated into the final report. However, as discussed below, parts of the investigation report and the documents associated with that investigation may be subject to the attorney-client privilege.



### Attorney-Client Privilege

BHP next argues that the information requested by the Secretary, specifically the ICAM report, emails, photos, a videotape, witness statements and other documents associated with the mine's investigation into the fatal accident, are subject to the attorney-client privilege and therefore should not be released. Attorney-client privilege serves to promote full and frank communication between attorneys and their clients. *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981). The privilege rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation to effectively carry out his or her objectives. *Trammel v. United States*, 445 U.S. 40, 41 (1980).

Yet attorney-client privilege also impedes the full discovery of the truth, and therefore must be strictly construed. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) citing *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). Attorney-client privilege protects communications between an attorney and their client and does not extend to facts disclosed by the clients while communicating with the attorney. *Upjohn*, 449 U.S. at 395.

Again, BHP and Tetra Tech bear the burden of proving that the accident investigation meets the eligibility requirements for attorney-client privilege. BHP and Tetra Tech must show that:

(1) [the] asserted holder of the privilege is or sought to become a client, (2) person to whom communication was made (a) is a member of the bar of a court, and (b) in connection with this communication is acting as a lawyer; (3) communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or a tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*See Secretary of Labor O/B/O Charles Scott Howard v. Cumberland River Coal Co.*, 34 FMSHRC 311, 314 (Jan. 2012) (ALJ); citing *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) (citations omitted). The Secretary, in its motion to compel, suggests a different test, promulgated by the 9th Circuit in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) which uses a substantially similar 8-part test. However, the Commission has consistently relied on the 4<sup>th</sup> Circuit test and therefore it is relied upon here.

BHP and Tetra Tech together argue that BHP engaged outside counsel to provide legal advice as to the regulatory actions that may follow as well as the wrongful death action based upon the death of Vanoss. The emails, slides and other information were created with counsel and for counsel to aid him in providing legal advice to his clients. In addition, MSHA conducted its own investigation and received volumes of documents and has not shown a need for the information gathered by the attorney for the mine operator.

The Secretary argues that the primary purpose of the ICAM report is to determine what caused an accident and identify corrective actions to prevent reoccurrence. With this purpose in mind, the Secretary asserts that BHP provided no evidence indicating that the ICAM report intended to seek legal advice. The Secretary further argues that BHP asserted privilege based on

the fact that the attorney directed and participated in the accident investigation yet, attorney-client privilege requires that the client communicate facts to the attorney, and he responds with legal advice and in his capacity as their attorney. The Secretary asserts that the report contains no legal advice. In addition, the ICAM procedure in Exhibit 6, as well as Robert Krohn's testimony, indicate that multiple parties receive copies of the ICAM report. If an individual outside of the employ of BHP or Tetra Tech received a copy, the dispersal may qualify as a waiver of attorney-client privilege.

Attorney-client privilege applies to communications between company employees and the counsel for the company acting in a legal capacity, in order to secure legal advice, and only if employees were aware of that purpose. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The courts have also determined that the underlying facts are separate and may not be withheld based upon the attorney client privilege. *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009). Here, emails were sent to any number of people; information was provided and shared, not always with an attorney; and the report was disseminated to managers at both BHP and Tetra Tech. The fact that emails were directed to or copied to an attorney does not alone make them privileged. Further, documents that contain factual information may not be privileged. *Laws v. Stevens Transport, Inc.*, 2013 WL 941435, (S.D. Ohio, 2013).

A number of Courts have determined that confidential communications made to attorneys "hired to investigate through the trained eyes of an attorney" are privileged, *In re International Sys.*, 91 F.R.D. at 557, the same is not true for the entire investigation file. Courts have consistently recognized that investigation may be an important part of an attorney's legal services to a client. See, e.g., *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir.1996); *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 875 (5th Cir.1991) (applying Mississippi law); *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir.1979); *Diversified Indus. v. Meredith*, 572 F.2d 596, 606-10 (8th Cir.1977) (en banc hearing 1978); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 91 F.R.D. 552, 557 (S.D.Tex.1981), *vacated on other grounds*, 693 F.2d 1235 (5th Cir.1982); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 599-611 (N.D.Tex.1981). *Upjohn* made "clear that fact finding which pertains to legal advice counts as professional legal services." *Rowe*, 96 F.3d at 1297 (internal citations omitted). Further, the 4<sup>th</sup> Circuit has found that an attorney did not act solely as an investigator when hired by the state Attorney General, but also as an attorney and therefore could invoke the privilege. *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997).

However, neither the attorney-client nor the work product privilege protects underlying facts. As the Supreme Court explained in *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981), the client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. Thus, "a party cannot conceal a fact merely by revealing it to his lawyer." *Id.*, 449 U.S. at 396, 101 S.Ct. at 686.

I agree with BHP that many of the communications between the mine operators and the attorney are protected by the attorney-client privilege, and particularly conversations that involve or include legal advice or the attorney's impressions or legal strategy. To that extent, emails and documents that contain any deliberation, attorney opinion, comment, legal strategy or mental impression are protected and need not be produced. However, given the nature of this case, and the importance of having all facts available to all parties, any documents that contain factual

information must be produced, after protected information is redacted. All photographs, whenever taken, must also be produced. There are not sufficient facts in the file to determine whether or not the video made after the investigation is subject to any privilege, or is even relevant to the MSHA matter as opposed to the wrongful death case, and therefore it is not included in this decision.

### **ORDER**

BHP and Tetra Tech are hereby ORDERED to provide a copy of the ICAM report, along with any emails, photographs, witness statements or other documents related to the ICAM report that contain any factual information. The operator may remove from any document any deliberation, opinion, comment, legal strategy or mental impression of any attorney or a representative of the attorney. The documents shall be produced within ten days of the date of this order.

/s/ Margaret A. Miller

Margaret A. Miller

Administrative Law Judge

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April 26, 2016

MATTHEW A. VARADY,  
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM  
WE-MD 14-03

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

**ORDER ON JERRITT CANYON GOLD'S MOTION FOR CERTIFICATION OF  
INTERLOCUTORY REVIEW**

Before: Judge Moran

Dorsey & Whitney LLP, on behalf of Jerritt Canyon Gold, LLC, ("JCG") has filed a motion seeking interlocutory review, per 29 C.F.R. § 2700.76.<sup>1</sup> The Motion requests that the Court "certify that [its] ruling to add JCG as a respondent in this matter involves a controlling question of law and that immediate review *will* advance the final disposition of the proceeding."<sup>2</sup> Motion at 1 (emphasis added).

For the reasons which follow, the Court, by not having determined that immediate review will materially advance the final disposition of the proceeding, DENIES the motion.<sup>3</sup>

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<sup>1</sup> The Court, after checking with the Commission's electronic filing system, emailed the Complainant on April 19, 2016, to determine if any response was made to this motion. The Respondent confirmed via email the same day that he had not submitted a response.

<sup>2</sup> An unexplained oddity, under § 2700.76, when a judge is addressing a motion for interlocutory review, part of the test is whether immediate review *will* materially advance the final disposition of the proceeding, but the same section provides that, if the motion is denied by the judge, the Commission's review is whether "immediate review *may* materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(1)(i), (a)(2) (emphasis added).

<sup>3</sup> Given this Court's denial of the motion, the provisions at 29 C.F.R. § 2700.76(a)(1)(ii) and (a)(2) come into effect. JCG Counsel is aware of these provisions.

In pertinent part, the provision addressing interlocutory review by a judge provides:

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. . . .

(1) Review cannot be granted unless:

(i) The judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review *will materially advance the final disposition of the proceeding*; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.

29 C.F.R. § 2700.76 (emphasis added).

The motion contends that there is no jurisdiction to add JCG as a party. It then revisits all of the arguments previously made to, and rejected by, this Court,<sup>4</sup> in support of its claim of lack of jurisdiction, which arguments will not be repeated here.<sup>5</sup>

The motion incorrectly describes the “Issue” as whether allowing the Complainant to amend his discrimination complaint “to add JCG as an additional respondent in the case [is] in contravention of the Canadian and U.S. Bankruptcy Courts’ automatic stay, prior adjudication, discharge and free and clear sale of the Veris Gold assets to JCG under Section 363(f) of the Bankruptcy Code.” Motion at 7. The issue, however, is whether the asserted jurisdictional bar involves a controlling question of law and whether, in the Court’s opinion, immediate review of that issue will materially advance the final disposition of the proceeding.<sup>6</sup>

Among the many reasons advanced by JCG, all rejected by this Court in its previous ruling, are that any actions taken in violation of the bankruptcy court’s automatic stay are void *ab initio*, that only the bankruptcy courts can modify the automatic stay and, because of that, all MSHA proceedings are stayed. *Id.* at 10. JCG then continues with citations to the Canadian and U.S. Bankruptcy Courts’ holding that JCG acquired the assets of Veris Gold free and clear of any

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<sup>4</sup> In fact, and as a matter of practicality, the motion essentially repeats, verbatim, large portions from previous submissions to this Court.

<sup>5</sup> The Court’s March 4, 2016, Order on Complainant’s Motion to Amend addresses JCG’s contentions. *See generally Varady v. Veris Gold USA, Inc.*, No. WEST 2014-307-DM, 2016 WL 944251 (FMSHRC Mar. 4, 2016) (ALJ).

<sup>6</sup> JCG also requests that “in the interest of judicial economy and fairness to the parties, [the] proceedings in th[is] docket . . . be stayed pending a final determination on the issue of jurisdiction.” Motion at 8. This request is DENIED. The proceedings are stayed but only until the Commission rules on the motion for interlocutory review.

interest, claim or liability. *Id.* at 10-12. These claims rest upon the asserted legitimacy of the § 363(f) proceeding under the Bankruptcy Code. In its prior ruling, the Court has addressed this issue as well.

The motion then discounts this Court's reference to the Commission's Order "in a recent parallel proceeding, *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at \*2 n.4 (FMSHRC Jan. 2016), in stating that JCG's asset purchase in bankruptcy 'free and clear' of employment claims may not extinguish successorship liability," as dicta and contends that the Court's reference to "the much criticized 35 year old NLRB opinion, *In International Technical Products Corp.* ("ITP"), 249 NLRB 1301 (June 1980)," is misplaced as outdated. *Id.* at 14. The motion also contends that this Court's reference to "dicta in *Chicago Truck Drivers, Helpers, and Warehouse Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995), in stating that a bankruptcy disposition did not preclude creditors from a successor liability claim . . . is distinguishable from the facts of the Varady case." *Id.* at 15.

The motion also maintains that "[t]he doctrine of *res judicata* bars the Complainant from attaching his discrimination claim to JCG." *Id.* at 17. However, the Court notes that this theory extends the *res judicata* claim beyond the bankruptcy court's sale order, asserting that it controls any Mine Safety and Health Review Commission decision. The Court, in the context of the entirety of its previous order addressing JCG and Varady, has spoken to this claim and rejected it.

JCG's motion ends with the assertion that "[t]here are strong preemptive and public policy considerations under the Bankruptcy Code that support the conclusion that the ALJ and Commission do not have jurisdiction to add JCG as a respondent to Varady's claims against Veris Gold, in an effort to *manufacture* a successor liability claim." *Id.* at 19 (emphasis added).

### **Discussion**

The Court cannot, in effect, endorse JCG's Motion because its previous ruling points in a very different direction.<sup>7</sup> That previous ruling provides a detailed basis for the Court's conclusion but the reasoning will be briefly highlighted here.

While JCG refers to cases in which it has been held that any actions taken in violation of the bankruptcy court's automatic stay are void *ab initio*, and that only the bankruptcy courts can modify the automatic stay and that, in light of those arguments, all MSHA proceedings are stayed, no cases involving MSHA discrimination proceedings have been cited. The same point applies to the assertion that no challenge can be made contravening a bankruptcy court's holding that assets of a successor are acquired free and clear of any interest, claim, or liability — there is no case law applying such a holding to MSHA discrimination actions.

The issue at this point is whether JCG and potentially others may be liable as successors for acts of discrimination committed by Veris Gold. The Commission has found that successorship liability may be available in a given case where an action is brought under section 105(c)(2) of the Mine Act, and no case has held that such relief is unavailable merely because a

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<sup>7</sup> See generally *Varady*, 2016 WL 944251.

discrimination claim has been brought under section 105(c)(3). *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom. Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983); *see also Sec'y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448, 1453 n.15 (D.C. Cir. 1989). Certainly there is no suggestion in the language employed by Congress in section 105(c)(3) matters that miners proceeding under that provision are to be treated as second class complainants. Though it may be that some other court may side with JCG's position, it is not for the Commission's judges to anticipate what another tribunal may conclude about the breadth and effect of Mine Act discrimination.

Discovery remains vital to the fair determination of potential successor liability for a number of reasons.<sup>8</sup> First, though the § 363(f) proceeding under the Bankruptcy Code has been

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<sup>8</sup> It is noted that fellow Administrative Law Judge David Simonton recently issued a briefing order relevant to these issues. After noting that there is legal ambiguity concerning the "correct interaction of bankruptcy law and the Commission's successorship doctrine," Judge Simonton concluded that "the most prudent course of action is to first resolve the factual question of JCG's successorship status before proceeding to potential bankruptcy protection issues," and, in line with view, that stated "further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine is necessary to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris." Briefing Order at 2, *Sec'y of Labor on behalf of Morreale v. Veris Gold U.S.A. Inc.*, WEST 2014-793 (FMSHRC Apr. 21, 2016). Helpfully, Judge Simonton directed the respondents to respond to the following non-exclusive, preliminary questions regarding successorship:

1) Did JCG management learn of the finalized settlement agreement between the Secretary, Ms. Morreale, and Veris prior to JCG's purchase of the Jerritt Canyon Mill mine?

2) Did JCG management learn of any pending 105(c) discrimination claim against Veris Gold USA prior to JCG's purchase of Veris?

3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine?

4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control?

5) What percentage of Veris employees employed at the Jerritt Canyon Mill mine did JCG rehire following their assumption of mining operations in June 2015?

6) What percentage of Veris supervisory agents at the Jerritt Canyon Mill mine were retained by JCG? In addition to senior management personnel, the

(continued...)

held up by JCG as a badge of authority, this Court's March 4, 2016, Order noted that several commenters have criticized that provision as being extended beyond its natural language and seriously deficient from a due process standard. The Court raised several concerns in this regard, including the nature of the hearing which occurred before the bankruptcy courts and the transcript of such proceeding. Also, as the Court previously noted, the bankruptcy monitor was apparently aware of, and inferentially approved, Veris Gold's attempt to defend the Varady discrimination claim at the hearing.<sup>9</sup> That action, in the Court's view, implicitly accepted that the bankruptcy proceeding may not have barred the discrimination action. More likely, Veris might have calculated that it could prevail at the hearing but, after it did not, it employed a "heads I win, tails you lose" strategy, the latter approach now being asserted.

Accordingly, for the reasons expressed both in this Court's March 4, 2016, Order on Complainant's Motion to Amend as well as those stated above, in this Order on Jerritt Canyon Gold's Motion for Certification of Interlocutory Review, JCG's Motion is DENIED.

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

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<sup>8</sup> (...continued)

Commission generally considers supervisors with production and safety responsibilities agents of the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who conducted safety examinations and assigned tasks were agents of the operator).

7) Has JCG substantially altered production methods at the Jerritt Canyon Mill mine?

*Id.* at 3.

<sup>9</sup> Only through discovery can Complainant learn both of the legitimacy of the § 363(f) proceeding and the appropriateness of any successorship application. Questions abound. For example, in the related matter of *Daniel Lowe v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, WEST 2014-614-DM, it was earlier suggested that two secured creditors, owed \$120 million, received nothing. See *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 1553724, at \*6 n.6 (FMSHRC Apr. 7, 2016) (ALJ). Yet, in the present Motion for Certification of Interlocutory Review, JCG advises that "the secured creditors received no monetary payments." Motion at 20 (emphasis added).



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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2016

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on  
Behalf of **ADAM WHITON**,  
Complainant

v.

WHARF RESOURCES (USA), INC.,  
Respondent

DISCRIMINATION PROCEEDING

Docket No. CENT 2016-0221-DM  
RM-MD-16-04

Mine: The Wharf Mine  
Mine ID: 39-01282

## **ORDER GRANTING IN PART, AND DENYING IN PART,** **RESPONDENT'S MOTION TO COMPEL**

Before: Judge McCarthy

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Adam Whiton under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2).<sup>1</sup> The matter is set for hearing in Deadwood, South Dakota on June 14 and 15, 2016, and continuing dates thereafter until completed.

On April 11, 2016, the Respondent filed a Motion to Compel 18 documents withheld during discovery pursuant to the Secretary's privilege log. On April 15, 2016, the Secretary filed an Opposition to Respondent's Motion to Compel. During an April 20, 2016 conference call, I ordered in camera review of the documents at issue.

Commission Procedural Rule 56(b) provides that parties may obtain discovery of any relevant matter that is not privileged. 29 C.F.R. § 2700.56(b). A Commission judge is authorized to exercise wide discretion in ruling on discovery issues and the Commission does not substitute its judgment for that of the judge unless error or abuse of discretion has occurred. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (1992).

Following my in camera review, I grant the motion to compel production of five Memorandums of Interview taken from management agents. The Secretary is **ORDERED** to turn these witness statements over immediately. In all other respects, the Respondent's Motion to

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<sup>1</sup> On January 21, 2016, I issued an Order of Temporary Economic Reinstatement in Docket No. CENT 2016-0136.

Compel is **DENIED**. The remaining seven Memorandums of Interview are subject to the *Jenks* rule. *See generally Jenks v. United States*, 353 U.S. 657, 667-69 (1957); 18 U.S.C. § 3500.<sup>2</sup>

## **Documents at Issue**

### **1. MSHA Case Analysis**

The first document at issue is an undated Case Analysis, prepared by MSHA analyst, Joel Gerhard, recommending that further action be pursued on Whiton's behalf under section 105(c)(2). The Secretary claims work product, deliberative process, and attorney client privilege. I agree, but need not pass on the latter two privileges.

The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privileged is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC 1239, 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See R. Mot.* at 6-7. Even if Respondent had made such a showing, the document discloses a party representative's mental impressions, conclusions, opinions, and legal theories, and such work product, including the evaluative and analytical discussion of facts inextricably intertwined therein, cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn Co. v. U.S.*, 449 U.S. 383, 400 (1980); Fed. R. Civ. P. 26(b)(3)(B).

### **2. Special Investigator Dan Scherer's Special Investigative Report**

The second document at issue is Special Investigator Dan Scherer's December 10, 2015 Special Investigative Report. The Secretary claims work product, deliberative process, informant, and attorney client privilege. I agree, but need not pass on the latter three privileges. The document is privileged work product that is not subject to disclosure for all of the reasons set forth in 1 above.

### **3. 12 Memorandums of Interview**

The Secretary asserts work product privilege and informant's privilege for each of the 12 Memorandums of Interview documents at issue in his privilege log. The informant's privilege protects the identity of the informant, not his statement, unless disclosure of the contents of the statement would tend to reveal the identity of the informant. *See Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 158 (1986), citing *Roviano v. United States*, 353 U.S. 53, 60 (1957) and 4 Moore's Federal Practice ¶ 26.61 [6.-2] (2d Ed. 1981). An informant is any person who has

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<sup>2</sup> The *Jenks* Rule applies to civil proceedings. *See e.g., Thunder Basin Coal Company*, 15 FMSHRC 2228, 2237 (1993); *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); National Labor Relations Board, Division of Judges Bench Book, An NLRB Trial Manual, August 2010, § 8-500.

furnished information to a government official to assist in the government's investigation of a possible violation of the law, including the Mine Act. *Bright Coal Co.*, 6 FMSHRC 2520, 2525 (1984). The Memorandums of Interview taken by Special Investigator Scherer include both privileged and unprivileged matter, to wit, the identities of the informants and the substance of their statements. The in camera review ordered properly balances the public interest in efficient enforcement of the Mine Act, the informants' right to be protected against possible retaliation, and Respondent's need to prepare for trial. *Cf.*, *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 305 (5<sup>th</sup> Cir. 1972); *Bright Coal*, FMSHRC at 2525.

Applying the *Bright Coal* balancing test, I find the Memorandums of Interview to be relevant and discoverable. I further find them subject to qualified informant and work product privileges at the discovery stage, except for statements taken from management agents with counsel present, which must be turned over immediately. I have considered the discriminatory discharge alleged, the Respondent's defense that Whiton called another miner a derogatory name, the significance of certain informant testimony concerning Whiton's protected activity and Respondent's defense, the possibility of retaliation or harassment against said informants, and the fact that the substantial equivalent of the information elicited by Special Investigator Scherer is available through the same sources based on Respondent's own investigatory prowess. I conclude that the Secretary's need to maintain the privileges to preserve the identity of informants and the work product of its special investigator outweighs the Respondent's need for the information, until witnesses are called at trial.

The Secretary asserts in his Opposition that there are two types of witness interview memorandums. The first are unsigned memorandums, which represent the work product of investigator Scherer and may be withheld from disclosure. *Baylor Mining, Inc.*, 26 FMSHRC 739, 742 (2004)(ALJ).<sup>3</sup> The second are memorandums signed and adopted by the interviewees, which may be disclosed at trial pursuant to the Jenks Act, 18 U.S.C. § 3500. *See Thunder Basin*, 15 FMSHRC at 2237 (1993).

Contrary to the Secretary, I find no difference between the two types of statements in the circumstances of this case. Under the Jenks Act, the term "statement" includes not only a written statement made and signed or otherwise adopted or approved by the witness, but also any "... other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement ..." 18 U.S.C. § 3500(e)(1) and (2).

Three Memorandums of Interview were signed and adopted by the interviewees. Each of the nine unsigned Memorandums of Interview were prepared from notes made by Special Investigator Scherer during and immediately after the interview and Scherer verified that he

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<sup>3</sup> In *Bright Coal*, the Commission found it apparent that the Secretary's underlying motive for invoking the executive and work product privilege was to shield the identity of informants. Accordingly, the Commission found that the memorandum of interview issue should be resolved in straight-forward fashion by addressing the issue solely in the context of the informant's privilege. *See Bright Coal*, 6 FMSHRC at 2520 n. 1. There was no discussion of why the Commission's conclusion regarding the Secretary's motive was apparent.

recorded in summary fashion all pertinent matters discussed with the interviewee. Accordingly, I find that all 12 Memorandums of Interview are “statements” for purposes of *Jenks*.

Five of the nine unsigned Memorandums of Interview were given by management agents, with counsel present. Under these circumstances, Respondent is entitled to a copy of these previous statements in discovery as they are not protected by the work product or informant’s privilege. *See* Fed. R. Civ. P. 26(b)(3); *Rovario*, 353 U.S. at 60 (suggesting that informant’s privilege is waived once the identity of the informant is disclosed); *Thunder Basin*, 15 FMSHRC at 2236 (informant privilege waived where there is an express identification of the individual as an informant).

With regard to the remaining seven Memorandums of Interview, based on the *Bright Coal* factors balanced above, I find that the Secretary’s interest in protecting the identity of its informants and work product outweigh the Respondent’s need for the statements of potential government witnesses at the discovery stage. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8<sup>th</sup> Cir. 1974). I also note that the contested issues of protected activity, adverse action, nexus, and Respondent’s defense are peculiarly within Respondent’s knowledge, and if it had no knowledge, there is no prima facie case. Further, Respondent can take its own statements and depose potentially adverse witnesses. “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.” *Hickman v. Taylor*, 329 U.S. 495, 516 (1947)(Justice Jackson concurring).

In the exercise of my discretion, after in camera review, I will order the remaining seven witness statements to be turned over at trial, pursuant to a proper invocation of the *Jenks* rule by Respondent, after each potential witness has testified under direct examination. The Secretary may request appropriate redactions at that time. *See* 18 U.S.C. § 3500(c).

#### **4. Memorandum to File From Special Investigator Scherer Dated November 5, 2015**

The Secretary claims that this document is privileged work product. I agree. The document was prepared in anticipation of litigation or for trial on behalf of a party or that party’s representative. Accordingly, the document is privileged work product. The work product privileged is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Even if Respondent had made such a showing, the document was incorporated into the Special Investigative Report to disclose a particular legal theory and therefore cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn*, 449 U.S. at 400 (1980); Fed. R. Civ. P. 26(b)(3)(B).

#### **5. Memorandum to File From Special Investigator Scherer Dated November 2, 2015**

The Secretary claims that this document is protected from disclosure by work product, informant, and common interest privileges. I need not pass on the latter two privileges. The

document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privilege is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Even if Respondent had made such a showing, the Memorandum to File refers to certain documents given to Special Investigator Scherer by complainant Whiton to support the legal theory of the case in the Special Investigative Report and such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn*, 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3)(B).

## **6. Various Handwritten Notes from Special Investigator Scherer**

The Secretary claims that these notes are protected from disclosure by work product, attorney client, informant, and common interest privileges. I need not pass on the latter three privileges. The handwritten notes were prepared by Scherer in anticipation of litigation and the notes record the results of witness leads or interviews conducted during the course of the special investigation. Accordingly, the notes are privileged work product. The work product privilege is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Respondent can conduct its own expansive investigation, take its own notes from potential witnesses, and depose potentially adverse witnesses. As noted, discovery was hardly intended to enable learned counsel to perform its functions on wits borrowed from its adversary. *Hickman v. Taylor*, 329 U.S. at 516. In the exercise of my discretion following in camera review, I find that the Respondent has failed to demonstrate either the substantial need or the undue hardship necessary to overcome the qualified immunity provided by the work product privilege. *See Brock v. Frank V. Panzarino*, 109 F.R.D. at 160.

## **7. Typewritten Pages Given by Complainant Whiton to Special Investigator Scherer<sup>4</sup>**

The Secretary claims that this document is protected from disclosure by work product informant, and common interest privileges. I need not pass on the latter two privileges, although I note that the document lists informants and potential informants. The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privilege is qualified

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<sup>4</sup> The Secretary's privilege log describes this document as an undated, typewritten page, but the document that was provided for in camera review is a two-page email from Complainant Whiton to Special Investigator Scherer, incorporating the apparent typewritten material.

and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Even if Respondent had made such a showing, the document, apart from the informant and potential informant contact information, was given to Special Investigator Scherer by complainant Whiton to support Whiton's opinion, mental impression, and legal theory about the case. Such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn*, 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3)(B).

### ORDER

Respondent's Motion to Compel is **GRANTED** for the five Memorandums of Interview taken from management agents, with counsel present. The Secretary is **ORDERED** to turn these witness statements over immediately. In all other respects, the Respondent's Motion to Compel is **DENIED**. The remaining seven Memorandums of Interview are subject to the *Jenks* rule.

It is **FURTHER ORDERED** that the privileged documents be placed under seal as part of the record for use on any appeal.

**SO ORDERED.**

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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