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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. KENT 2013-196-R KENT 2013-197-R
CAM MINING, LLC	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue are a citation and order which the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to CAM Mining, LLC ("CAM"). The citation alleges a violation of 30 C.F.R. § 75.220(a)(1)[1] for the failure to follow the mine's approved roof control plan by leaving insufficient stumps during retreat mining. The order alleges a violation of 30 C.F.R. § 75.360(b)(3)[2] for failing to document the aforementioned hazard during the preshift examination. MSHA designated both violations as

[1] 30 C.F.R. § 75.220(a)(1) states that:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[2] 30 C.F.R. § 75.360(b) requires that preshift examinations be conducted in working places and approaches to worked-out areas where miners will work or travel during the subsequent shift.

being "significant and substantial" ("S&S") and resulting from an unwarrantable failure to comply.[3]

The Administrative Law Judge affirmed the citation and order as written. He found that both the citation and order were "validly issued" to CAM but did not specifically address the S&S and unwarrantable failure allegations. 36 FMSHRC 2204, 2223 (Aug. 2014) (ALJ). On review, CAM challenges the Judge's findings as to the validity of the preshift examination order and the S&S and unwarrantable failure designations for both violations.

For the reasons that follow, we affirm the Judge's decision.

I.

Factual and Procedural Background

CAM operates an underground coal mine in Kentucky. The mine has an approved roof control plan that permits it to engage in retreat mining, whereby CAM makes cuts in the pillars of coal that were originally left for roof support as mining advanced into the coal seam. The roof control plan permits CAM to take two to three cuts on each side of a 60-by-50 foot pillar, forming a chevron pattern. *See* CAM Ex. G. Cuts must be made at least six feet away from the corners of the pillar so that sufficient coal remains to help temporarily support the roof. The remaining coal on the outby side of the pillar is referred to as a "stump."

On October 17, 2012, MSHA Inspector Carl Little was inspecting the seven entries along the 001/003 super-section of the mine that was engaged in retreat mining. 36 FMSHRC at 2218; Tr. 257–58. At the breaker line,[4] Little looked across the intersection and noted that the stumps appeared significantly less than the six-foot minimum required by the roof control plan. Tr. 58–59, 68–70, 260. Little estimated that the stumps measured between one to five feet, with over half of the stumps measuring three feet or less. 36 FMSHRC at 2215 (citing Sec'y Ex. 5, Tr. 321, 322).

The row of columns in the worked-out area adjacent to the active workings had been mined during the previous day. Since mining began on the row, CAM had performed two

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

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[4] The breaker line is the most inby point of each entry on the working section where timbers are set to help temporarily support the roof during the retreat mining process. Miners are not permitted to work or travel inby the breaker line. *See* 36 FMSHRC at 2206, 2211–12; CAM Ex. G.

preshift examinations of the area. Tr. 270. When Little reviewed the preshift reports, he found no mention of the inadequately sized stumps.

Based on these observations, Little issued Citation No. 8273702, alleging a violation of 30 C.F.R. § 75.220(a)(1), and Order No. 8273703, alleging a violation of 30 C.F.R. § 75.360(b)(3). Sec'y Exs. 1–2. Citation No. 8273702 states that the operator failed to leave the minimum size stumps as required in the approved roof control plan. Order No. 8273703 states that CAM failed to conduct an adequate preshift examination because the conditions for which Citation No. 8273702 was issued were not observed by the preshift examiner, reported to the operator, or corrected prior to the beginning of the shift. Both of the violations were designated as S&S and as unwarrantable failures with high negligence. *Id.*

In his decision, the Judge affirmed both the citation and the order. Crediting the testimony of Inspector Little, the Judge found that CAM had taken three cuts from each side of the pillars, and, in doing so, had failed to leave the six-foot stumps required under the roof control plan. The Judge rejected CAM's arguments that the reduced size of the stumps could be explained by sloughage or permitted rounding of the pillar's corners. Instead, the Judge concluded that the evidence of greatly undersized stumps, some only one to three feet wide, strongly suggested that CAM had mined more coal from the pillars than the roof control plan allowed. The Judge credited the Inspector's testimony and found that the inadequate stumps could reduce the stability of the roof in the active workings and would pose a hazard to miners working outby in the next row of pillars. 36 FMSHRC at 2215–16.

Concerning the preshift examination, the Judge found that CAM was required to examine the stumps from the breaker line because sections 75.360(b)(3) and (11)(i) specifically require that the preshift examination be conducted in "approaches to worked-out areas" and that such examinations identify roof control violations. The Judge did not fully articulate how subsection 75.360(b)(3), the cited standard, could be interpreted to include areas outside the approach to the worked-out area in the preshift examination. Rather, the Judge concluded that 30 C.F.R. § 75.360(b)(11) requires the preshift examiner to examine the entire subsection, regardless of whether miners will work or travel in that area. 36 FMSHRC at 2222.

II.

Disposition

A. Order No. 8273703 – Failure to Perform an Adequate Preshift Examination

Section 75.360(b) states in relevant part:

> The person conducting the preshift examination shall examine for hazardous conditions and violations . . . *at the following locations*:
> . . . .
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The

> scope of the examination shall include the working places, *approaches to worked-out areas* and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

30 C.F.R. § 75.360(b)(emphasis added).

The parties disagree as to the meaning of section 75.360(b)(3).[5] CAM argues that the preshift examination is limited to the areas specified in section 75.360(b)(3), i.e., working places, approaches to worked-out areas, and ventilation controls on these sections and in these areas. CAM contends that an examiner is not responsible for reporting hazards or violations that exist outside the areas expressly identified in section 75.360(b)(3). The Secretary, however, disagrees and argues that requiring the examiner to include all hazards visible from the examination area is consistent with the history and purpose of the standard.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co*., 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a "regulation is silent or ambiguous with respect to the specific point at issue, we must defer to the agency's interpretation as long as it is reasonable." *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001). *See generally Auer v. Robbins*, 519 U.S. 452, 457 (1987).

The plain purpose of the regulation is to protect miners on working sections and where mechanized equipment is being installed or removed. It would be antithetical to that purpose if a preshift examiner could turn a blind eye to observable conditions that create hazards within the designated areas merely because the source of the hazard is in an area outside the specific area the examiner must traverse. Section 75.360(b)(3) requires that a preshift examination be conducted "at" the approaches to worked-out areas. "At" is an imprecise term that can mean "in" or "near" a specified location. *The American Heritage Dictionary of the English Language* 112 (4th ed. 2009). Nothing in the standard excludes a preshift examiner from reporting a hazard to miners in working areas because the hazard arises from outside the specific areas traveled in the preshift. Therefore, we conclude that section 75.360(b)(3) requires preshift examiners to report observable conditions regardless of where the condition is located if the condition creates a

[5] In its reply brief, CAM claims that the order should be vacated because it was not given fair notice of the Secretary's interpretation of the preshift standard. The Secretary filed a motion to strike CAM's fair notice argument, claiming that the issue was not raised in CAM's Petition for Discretionary Review. To the extent that the issue of notice was raised in the petition, it was limited to the argument that the Secretary was advancing a new position under a 2012 revision to 30 C.F.R. § 75.360(b) which added section 75.360(b)(11). PDR at 2. Because our holding is based on section 75.360(b)(3), which predated the 2012 revisions, we need not address issues arising from the Judge's consideration of section 75.360(b)(11). Accordingly, the Secretary's motion to strike is moot.

hazard within working sections or an area where mechanized equipment is being installed or removed.

Were we uncertain of the proper interpretation, we would find the regulation ambiguous and recognize that the Secretary's interpretation is reasonable and must be accorded controlling deference. The Secretary's interpretation does not, as CAM argues, require the examiner to enter the worked-out area. The Judge found that the stumps were clearly visible from the breaker line while the examiner was making other required observations. 36 FMSHRC at 2221. This interpretation does not require a preshift examination of the entire mine.

If a hazardous condition that would affect miners outby can be seen from the examination area, then our and the Secretary's interpretation of section 75.360(b)(3) requires such a condition to be recorded during the preshift examination and abated before the start of the shift. As stated, such an interpretation is consistent with the standard's plain language and furthers the purpose of the preshift examination—to prevent miners from being exposed to hazardous conditions created during the prior shift. *See* 57 Fed. Reg. 20,868, 20,893 (May 15, 1992) (codified at 30 C.F.R. pt. 75) (the preshift examination "allows miners on the oncoming shift to be notified if hazards exist and allows corrective actions to be taken"). We note that CAM's interpretation is inconsistent with its own practice of checking the roof and timbers located in the intersection beyond the breaker line. Tr. 185–86.

Based on the foregoing, we find that the Secretary's interpretation is reasonable and deserving of controlling deference. Accordingly, we affirm the fact of the violation.

B. Citation No. 8273702 and Order No. 8273703 – S&S and Unwarrantable Failure

The Judge concluded that Citation No. 8273702 and Order No. 8273703 were "validly issued to CAM Mining LLC." 36 FMSHRC at 2223. However, the Judge did not expressly make findings as to S&S or the unwarrantable failure designation. Both the Secretary and CAM acknowledge that the Judge erred in failing to provide any analysis of these issues.

Pursuant to Commission Rule 69(a), a Judge is responsible for addressing "all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). The Commission requires that its Judges analyze and weigh all probative evidence, make appropriate findings, and explain the reasons for their decisions. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *Martin County Coal Corp.,* 28 FMSHRC 247, 262–63 (May 2006) (reversing and remanding ALJ's decision to uphold violation, S&S and unwarrantable failure because the opinion "fails to articulate the basis for his conclusion and omits necessary findings.").

Because the Judge failed to address S&S and unwarrantable failure in his decision, we would normally remand the case to make these findings. However, we need not do so where the record so clearly supports the Secretary's S&S and unwarrantable failure allegations. *See American Mine Servs., Inc.,* 15 FMSHRC 1830, 1834 (Sept. 1993) (where evidence supports only one conclusion, remand on that issue is unnecessary) (citing *Donovan v. Stafford Constr. Co*., 732 F.2d 954, 961 (D.C. Cir. 1984)).

1. S&S

First, we address whether the violations were S&S. In *Mathies Coal Company*, the Commission explained:

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

6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The record is clear that CAM's failure to leave adequate stumps severely jeopardized the integrity of the roof, exposing miners to the hazard of working under an inadequately supported roof. At the time of the inspection, the roof conditions had deteriorated to the point where it was possible to hear the roof working, and timbers were starting to fail in the area that had been mined during the previous shift. Tr. 265. The danger of the roof was so pronounced that Inspector Little found it necessary to require CAM to skip an entire row of pillars in order to abate the hazard.

The Judge credited Inspector Little's assessment of the risk posed by the inadequate stumps and Graduate Engineer Robert Bellamy's testimony that even a one-foot reduction in the stump size across an entire row would be a "big concern." 36 FMSHRC at 2211. The Judge also credited the inspector's testimony that the failure of the roof in the worked out area could adversely affect the miners mining the next pillar and that the conditions were "likely to cause a very serious accident or fatality if the practice continues." *Id*. at 2210. Given these findings, it is reasonably likely that the hazard could result in an injury of a reasonably serious nature. *See Halfway, Inc.*, 8 FMSHRC 8, 12–13 (Jan. 1986) (affirming an S&S determination for failing to comply with the mine's roof control plan when miners could have worked or traveled in areas with inadequately supported roof).

2. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal,* 52 F.3d at 136 (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1350–57 (Dec. 2009). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

As discussed above in our S&S analysis, the record is clear that the failure to maintain adequate stumps created a high degree of danger. In addition, CAM should have known about the deficient stumps because the hazardous condition was so extensive and obvious. All of the stumps on the 001/003 super-section were less than the six-foot minimum, and many of them were significantly deficient. Four of the stumps were two feet or less in width. 26 FMSHRC at 2215.

Such a striking difference in size should have been obvious during even the most cursory exam. Yet, despite the fact that the Judge found that it was "entirely possible to observe and estimate the size of the stumps from the breaker line," examiners traveled to the breaker line but did not report observable conditions across the crosscut during two separate preshift examinations. *Id*. at 2221.

Moreover, CAM's repeated failure to report the inadequate stumps and abate the hazard exposed at least two shifts of miners to highly dangerous conditions. The row of pillars had been cut during the day shift the day prior to the MSHA inspection. Tr. 59–60. That means that the hazardous condition had lasted in excess of 24 hours before the hazardous condition could be abated. *See generally Windsor Coal Co.,* 21 FMSHRC 997, 1001–04 (Sept. 1999) (finding that a duration in excess of one shift weighs in favor of finding an unwarrantable failure).

While the record does not contain any evidence that CAM was placed on notice that greater efforts were required to comply with its roof control plan or preshift examination requirements, the evidence supporting the other factors overwhelmingly weighs in favor of the unwarrantable failure designations. Accordingly, we affirm the Judge's S&S and unwarrantable failure determinations.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's finding of a violation for failing to perform an adequate preshift examination. We also conclude that the record supports the S&S and unwarrantable failure designations for both Citation No. 8273702 and Order No. 8273703.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Cohen, concurring in part and dissenting in part:

We agree with the majority's reasoning and its decision in affirming the Judge's finding of a violation. We also agree with the conclusion that the nature of the violation as S&S is irrefutably established by the record. However, we do not join in its short-circuiting—well-intentioned and understandable though it may be—of the review process on the unwarrantable failure findings.

Our principal concern is the lack of any analysis or even an express conclusion on the unwarrantable failure issue by the Judge. The determination of an unwarrantable failure is inherently a judicial function. It is both fact-intensive and committed to the subjective discretion of the trier of fact. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009) (vacating and remanding ALJ's finding for failure to address all the elements of unwarrantable failure, and failure to identify the relevant factors that affected his finding); *see also Martin County Coal Corp.,* 28 FMSHRC 247, 261 (May 2006) ("The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision."). While the majority correctly notes that the record clearly contains substantial evidence that would support a finding of unwarrantable failure, the operator did, in fact, contest the issue, both before the Judge and on review, and argued at length that the finding was not appropriate. *See* CAM Post Hrg. Br. at 33–36; PDR at 22–25. As the operator notes, and as the Secretary acknowledges,[1] the Judge's opinion doesn't discuss "unwarrantable failure" beyond noting the inspector's designation of the violation as such in the order. Thus, there is no exposition of the specific criteria or the weight given to those criteria in determining that the violations here arose from the operator's unwarrantable failure.

The Commission, citing the D.C. Circuit Court of Appeals, has noted that "'[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review.'" *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009) (quoting *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979)). "Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively." *Id.* (citing *Anaconda Co.,* 3 FMSHRC 299, 299–300 (Feb. 1981)). The credibility of the Commission's deliberative process depends on the transparency afforded by clearly articulated bases in our decisions.

In this case, the operator expressly noted the Commission's well-established requirement that the factors relevant to the determination of the unwarrantable failure issue must all be at least acknowledged, and that relevant factors must be discussed. CAM Post Hrg. Br. at 34–35 (citations omitted). There is a complete absence of any analysis in the Judge's Decision, or even recognition of the relevant factors here.

As the majority notes, there is no evidence in the record that the operator was on notice that greater efforts at compliance were necessary. Slip op. at 7. Arguably, then, this is a factor weighing in favor of the operator. The Judge's failure to either decide that the factor is not

[1] The Secretary did not argue that the Commission should conclude that the violations were established as S&S and unwarrantable by the record, requesting instead that the issues be remanded for determination.

relevant or is outweighed by the other factors requires remand because the evaluation of the relative weight assigned to various factors is the province of the Judge. *Sierra Rock Prods., Inc.*, 37 FMSHRC 1, 6 (Jan. 2015) (noting that "[i]t is ordinarily the province of the Judge to engage in an analysis and balancing of the unwarrantability factors in the context of the cited standard in the first instance."). In *Sierra Rock Products*, the Commission remanded the case to the Judge for further consideration of the operator's good faith belief, recognizing that consideration of that sole factor needed to be "weighed against other unwarrantability factors as re-examined in the context of the cited standard." *Id.* at 6–7. As we have held:

> These 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 factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated.

Consolidation Coal Co., 22 FMSHRC 340, 353 (Mar. 2000); s*ee also Martin County Coal*, 28 FMSHRC at 257 (stating that "fact-finding is not the province of the Commission") (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222–23 (June 1994) (holding remand appropriate when the Judge failed to adequately address evidentiary record)).

A remand would reinforce the important and central contribution Judges make in weighing the totality of evidence presented in order to establish or refute a charge of unwarrantable failure. Unlike an S&S determination, which often involves a somewhat simpler, or at least more direct, analysis of the danger presented by a hazard and the violation's contribution to it, unwarrantable failure requires an assessment and weighing of various different factors. The fact that it involves weighing factors reinforces the need to show how the Judge's conclusion is grounded on objective facts in the record and their relative values under the unique circumstances presented in each case.

We, therefore, would remand the case for the Judge to make and support an express finding on the unwarrantable failure issue. Such an outcome would be consistent with the requirements we have established and our general practice to remand a decision to the Judge for further consideration when decisions do not conform to those requirements in deciding whether a violation did or did not result from the operator's unwarrantable failure.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CHARLES RIORDAN	
v.	Docket No. VA 2014-343-D
KNOX CREEK COAL CORPORATION	

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

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This proceeding concerns a discrimination complaint filed by the Secretary of Labor pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2012) ("Mine Act"),[1] on behalf of Charles Riordan. After a hearing on the case, the Judge issued his decision finding that discrimination had occurred and assessed a $25,000 civil penalty against the operator. 37 FMSHRC 1074 (May 2015) (ALJ). He subsequently entered a final unpublished order requiring Knox Creek to permanently reinstate Riordan to his former position with back pay.

For the reasons stated below, we affirm the Judge's decision and final order. We conclude that substantial evidence supports the Judge's findings that the Secretary established a prima facie case of discrimination and that a layoff occurring at the mine was used as a pretext to retaliate against the miner for making safety complaints. We also conclude that the Judge

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

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

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

properly applied the Commission's longstanding analytical framework in reaching his determination that discrimination occurred.

I.

Factual and Procedural Background

A. Factual Background

Riordan began working at Knox Creek's Tiller No. 1 Mine in 2004. Tr. 30. Riordan, who had 32 years of experience as a miner, most recently worked for Knox Creek as a foreman on the active working section, an "outby" foreman for mine areas away from the active section, a trainer for other miners seeking foreman certifications, and a safety trainer for new hires. Tr. 29-33. Riordan received a $3,000 bonus from the operator in March 2013 following what he believed was a positive performance review for 2012. Tr. 34-35. On December 13, 2013, Knox Creek terminated Riordan's employment.

As part of his job as a section foreman, Riordan was responsible for checking the mine's ventilation to ensure that a sufficient volume of air reached the working section. Tr. 58-62. Riordan began voicing concerns about ventilation at the Tiller Mine to his supervisor, general mine foreman Mark Jackson, in late 2012, and did so "almost . . . daily." Tr. 36, 39. At that time, Knox Creek was developing a "super section,"[2] and controlling the flow of air to the two working faces became increasingly difficult as the cut went deeper. Tr. 37-38. Riordan did not retain any documentation of the ventilation problems, but did make verbal safety complaints and fixed the problems directly by doing "whatever was necessary." Tr. 62-64. When Riordan found inadequate ventilation, he would stop production until ventilation had been restored. *Id*. Although Riordan acknowledged that Knox Creek committed a large amount of resources and made "quite a number of changes" to address the ventilation problems, he did not see results from those efforts. Tr. 67-69, 73.

Jackson acknowledged discussing ventilation issues with Riordan, but testified that only two or three such conversations occurred and that they were as frequent as his discussions with other foremen. According to Riordan, Jackson "usually had a smart aleck comment about everything" in response to the safety complaints. Tr. 41-42. Riordan also voiced his concerns to Mine Superintendent Scott Jessee, Jackson's boss, and Mike Wright, Knox Creek's safety representative. Tr. 53-54, 207, 233; S. Ex. 1 at 22-23 (deposition testimony of Mike Wright). Jessee and Wright downplayed the frequency and import of those conversations with Riordan. Tr. 208; S. Ex. 1 at 22-23, 34-35.

On August 22, 2013, Riordan attended a company picnic at which Ron Patrick, Knox Creek's General Manager (and Jessee's supervisor), was present. KC Ex. 5, at 1. Jackson was on vacation and not at the picnic. Tr. 210. At the picnic, Riordan and fellow section foreman Les Blankenship raised with Patrick their concerns with the adequacy of the ventilation to the super

[2] A "super section" is a section with two continuous miners operating, one on each side of the section, with two splits of air. This allows both continuous miners to operate at the same time. Tr. 38, 53, 208-09.

section. Tr. 43, 81-84. Riordan made some suggestions as to how to improve airflow. Tr. 43, 81-84. According to Riordan, Patrick responded that Knox Creek would do whatever was necessary to fix the ventilation problems. Tr. 43-44.

Riordan next saw Jackson on August 26, Jackson's first day back from vacation. According to Riordan, Jackson confronted Riordan then and told Riordan he had "thrown [Jackson] under the bus by discussing these problems with Mr. Patrick." Tr. 44-45, 85. Jackson denied that this conversation occurred. Tr. 285-86, 299.

The same day as the alleged "under the bus" comment, Jackson and Jessee claimed that they saw Riordan standing under unsupported roof. Riordan testified that he had been in the bleeder entry that was not being actively mined. Tr. 47-48. Jackson issued Riordan a written warning and suspended Riordan with pay for three days. Tr. 46-48. This was the only time Knox Creek ever disciplined Riordan in writing. Regarding Jesse, Riordan believed that his relationship with him began generally deteriorating in 2013 and "continued to go downhill" after the picnic. Tr. 33, 46.

Also in August 2013, the Dickenson-Russell Coal Company[3] ("Dickenson-Russell") began the process of closing two nearby coal mines and laying off the 133 miners who worked in those mines.[4] Tr. 118-22. Patrick, who was general manager for both Knox Creek and Dickenson-Russell, testified that he wanted to retain the best foremen from the closed mines. Tr. 122. Patrick asked the superintendents from the Tiller mine and Dickenson-Russell's three mines to evaluate their salaried employees, including foremen, using a standardized form. Tr. 123; KC Ex. 2A. According to Patrick, the highest-ranked foremen were retained and moved to other mines where necessary, while lower-ranked foremen were terminated. Tr. 126-28, 344.

Knox Creek terminated Riordan's employment on December 13, 2013, the same day Dickenson-Russell closed the Laurel Mountain mine. Tr. 48-49; KC Ex. 3. Riordan had scored a 46 on his standardized evaluation. Tr. 135, 194. A foreman who scored a 61 directly replaced Riordan. Tr. 135. Knox Creek also retained another foreman, Donald Duncan, who received a score of 45 on the evaluation. Tr. 135-37. Riordan was the only Knox Creek foreman fired in the layoffs. Tr. 160; S. Ex. 3.

Patrick asserted that Riordan's score was based solely on Superintendent Jessee's standardized evaluation. Tr. 127, 199, 232. Jessee denied speaking with anyone about the evaluations or inquiring as to their purpose.[5] Tr. 200-01, 220-21, 224, 242-44. Jackson denied

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[3] Alpha Natural Resources controlled both the Knox Creek and Dickenson-Russell coal companies. Tr. 122-23.

[4] Dickenson-Russell mined out and closed the Roaring Fork mine in October 2013. Tr. 327. The company closed the Laurel Mountain mine the following December for economic reasons. Tr. 120, 327.

[5] Knox Creek produced no objective criteria, or any guidance relied upon by Jessee regarding objective factors to be considered when evaluating foremen.

any knowledge of or involvement with the evaluation process. Tr. 287-88. Jessee claimed that he filled out Riordan's evaluation on August 8-9, 2013, approximately two weeks before the company picnic. Tr. 199. Nevertheless, Knox Creek's summary of Riordan's evaluation apparently referenced the miner's subsequent incident under an unsupported roof on August 26, noting "[d]isciplinary measures regarding red zone areas." *See* Sec Ex. 3, at 19-20; Tr. 231. When confronted with this inconsistency, Patrick and Jessee both denied any knowledge of how the comments referencing the disciplinary measure came to be included in the summary of Riordan's evaluation. Tr. 155, 231-32.

Patrick referred some of the miners displaced by closures, but apparently not Riordan, to another Alpha company, Paramont Coal.[6] In the year after Riordan's termination, Knox Creek hired as many as six new foremen, including several who had not previously worked as foremen. Tr. 163, 237-38, 273.

Riordan believed his discharge resulted from his recent complaints about ventilation safety issues at the Tiller Mine. Tr. 51. Riordan filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration (MSHA), and the Secretary filed the section 105(c)(2) complaint on Riordan's behalf.

B. The Judge's Decision

The Judge analyzed the discrimination claim under the analytical framework set forth in *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom*. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); and *Secretary of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981). The Judge rejected the operator's argument that the *Pasula-Robinette* approach to discrimination cases[7] "must be discarded" in light of the Supreme Court's recent decisions dealing with the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. (2012), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. (2012). 37 FMSHRC at 1100-04, n. 18 (discussing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (ADEA); *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (Title VII)). The Judge held that the Supreme Court's decisions in *Gross* and *Nassar* are inapplicable in the Mine Act context. *Id.*

[6] Patrick testified that he could not remember if Riordan was on the list of employees sent to Paramont, and that list was not provided to the Secretary during discovery. Tr. 176-78. In its brief on appeal, the operator conceded that Riordan was not on that list. KC PDR at 28.

[7] Under *Pasula-Robinette*, as described *infra*, the Commission utilizes a shifting burden of proof in cases under section 105(c). The Secretary's initial burden is only to prove that the adverse action was motivated "in any part" by protected activity. The burden then shifts to the operator to prove that the adverse action was motivated "in no part" by the protected activity or, alternatively, that the adverse action would have been taken solely for non-protected activities. *See, e.g., Pasula*, 2 FMSHRC at 2786; *Driessen v. Nevada Goldfields, Inc*., 20 FMSHRC 324, 328 (Apr. 1998).

Applying *Pasula-Robinette*, the Judge found that Riordan engaged in protected activity. 37 FMSHRC at 1074, 1104-05. He noted that Riordan made several verbal safety complaints about Knox Creek's inadequate ventilation, and he determined that these complaints constituted protected activity. *Id*. at 1104-05. In addition, the Judge found that Riordan's dismissal was an adverse action. *Id.* at 1104.

The Judge further determined that Riordan had established a prima facie case of discrimination, in that his protected activity motivated Knox Creek's decision to terminate his employment. The Judge found that Riordan's direct supervisor, Jackson, displayed animus toward Riordan's safety complaints in general and was particularly upset with Riordan's discussion of ventilation problems with Patrick at the mine's picnic. *Id.* at 1077, 1105. The Judge rejected Jackson's and Jessee's testimony that they had not heard of Riordan's comments to the mine's general manager.[8] To the contrary, the Judge found that Jackson took umbrage at Riordan's comments during the picnic and that Jackson's and Jessee's subsequent punishment of Riordan for allegedly standing under unsupported roof was "no coincidence." *Id.* at 1105. The Judge also noted a strong proximity in time between Riordan's protected activities and the adverse actions against him. *Id.* at 1104 n.20. The Judge thus found a nexus between Riordan's safety complaints and his termination, and accordingly concluded that Riordan's protected activity motivated Knox Creek's decision to terminate him.

Next, the Judge found that Riordan's inclusion in the layoffs was a pretext. The Judge rejected the operator's assertions of the "legitimacy of the [performance] rating system as applied." *Id.* at 1078. He found that the system "was malleable" and that "[d]esired outcomes trumped scores when needed." *Id*. at 1105. The Judge found that the allegations regarding Riordan's failings as a foreman lacked credibility, and thus dismissed the rationale behind Riordan's low evaluation score. Moreover, the Judge did not believe that Jessee conducted Riordan's evaluation in early August or independently of Jackson because Riordan's evaluation summary noted his later disciplinary action for allegedly standing under unsupported roof. *Id.* at 1094-95.[9] In addition, the Judge expressed doubts that Duncan, the foreman who received a lower rating than Riordan, was retained because of his membership on the mine rescue team. Finally, the Judge emphasized that Knox Creek hired a number of other foremen in 2014, undermining the operator's assertion that it needed to dismiss Riordan to make room for other foremen. *Id.* at 1105. In sum, the Judge inferred that the operator's witnesses were covering up the improper dismissal of Riordan. *Id*. at 1089-90 n.9, 1094-95, 1105.

In making his factual findings, the Judge found Riordan to be "a very credible and forthright witness." *Id*. at 1075. The Judge also made several specific negative credibility determinations about the operator's witnesses and discounted their testimony about Riordan's termination. The Judge generally found Jackson, Jessee, and Patrick to lack credibility in light of

[8] The Judge also found Patrick's poor recollection of the picnic to be a sign of suspiciously selective memory. 37 FMSHRC at 1086, 1092 n.13.

[9] In discounting the operator's narrative, the Judge also pointed to inconsistencies in the testimony of Christy Viers, Knox Creek's human resources representative, about the evaluations' completion and processing. *Id.* at 1088-89.

their demeanor, evasive answers during cross examination, reliance on leading questions during direct testimony, and selective memories. *Id*. at 1079 n.5, 1092 n.13, 1094 n.15.

The Judge concluded that the Secretary had proven that Knox Creek Coal unlawfully discriminated against Riordin for engaging in protected activity. *Id.* at 1104-06. The Judge assessed a penalty of $25,000, which was $5,000 more than the Secretary had proposed, in light of the operator's "lack of good faith, the gravity, and the negligence involved." *Id*. He retained jurisdiction to determine what remedies Riordan was owed. On July 23, 2015, the Judge issued a final order awarding Riordan relief.

II.

Analysis

Knox Creek challenges the Judge's decision on multiple grounds. First, the operator contends that the Judge improperly applied the Commission's *Pasula-Robinette* test because the Supreme Court has invalidated the same burden-shifting scheme in other, similar contexts. KC PDR at 18-23. Knox Creek further argues that substantial evidence does not support the Judge's conclusion that Riordan engaged in activity protected by section 105(c) of the Mine Act. *Id*. at 14-18. Third, Knox Creek contends that substantial evidence does not support the Judge's finding that animus toward Riordan's safety concerns motivated his dismissal. *Id.* at 27-35. Fourth, Knox Creek contends that substantial evidence does not support the Judge's conclusion that the broader layoffs were a pretext concealing the operator's discrimination against Riordan. *Id.* at 23-26.

A. The *Pasula-Robinette* test is the correct test for discrimination under the Mine Act.

Under *Pasula-Robinette*, a miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Knox Creek contends that the Supreme Court has invalidated the same burden-shifting scheme in age discrimination and Title VII cases, and that therefore the burden-shifting scheme in Mine Act discrimination cases must also be invalidated because the Mine Act involves the same operative language. KC PDR at 18-23; *see Gross*, 557 U.S. at 167 (age discrimination); *Nassar*, 133 S. Ct. at 2533 (Title VII). Specifically, the operator argues that section 105(c) of the Mine Act, like the ADEA's discrimination provision and Title VII's retaliation provision, only

remedies discrimination that occurs "because of" the protected status or activity. KC PDR at 19. The operator asserts that the Mine Act provides no remedy where the protected activity was simply "a motivating factor." *Id.*

Knox Creek asserts that the cited Supreme Court cases establish two important principles pertinent to this case: first, the Secretary must prove as part of his case in chief that Riordan would not have been terminated "but for" the protected activity; and second, the burden of proof never shifts to the operator to show that the adverse action was motivated "in no part" by the protected activity or that the adverse action would have been taken solely for non-protected activities. *Id.* Rather, the burden of proof remains with the Secretary.

The operator's argument disregards the differences in the context, goals, and legislative history of the Mine Act and the statutes at issue in *Gross* and *Nassar*. In both *Nassar* and *Gross*, the Supreme Court emphasized that the legislative history and context of the discrimination provisions were essential to interpreting what standard of causation applies. *See Nassar*, 133 S.Ct. at 2530, 2533 ("Text may not be divorced from context"); *Gross*, 557 U.S. at 174 ("[We] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); *see also Paroline v. United States*, 134 S.Ct. 1710, 1727 (2014) (stating that even when Congress uses terms that, under *Nassar*, ordinarily connote "but-for" causation, such terms may have other meanings based on "textual or contextual" reasons (quoting *Burrage v. United States*, 134 S.Ct. 881, 888 (2014)).

In contrast to the ADEA and Title VII, the legislative history of the Mine Act affirmatively demonstrates that Congress envisioned such a burden-shifting framework when drafting the discrimination protections of section 105(c)(1). The report of the Senate committee that drafted section 105(c)(1) states that for the protections of the Mine Act "to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. 95-181, 35, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Thus, Congress recognized that in a treacherous environment, miners had to have the ability to act to protect their safety. There is no equivalent to this concern in the ADEA or Title VII contexts. Obviously, if miners advocate strongly for their own safety, they could be inviting retaliation from mine management. For this reason, Congress concluded that "[w]henever protected activity is *in any manner* a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 36 (emphasis added). As noted in *Pasula*, "the [in any part] test reflects better the congressional policy under the 1977 Act of encouraging the free engagement by employees in protected activities . . . ." 2 FMSHRC at 2798.

The predecessor provision to section 105(c)(1) in the 1969 Coal Act prohibited discrimination "by reason of" a miner's protected activity. 30 U.S.C. § 820(b)(1) (1970). That provision was introduced as a floor amendment by Senator Kennedy, who said its purpose was to provide "the same protection against retaliation which we give employees under other Federal labor laws." 115 Cong. Rec. 27948 (Oct. 1, 1969). Senator Kennedy cited the National Labor Relations Act (NLRA) as the first example of "other Federal labor laws." *Id.* At that point, the NLRB had long applied the "in any part" test in NLRA retaliation cases. *See NLRB v.*

Transportation Management Corp., 462 U.S. 393, 398-99 (1983) (discussing NLRA case law from 1938-1947); *see also Wright Line*, 251 NLRB 1083, 1083-84 (1980).

In *Pasula*, the Commission observed that the Mine Act replaced the Coal Act's phrase "by reason of" with the phrase "because of." *See* 2 FMSHRC at 2798. The only legislative history that speaks to this change suggests that it was calculated to *expand* the scope of the Coal Act's anti-retaliation provision. As noted above, the Senate Report stated that "[w]henever protected activity is in any manner *a contributing factor* to the retaliatory conduct, a finding of discrimination should be made." S. Rep. No. 95-181, at 36 (emphasis added); *see also Simpson*, 842 F.2d 453, 463 (D.C. Cir. 1988) (relying on this legislative history to construe section 105(c)(1) to protect conduct not discussed in the Mine Act's text). This suggests that, if anything, the "because of" language was intended to *reduce* the causation standard in mine health and safety cases – not to heighten it, as the operator argues.

Finally, Congress intended generally that the Mine Act be read broadly in favor of protecting miners. *See, e.g.*, *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 187 (3d Cir. 1997); *United Mine Workers of Am. v. Dep't of Interior*, 562 F.2d 1260, 1265 (D.C. Cir. 1977); *see also Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 315 (4th Cir. 2008). The legislative history of section 105(c)(1) is even clearer: the provision was intended "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (emphasis added); *see Swift v. Consolidation Coal Co*., 16 FMSHRC 201, 205 (Feb. 1994); *Pasula*, 2 FMSHRC at 2791.

Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission's reasoning in *Pasula* was sound, and we decline to overturn it. The Judge appropriately applied the Commission's burden-shifting framework to analyze this section 105(c)(2) case.[10]

[10] We note that the burden of proof under both the test from *Gross* and *Nassar* and the *Pasula* approach is a preponderance of the evidence. *Gross*, 557 U.S. at 167; *Nassar*, 133 S. Ct. at 2533. This means that the party bearing the burden of proof only needs to show that it is more likely than not that causation does or does not exist. Regardless of which party faces this burden, the outcome is the same here. As discussed below, the Judge made several well-supported credibility findings and properly concluded that it was "clear enough from the record testimony that, circumstantially, [Jackson] was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79; *see also id*. at 1092 ("[T]he Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan . . . and not because he was simply the 'unfortunate' recipient of a lower evaluation score."). Thus, the Judge concluded in effect that Knox Creek would not have terminated Riordan "but for" his protected conduct. Given the Judge's findings, the result of this case would not change under the standard articulated in *Nassar* and *Gross*.

B. Substantial evidence supports the Judge's finding that Riordan engaged in protected activity.

Riordan testified that he raised safety issues regarding ventilation on an almost "daily" basis. Tr. 36, 39. Furthermore, both Jackson and Jessee acknowledged discussing ventilation issues with Riordan. Tr. 53-54, 207, 233, 278-79, 282, 294, 302. The Judge found that Riordan's complaints constituted protected activity under the Mine Act. 37 FMSHRC at 1104.

Knox Creek challenges the Judge's conclusion, asserting that Riordan's voiced concerns about the ventilation system were not protected safety complaints. Knox Creek agrees that Riordan regularly discussed ventilation problems with his supervisors. Knox Creek asserts, however, that Riordan's comments were nothing more than discussions between mine managers trying to address problems and were motivated by a desire to improve production, not to ensure safe working conditions.

Raising safety concerns is paradigmatic "protected activity" within the meaning of section 105(c)(2). Although other miners and foremen may have raised similar concerns, Riordan's safety complaints are no less protected as a result. *Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 n.3 (Nov. 2015).

Furthermore, Knox Creek's framing of Riordan's concerns is misleading. Riordan explained that he stopped producing coal whenever he observed insufficient airflow until he could remedy the problem. In this role, Riordan was thus responsible for satisfying the pressures of production demands without sacrificing the mine's safety requirements. Faced with this balancing act, Riordan's production concerns were inherently connected to safety.

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) is to "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *UMWA*, *on behalf of Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2095-96 (Aug. 2014) *vacated and remanded on other grounds*, 620 Fed. Appx. 127 (3d Cir. 2015), *citing* S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Given these principles, the Judge was correct in determining that Riordan's complaints about the ventilation system were safety complaints protected under the Mine Act. Accordingly, the Judge's finding that Riordan engaged in protected activity is consistent with the law and supported by substantial evidence.

Other than its assertion that Riordan did not establish protected activity, Knox Creek does not dispute that Riordan demonstrated a prima facie case. Accordingly, we need not discuss the remaining elements of his prima facie case.

C. The Judge's finding that the adverse action was motivated by Riordan's protected activity is supported by the record.

Knox Creek contends that its termination of Riordan's employment was unrelated to his voicing of safety concerns. KC PDR at 27-35. Thus, in terms of *Pasula-Robinette*, the operator seeks to rebut Riordan's prima facie case by proving the termination was in no way motivated by the miner's protected activity. Specifically, Knox Creek asserts that the Judge improperly discredited the testimony of the operator's witnesses and made inferences that were not logically or rationally connected to the facts in evidence.[11] *Id.* at 27.

Among the indicia of discriminatory intent that establish that a complainant's adverse action was motivated by his protected activity are: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) a coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981)). The Judge found that those indicia had been established. His conclusions are supported by the record.

Riordan raised safety concerns to Jackson, Jessee, Wright and Patrick about ventilation, providing knowledge of his protected activity to his entire chain of supervision.

Concerning hostility, the Judge credited Riordan's testimony that Jackson accused Riordan of throwing him "under the bus" by discussing the ventilation problems with Patrick at the picnic. 37 FMSHRC at 1077 n.4. The Judge also credited Riordan's testimony that Jackson "usually had a smart aleck comment about everything" in response to safety complaints. *Id.* at 1077; *see* Tr. 41-42. For example, the Judge credited Riordan's testimony that when Riordan once tried to discuss inadequate airflow with Jackson, Jackson told Riordan that he could tell if there was adequate airflow by "slapping his jacket" and watching the "dust blow[…] off" it. 37 FMSHRC at 1077; *see* Tr. 55.[12] Additionally, the Judge reasonably found Patrick's claim that

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[11] Since Knox Creek contends that its termination of Riordan was completely unrelated to his protected activity, this is not a "mixed-motive" case where, under *Pasula-Robinette*, the operator could prove an affirmative defense by showing that it would have terminated Riordan for unprotected activity alone.

[12] Our dissenting colleague states that the Judge "rests the outcome of the case squarely on Jackson's reaction to the brief conversation in late August. . . ." Slip op. at 20. Although this conversation was important to the Judge, he based his findings of hostility on a whole course of conduct that culminated in the conversation at the picnic. Specifically, the Judge relied upon Riordan's testimony that from the time he began making safety complaints in late 2012, Jessee and Jackson were, at best, dismissive of Riordan's concerns. In one incident prior to the picnic in late August, he pressed Jackson to use air readings from an anemometer to ensure that the active face received a sufficient volume of clean air. Tr. 55, 62. Jackson insisted that the tool was unnecessary because he could tell by slapping his jacket and watching the dust blow off that the air flow to the face was an ample 2,000 cubic feet per minute. Tr. 55. Riordan, however, had measured less than a third of that amount. Tr. 55.

he did not discuss the picnic conversation with Jessee or Jackson to lack credibility because: 1) the Judge found Patrick's inability to remember the picnic conversation at all to be "suspiciously selective"; and 2) the Judge rejected as not believable Jackson's denial that he had accused Riordan of throwing Jackson "under the bus." 37 FMSHRC at 1077, 1086; Tr. 138-39, 285-86, 299.

The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981) ("to the extent the judge's conclusion reflects a credibility determination . . . that credibility determination should be given deference."). The Commission has also recognized that, because the Judge "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). Knox Creek's objections to the Judge's credibility findings amount to nothing more than a request that the Commission reweigh the evidence. We do not accept this invitation.[13]

The Judge's finding of discriminatory intent was particularly reasonable given that Riordan was not only disciplined almost immediately after the picnic, but was also terminated less than four months later. Taken together, these two incidents raise an inference that Riordan's termination was not coincidental. *See, e.g., Gorzynski v. JetBlue Airways Corp*., 596 F.3d 93, 110 (2d Cir. 2010) ("five months is not too long to find the causal relationship" between discipline and protected activity); *Pero v. Cyprus Plateau Mining Corp*., 22 FMSHRC 1361, 1365 (Dec. 2000) (four-month gap between protected activity and discharge probative of animus).

The record also supports a conclusion of disparate treatment. The Secretary showed that the operator did not discharge Duncan, the similarly situated foreman who had a lower evaluation score than Riordan. Patrick claimed that Duncan was retained specifically because he was a member of the mine rescue team and that if Duncan had lost his job, the rescue team would have fallen short of the required team members and the mine would have been in violation of the law. Tr. 135. On cross examination, however, Patrick admitted that other trained Knox Creek miners could have taken over for Duncan, preventing the team from falling short of the required members. Tr. 188. Patrick's willingness to retain a lower-ranked foreman, rather than finding other miners to fill in for Duncan undermines the legitimacy of Knox Creek's claim that

[13] Likewise, our dissenting colleague's rejection of the Judge's credibility findings amounts to an attempt to reweigh the evidence. It is well-established that it is not within our power to reweigh the evidence or to enter *de novo* findings of fact based on an independent evaluation of the record. *Island Creek Coal Co*., 15 FMSHRC 339, 347 (Mar. 1993); *see also Wellmore Coal Corp v. Federal Mine Safety and Health Review Comm'm*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. 1997) ("'[T] he ALJ has sole power to . . . resolve inconsistencies in the evidence.'").

it was necessary to retain Duncan while terminating Riordan. This supports the Judge's finding of disparate treatment.[14]

As a result, the Judge's finding that Riordan's adverse action was motivated by his protected activity is supported by substantial evidence.

D. Substantial evidence supports the Judge's finding that the layoff was used as a pretext to retaliate against Riordan for making safety complaints.

Knox Creek also argues that the Judge's finding that it used the layoffs as a pretext to terminate Riordan's employment lacks the support of substantial evidence in the record. The operator maintains that it would not fabricate wide-reaching layoffs merely to dismiss one foreman, and that its business judgment in the layoffs should be respected. Knox Creek further attests that it followed the evaluation scores closely, deviating only once to retain Duncan, who was a member of the legally required mine rescue team.

The Commission has explained that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co*., 4 FMSHRC 1935, 1938 (Nov. 1982); *see Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 320 (6th Cir. 2013). In reviewing defenses, the Judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

In finding pretext, the Judge made a number of credibility determinations and drew reasonable inferences from the record. The Judge noted instances where testimony was inconsistent, vague, or simply implausible. For instance, he noted that Jackson and Jessee failed to document alleged instances of misconduct by Riordan. 37 FMSHRC at 1085, 1105. The Judge found that Jessee's claims – that he never spoke with anyone about the miner evaluation process, Riordan's termination, the closure of other Alpha mines, or the transfer of employees to Knox Creek's Tiller Mine – to be inherently implausible. The Judge also found Patrick's testimony to lack credibility because the general manager inconsistently remembered the mine picnic, alleged discussions with Jessee about Riordan's performance, and his own efforts to retain foremen displaced by the mine closures. We have reviewed these findings, find no error, and therefore affirm the conclusion of the Judge that Knox Creek's asserted business justification was pretextual and not credible. The Judge's specific findings are supported by substantial evidence.

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[14] Knox Creek asserts that the Judge improperly overlooked the operator's retention of Les Blankenship, the other section foreman who raised concerns about the ventilation to Patrick. Knox Creek's contention misses the point. Although Blankenship was retained, the operator provided no evidence that Blankenship worked under Jackson or scored similarly to Riordan on the foreman evaluations. Knox Creek therefore failed to establish that Blankenship and Riordan were similarly situated. Accordingly, the Judge properly disregarded the fact that Blankenship was retained while Riordan was terminated.

The operator's asserted business justification relies on a factual timeline that is inconsistent with the record evidence. Jessee claimed to have conducted Riordan's evaluation prior to the picnic and without input from anyone else. Specifically, Jessee claimed that he filled out the evaluations on August 8 or 9, two weeks before the August 22 picnic and therefore before any of Riordan's supervisors had reason to retaliate. Tr. 199. However, Knox Creek's evaluation summary included the following reference to Riordan's written warning for allegedly standing under unsupported roof: "Disciplinary measures regarding red zone areas." Sec Ex. 3 at 19-20. Riordan received this warning on the first day Jackson returned to work *after* the picnic, and the same day that Jackson accused Riordan of throwing Jackson "under the bus."[15] Tr. 231. The evidence therefore indicates that the evaluation forms were amended, if not prepared, *after the picnic*,[16] when a motive to retaliate against Riordan clearly existed.[17] When confronted with this discrepancy in the evaluations' completion, Patrick and Jessee both denied any knowledge of how the comments referencing the disciplinary measure came to be included in the summary of Riordan's evaluation. Tr. 155, 231-32. This evidence, in the absence of any explanation, supports the Judge's finding that the layoff was used as a pretext to retaliate against Riordan.[18]

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[15] It is worth noting that Jessee was in Riordan's chain of supervision between Patrick, with whom Riordan had discussed ventilation, and Jackson, who resented that discussion.

[16] Our dissenting colleague suggests that we have conceded the numerical rankings were completed prior to the picnic. Slip op. at 26. We do not make any such concession.

[17] As noted *supra*, slip op. at 10 n.12, although Jackson's animus toward Riordan was most apparent following the picnic, Riordan's relationship with his supervisors began deteriorating months earlier. Tr. 33. According to Riordan, Jessee and Jackson displayed indifference or hostility to the ventilation complaints Riordan began making in late 2012. Tr. 39, 41-42.

[18] Our dissenting colleague rejects the inference that Jessee filled out or altered the form after the August 22 picnic as unsupported speculation. *See* slip op. at 25-28. Jessee testified he filled out the evaluation on August 8 or 9 and that he conducted the evaluations alone. Tr. 199. Riordan's evaluation included a warning for standing under unsupported roof. Ex. 3 at 19-20. However, it is undisputed that Riordan was not warned about standing under unsupported roof until after August 22. Tr. 231. This raises a question as to the accuracy of the August 8/9 evaluation dates.

Knox Creek was the only party that could explain how the warning was added to the evaluation. It had an opportunity to make that explanation at hearing but failed to do so; Jessee and Patrick simply testified that they did not know how or when the warning was added. Tr. 155, 231-32. The only reasonable conclusion that can be drawn from this record is that the evaluation was completed or amended after August 22. It is possible that there is some explanation for the inclusion of the warning that could lead to a different conclusion regarding the timing of the evaluation. However, that explanation is not in the record. If anything would be speculative, it would be for the Commission to supply such an alternative explanation now.

The record also lacks written documentation to support Jackson's and Jessee's testimony regarding Riordan. Jackson and Jessee attested that Riordan had serious shortcomings as a foreman.[19] However, Jackson and Jessee did not document in writing those alleged shortcomings, despite company policy requiring a written record of any serious failures by mine employees. Tr. 293, 303-09. Riordan's only written discipline was the warning he received for allegedly standing under unsupported roof, and that warning followed shortly on the heels of the picnic and Jackson's confrontation with Riordan. The lack of further written documentation undermines Jessee's and Jackson's testimony about Riordan's alleged shortcomings.[20]

Similarly, Patrick's testimony included inconsistencies. Patrick testified at hearing that he had previously discussed Riordan's allegedly subpar performance with Jackson because Patrick saw Riordan above ground suspiciously often. Tr. 132-35. During his earlier deposition, however, Patrick was unable to recall any significant detail about his conversation with Jackson. Tr. 145-48, 164-67. At another point, Patrick testified that he could not recall the picnic conversation with Riordan, but nevertheless contended he did not discuss that conversation with Jessee or Jackson. Tr. 137-39. Patrick also inconsistently remembered whether he sought to get jobs at Paramont for all terminated employees, including Riordan. And although Patrick insisted he wanted to retain Knox Creek's workers, the operator began *expanding* its workforce in the months following Riordan's December 2013 layoff but did not rehire Riordan. Tr. 163, 237-38, 273. Patrick's inconsistent recollections of the picnic conversation, his discussions about Riordan, and his efforts to retain miners call into question the veracity of his testimony.

In contrast to Knox Creek's witnesses, Mike Wright, Knox Creek's safety representative, considered Riordan a "conscientious" foreman, an "excellent employee" who "gave a hundred and ten percent to the mine," and "a stronger employee" than others at the mine. Sec Ex. 1, at 5-6, 16, 21, 25. Moreover, Knox Creek continued to allow Riordan to teach safety classes and train other foremen, despite alleged concerns about Riordan's safety record. Knox Creek's reliance

[19] Jackson claimed that Riordan was a "poor" foreman who hung curtains incorrectly and lingered around instead of directing his men. Tr. 286-87, 292, 302-03. Jessee claimed that Riordan was one of Knox Creek's "weaker foremen." Tr. 203. Jessee added that he had difficulty getting Riordan to go underground in the Spring of 2013 because Riordan had back issues and desired instead to work on the surface as a safety trainer. Tr. 92, 203-04, 207, 225-26, 244-45.

[20] The dissent criticizes the Judge's analysis as flawed, asserting that the termination of Riordan's employment was not due to his poor performance, but rather was part of widespread layoffs. Slip op. at 22. However, Knox Creek's case justifying Riordan's dismissal was based on Jessee's and Jackson's testimony on direct examination that Riordan was a "poor" and "weak" foreman. Tr. 203-04, 207, 286-87. The dissent creates a distinction without a difference. Whatever the context for Riordan's dismissal, that dismissal was improper under the Mine Act if it resulted from animus toward Riordan's protected safety complaints.

upon Riordan to teach miners does not comport with its alleged low regard for Riordan's work.[21] Given these inconsistencies, it was reasonable for the Judge to doubt Knox Creek's assertion that Riordan was a poor foreman. *See* 37 FMSHRC 1086-88, 1092, 1098-99, 1105. Accordingly, the Judge reasonably inferred that Knox Creek manipulated the layoffs and Riordan's evaluation to retaliate against the miner.

Knox Creek argues that the Secretary could not prove Jackson had any influence on the scoring process. This argument overlooks the difficulty of establishing such matters in this context. The Secretary acknowledges that he "couldn't prove exactly how this happened because Jackson, Jessee, and Patrick were each lying, dissembling, or 'forgetting' the relevant facts."[22] This is precisely why "the consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences." *Colorado Lava, Inc*., 24 FMSHRC 350, 354 (Apr. 2002). The Judge reasonably drew the necessary and logical inference that "[w]hile the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (recognizing the utility of circumstantial evidence to establish motivation in discrimination cases because such evidence "may [] be more certain, satisfying and

[21] Our dissenting colleague takes issue with the Judge's finding of an inconsistency between Knox Creek's view of Riordan as one of the mine's poorer foremen and his assignment to conduct safety training. Slip op. at 23-24, citing 37 FMSHRC at 1099. However, not only did Knox Creek allegedly regard Riordan as one of its poorer foremen, but the operator's evaluation of Riordan specifically gave him a score of "3" for safety, tied for the lowest score among all of the foremen at the Tiller mine included in Knox Creek's evaluation summary. KC Ex. 3. Thus, the low regard Knox Creek claims to have had for Riordan as a foreman extended to his concern for safety. Clearly, substantial evidence supports the Judge's finding of an inconsistency. The inconsistency may also call into question the specific score Knox Creek gave Riordan for safety.

[22] Our dissenting colleague assigns great significance to the fact that Patrick made the decision on which miners were retained. However, his "decision" was grounded on the numerical rankings provided by Jesse, who was either evasive or genuinely ignorant about any guidance or objective criteria used in calculating the ratings assigned to foremen. This is a classic "garbage in, garbage out" scenario. Jessee gave Riordan the lowest evaluation score of all the Knox Creek foremen. S. Ex. 3. If Patrick was provided with invalid or improperly skewed data, and he based his decision on those data, Patrick's decision was tainted by the flaws in the process. *See Turner*, 33 FMSHRC at 1067-69. As we have noted, both Jackson and Jessee were between Riordan and Patrick in the chain of command, and both participated in what the Judge fairly characterized as a retaliatory disciplinary action against Riordan almost immediately after Jackson confronted Riordan about his conversation with Patrick at the picnic.

persuasive than direct evidence"); *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC,* 31 FMSHRC 1085, 1089.[23]

Our dissenting colleague asserts that "[t]he lack of evidence that Jackson could, or did, manipulate the rankings, standing alone, warrants reversal of the Judge's decision." Slip op. at 21. Consistent with this statement, our colleague repeatedly accepts the truthfulness of the testimony of Knox Creek's witnesses.[24] However, the Judge generally disbelieved their testimony, and, as discussed herein, the Judge's credibility determinations were supported. Substantial evidence is not limited to direct evidence, but includes inferences drawn from negative credibility determinations. In *Southwest Merchandising Corp. v. N.L.R.B.*, 53 F.3d 1334 (D.C. Cir. 1995), for example, the National Labor Relations Board found that a successor corporation had committed an unfair labor practice by not hiring workers who had engaged in a strike while employed by the predecessor company. *Id.* at 1342-44. Although Southwest vehemently disputed the allegation that it was motivated by anti-union animus, the Board found an unfair labor practice based entirely on inferences drawn from finding Southwest's witnesses to be not credible. 53 F.3d at 1340-41. The court concluded that substantial evidence supported the NLRB's inferences drawn from negative credibility determinations. *Id.* at 1342-44. Here, the negative inferences drawn by the Judge after finding Knox Creek's witnesses to be not credible similarly are supported by substantial evidence.[25]

Knox Creek demands that its business justification for terminating a miner requires acceptance unless it is "plainly incredible or implausible." *Chacon*, 3 FMSHRC at 2516. However, the Commission has rejected this argument. The language Knox Creek relies on from *Chacon*, 3 FMSHRC at 2516, merely means that if an operator's explanation is true, a Judge

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[23] The operator further asserts that the closure of two mines and widespread layoffs could not reasonably be considered a pretext to fire one employee. KC PDR at 27. Knox Creek's argument, however, misrepresents the Judge's findings. The Judge did not deem the closure of the mines to be a pretext for firing Riordan, but rather determined that the operator manipulated its broader layoff process to terminate Riordan's employment, and that Jackson's hostility influenced the decision-making process. 37 FMSHRC at 1078, 1092.

[24] For example, our colleague states that prior to the August 22 picnic, "evidence shows Riordan only engaging in ventilation discussions with Jackson and, occasionally, with Jessee in the same manner essentially as one would expect of all underground foremen." Slip op. at 25. This was the characterization by Jessee and Jackson, but it certainly was not how Riordan described the conversations. *See* footnote 12, supra. Our colleague's description is based on testimony that the Judge rejected.

[25] The dissent suggests we are reversing the burden of proof in this matter. Slip op. at 25 n.12. The dissent, however, fails to recognize how the burdens of proof are allocated under the approach set forth in *Pasula-Robinette*. The burden is upon the Secretary to establish a prima facie case, as was done here. The operator may then seek to rebut the prima facie case. *Robinette*, 3 FMSHRC at 818 n.20. On rebuttal, the operator bears the burden of proof. The Judge's negative inferences from finding the operator's witnesses to be not credible support the conclusion that Knox Creek's asserted justification for Riordan's dismissal was pretextual.

should not reject it because he disagrees with the business decision or considers it unfair. *See Haro*, 4 FMSHRC at 1937-38. But that "does not mean that such defenses should be examined superficially or be approved automatically once offered." *Id*.; *see Cumberland River Coal*, 712 F.3d at 320. Before deferring to an operator's business justifications, a Judge must first "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Haro*, 4 FMSHRC at 1938 (emphasis and quotation marks omitted). That is precisely what the Judge did here. He found that the justifications were not credible.

As discussed *infra*, a Judge's credibility determinations are entitled to great weight. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal*, 3 FMSHRC at 2770. The operator's complaints about the Judge's credibility determinations ignore the mutually dependent nature of those determinations and the fact that they were partially based on the witnesses' demeanor. *See Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (findings of "demeanor and credibility . . . are peculiarly within a trial judge's province"); *Cordero Mining LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1236 (10th Cir. 2012). Evaluation of the demeanor of witnesses is an essential element of a judge's credibility determinations. For example, here the Judge noted that Jessee, when asked to explain a discrepancy between his trial testimony and his deposition testimony, looked over at his attorney to seek assistance in answering. 37 FMSHRC 1095; Tr. 236.[26]

Accordingly, we defer to the Judge's credibility determinations and conclude that his findings of pretext are supported by substantial evidence.

[26] Knox Creek's claim that Riordan testified inconsistently about the timing of the "under the bus" conversation is exaggerated. Although Riordan first said the conversation happened the day after the picnic, he later clarified – without prompting – that the conversation happened, "either the following day or the next time I encountered [Jackson], the next morning I encountered him." Tr. 44-45, 85.

III.

Conclusion

For the reasons stated above, we affirm the Judge's decision that Knox Creek discriminated against Riordan because it is supported by substantial evidence under a correct interpretation of the Mine Act.

/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

Commissioner Althen, dissenting:

The Judge's and majority's decision in this case rests upon wholly unfounded speculation rather than substantial evidence. I respectfully dissent.

I.

Analysis

Ronald Patrick, General Manager for operations of Dickenson Russell Coal Company and Knox Creek Coal Company, testified that he alone made the final decision to layoff section foreman Charles Riordan. Patrick testified he made that decision based upon the numerical rankings resulting from evaluations of foremen made by mine superintendents. Tr. 126. Therefore, there were two possible routes to prove that protected activity motivated, at least in part, the layoff of Riordan by Patrick.[1]

If Patrick laid off Riordan based upon animus by Patrick himself to protected activity by Riordan, then discrimination occurred. The Judge, however, does not find that Patrick himself chose to discriminate against Riordan. Despite several adverse credibility comments regarding Patrick,[2] the Judge does not find that Patrick lied in testifying that he was the person to decide which four foremen to lay off as a result of the two mine consolidations and does not find that

[1] The operator raised an affirmative defense that, if Riordan's layoff was motivated in any part by protected activity, it would have occurred in any event based on unprotected activities alone — that is, the shutdown of Laurel Mountain and consequent layoffs. As I view the case, however, whether examined from the standpoint of the second part of the *Pasula* test or from the view of an affirmative defense, the case turns upon one issue — whether protected activity, standing alone, was the motive for the layoff of Riordan. For that reason, I do not find it necessary or desirable to deal with the operator's defense based upon the decisions in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), or *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013). I express no opinion regarding the impact of those decisions upon our discrimination jurisprudence. The majority agrees that consideration of those cases is not necessary for adjudication of this case. Slip op. at 8 n. 10 ("Given the Judge's findings, the result of this case would not change under the standard articulated in *Nassar* and *Gross*."). Nonetheless, it discusses the cases in a brief passage of dicta. Slip op. at 7-8. I look forward to a future case in which the Commission will have the opportunity to consider the issue when it is outcome determinative.

[2] The Judge found it not credible that Patrick did not recall the brief picnic conversation with several miners including Riordan and, to some extent, that finding carries throughout his decision. 37 FMSHRC at 1086. The Judge does not identify any motive Patrick would have had for not recalling that conversation. Given Patrick accepted the occurrence of the conversation (Tr. 138), it would have been better for the operator if Patrick remembered the conversation in exactly the detail as Riordan. There is no evidence of discrimination in the conversation. Instead, the conversation shows the most senior manager desirous of, and receptive to, comments and advice from a number of miners, including Riordan.

Patrick himself had animus against, or discriminated against, Riordan because of protected activities.

In finding discrimination, the Judge expressly identifies the culprit as Mark Jackson, an employee two levels beneath Patrick and with respect to whom there is no evidence of participation in the rankings leading to the layoff decisions. The Judge states:

> The issue is whether Riordan was discriminated against for making the safety complaints, which specifically came to rest on Mr. Jackson's doorstep, and about which Mr. Jackson took umbrage. While the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge.

37 FMSHRC at 1078-79.

Indeed, the Judge rests the outcome of the case squarely on Jackson's reaction to the brief conversation in late August, in which Riordan and other employees amicably discussed ventilation with Patrick:

> As noted, the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick and not because he was simply the "unfortunate" recipient of a lower evaluation score.

Id. at 1092.[3]

Riordan's testimony does not provide any evidence of manipulation of the ranking system. The Judge drew an outcome determinative inference of discrimination based upon circumstantial evidence drawn from testimony of operator employees, none of whom testified in any manner that the operator manipulated the rankings or discriminated against Riordan.

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[3] The Judge, in his "overview" of his findings, further stresses Jackson as responsible for the rankings manipulation, stating that "Riordan's candor with the president did not sit well with his immediate supervisor, Mark Jackson." 37 FMSHRC at 1075. The majority asserts that the Judge based his decision upon an entire course of conduct. Slip op. at 10 n.12. That is not what the Judge stated. Again, he said, "the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick." 37 FMSHRC at 1092. Ironically, the majority's footnote cites one conversation between Jackson and Riordan. Thus, the majority, along with the Judge, points at Jackson as causing manipulation of the rankings although neither is able to cite any evidence of such manipulation of previously completed rankings. Consequently, they expose their opinion to the critical flaw – there is an absence of any, let alone substantial, evidence of manipulation of rankings by Jackson.

The fatal problem with the Judge's decision, and the majority opinion, is that the evidence does not support the outcome determinative inference. It should be enough to reverse the Judge's unsupported inference to point out that the Judge bases his decision upon the finding that "Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks." There is not a speck, scintilla, or smidgen of evidence that Jackson, one of many general mine foremen, had or could have had any role in rankings that were compiled *before* the company picnic, or that he had any ability or made any effort to manipulate those already made rankings after the picnic. In reaching his circumstantial inference, the Judge writes a discursive opinion mostly citing irrelevancies to find that Jackson, an employee not involved in human relations and two steps below Patrick, took aim at Riordan due to a three-to-five minute conversation between Riordan and other miners with Patrick in late August and in some unexplained way manipulated a major workforce consolidation to discriminate against Riordan.[4]

The lack of evidence that Jackson could, or did, manipulate the rankings, standing alone, warrants reversal of the Judge's decision. However, it is useful to cut the many disparate threads of the Judge's decision.[5]

First, the Judge notes, but does not discuss, the testimony that the miner who replaced Riordan scored far above him on the ranking system. 37 FMSHRC at 1090. In fact, that miner had to take a demotion from general mine foreman to section foreman. Tr. 131. The Judge further notes testimony that Patrick gave Knox Creek Human Resources a list of high performers at the Cherokee, Roaring Fork, and Laurel Mountain mines with whom Knox Creek would like

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[4] The majority asserts that the dissent does not accept the Judge's credibility findings. Slip op. at 11 n.13. In fact, the dissent rests upon the absence of ***substantial evidence*** that Jackson, directly or indirectly, manipulated the rankings and thus that protected activity motivated one particular layoff made as part of a massive realignment and reduction in force. There simply is not substantial evidence that protected activity motivated Riordan's layoff. Further, neither the Judge nor the majority explain the anomaly of conspirators, determined to manipulate rankings to make sure Riordan was laid off, only manipulating the rankings to the extent that Riordan was fifth from the bottom of the ranked foremen, a position that did not assure that he would be reached in the layoff.

[5] Riordan was the first witness. 37 FMSHRC at 1075. The Judge enthusiastically praised Riordan's testimony immediately after he left the witness stand gushing, "you served yourself well" and "I want to compliment you on your demeanor . . . you did yourself a service by the way you maintained a calm demeanor, answered questions, I felt honestly, and so that's a compliment to you." Tr. 100-01. This praise contrasts with the Judge's treatment of the operator witnesses, whom he mocks with the contrived, flippant terms "recall-itis" and "no idea-it is." *Id*. at 1092-94 & nn.13-15, 1098. The Judge further explicitly "discounted" testimony of operator witnesses solely because of the form of questions, even though the Judge never intervened and opposing counsel, with rare exception, did not object to the form of the questions. *Id*. at 1075 n.5. There is no reason not to think the substance of the testimony would have differed had a more time-consuming approach been followed in this bench hearing. Further, all of these operator witnesses were subject to cross-examination.

to fill vacancies. 37 FMSHRC at 1089 n.9. Obviously, the Judge could not and did not find that a desire to retain the best workers would be a basis for finding unlawful discrimination in the layoff of less proficient employees. No one asserts that the general mine foreman who replaced Riordan suffered such demotion due to manipulated rankings. That miner suffered an adverse job action because of workforce consolidation and mine closures. None of this supports manipulation.

Second, the Judge writes at length about Riordan's job performance as if Riordan's layoff resulted from unsatisfactory performance; the Judge finds that the evidence does not support a conclusion that Riordan was an unsatisfactory foreman. *Id*. at 1097-99. This extensive discussion of whether Riordan was a competent foreman ignores the fact that the operator did not assert that Riordan was laid off for cause or for poor performance. The testimony, including Riordan's testimony, is consistent that the operator laid off Riordan because of a reduction in force in which four foremen and 129 other employees lost their positions, resulting from the consolidation of workforces resulting from the closure of two mines. There is no evidence, for example, that the three other foremen who were laid off as a result of the consolidations were not competent foremen. There is no evidence that, absent the consolidations, any of the four foremen would have been discharged for cause. By discussing the case as if it were a for-cause dismissal, the Judge miscasts the discussion and decision.

In terms of the rankings used for the necessary reduction in force, Riordan did not produce any evidence and in fact did not even claim that the points he received in the rankings were unjust — that is, that his ranking points on any specific performance characteristics were unfair, or that any other foreman received scores higher than deserved. By casting the layoff as if it were a dismissal for cause, the Judge holds the layoff to an entirely different standard than a necessary workforce contraction due to market or mining conditions, in which all foremen were evaluated and the best retained, albeit some with demotions.

Third, there is no evidence whatsoever that the ranking system or rankings themselves were unfair. The evidence establishes that, in planning for a substantial reduction in force, the operator asked superintendents to rank foremen under their supervision. Four separate superintendents individually ranked the foremen under their supervision by assigning each of them 1 to 5 points to each factor in a list of 15 specific and easily understood characteristics of performance. 37 FMSHRC at 1088; S. Ex. 3. The four superintendents assigned points to a total of 24 foremen based upon those criteria. *Id*.[6] Further, the ranking system added points for certifications. Riordan was the principal beneficiary of such additions – a fact that is, of course, inconsistent with manipulation of the system to dismiss Riordan. Riordan did not finish last – that is, in a position assuring layoff. He finished fifth from the bottom in rankings. That system and result does not speak to a discharge for cause; it speaks to an objective and business-like approach to keeping the best foremen. No evidence even suggests that Riordan was a superior

[6] The criteria were: safety, policy and procedure, attitude, right thing, cooperative, observations, knowledge, ability, reduce cost, results based, quick learner, dependable, adapt to change, proactive, and problem solver. S. Ex. 3. Additionally, extra points were awarded for certifications, thereby giving Riordan an extra 5 points. *Id*.

performer to any foreman ranked above him. Indeed, Riordan had expressed the desire to leave the position as an underground foreman and work on the surface.

Although the Judge writes in terms of the reduction in force as a pretext for laying off Riordan, he does not make the patently absurd suggestion that the operator closed two mines and laid off 133 employees as a pretext for the dismissal of Riordan. The Judge, therefore, must believe that the operator used the closures as a convenient opportunity to layoff Riordan. However, although Riordan claims, and the Judge implicitly found, that the rankings were manipulated in some way, Riordan does not contest the fairness of his score as compared to other foremen. There simply is no evidence that Superintendent Scott Jessee ranked Riordan unfairly as compared to other foremen under his supervision.

Fourth, the Judge finds it unbelievable that the operator did not explain the scoring process to the mine superintendents. 37 FMSHRC at 1091 n.10. However, as noted immediately above, superintendents entered 1 to 5 points based upon objective and easily understood characteristics or reasons for compilation of the rankings through assignment of points to each specific characteristic. A simple review of the criteria (listed *supra*, note 6) demonstrates they are self-explanatory. Further, a lack of explanation to superintendents had no particularized effect on Riordan. The state of the superintendents' knowledge applied equally to the ranking of all foremen by their respective superintendents and is irrelevant to Riordan being ranked fifth from the bottom.

Fifth, the Judge found it unbelievable that senior management did not explicitly inform superintendents of the reason for obtaining the rankings. 37 FMSHRC at 1094. He states this disbelief without identifying any evidence, testimony, or expertise on his part for such disbelief. It seems as likely that an operator would not announce to any persons other those to whom it was necessary that it was planning/considering closure of two mines in advance of the actual decision and a planned announcement. The Judge simply expresses his uninformed, non-expert opinion to take what amounts to judicial notice that an operator would explicitly identify plans to close mines in advance of such announcement becoming necessary. In any event, as with the point directly above, the absence of explanation would apply equally to all four superintendents who ranked their foremen. The Judge's disbelief is irrelevant to whether the operator manipulated the rankings and, therefore, is irrelevant to the claim made in this case.[7]

Sixth, the Judge states that the ranking of foremen process was malleable and allowed manipulation to achieve desired results – another merely conclusory statement. *See* 37 FMSHRC at 1093, 1105. In reality, of course, there is no evidence of manipulation to achieve predetermined or prejudicial results. This case involves one and only one person, Riordan. Other than Riordan's claim, there is not any other claim that any other foreman was favored or disfavored in the ranking system. The Judge cites no evidence of manipulation other than his own conclusory speculation that somehow Jackson caused the layoff of Riordan. However, no one, particularly none of the three foremen ranked lower than Riordan and, therefore, also laid off, has suggested how the process was "manipulated" to achieve dismissal of pre-selected

[7] Notably, the Judge does not find that Jessee had any discriminatory motive or intent when he ranked the foremen under his supervision in early August.

foremen. Here, we have one, explained exception to use of the numerical rankings. That does not constitute substantial evidence of nefarious malleability.

Seventh, the Judge finds it unbelievable that an operator would assign an inferior foreman to teach safety. 37 FMSHRC at 1099. Once again, the Judge just states a conclusion not supported by evidence or expertise and misses the point that the operator did not assert Riordan was an incapable foreman who would have been discharged absent the consolidations. Further, the shortcomings that witnesses describe in Jackson's performance did not have anything to do with knowledge of safe operating practices. No relationship may be drawn fairly between his performance as a production foreman and his ability to teach safety. It is not libelous to suggest that many a scholarly law professor or learned judge might be a poorly producing legal practitioner.[8]

A foreman with good knowledge of safety, reasonable communication skills, desire to work outside, and inferior production capabilities would seem an excellent candidate to teach safety. In any event, the Judge again simply engages in irrelevant speculation that has no evidentiary value to any conclusion regarding motivation for the layoff.[9] The Judge makes no

[8] The Judge finds fault with Patrick's testimony stating that Patrick was not entirely clear in recalling whether he asked a related company to try to find jobs for laid off employees only after the first layoff of 40 employees resulting from closure of the Roaring Forks mine or also after the closure of Laurel Mountain and a resultant 93 additional layoffs. 37 FMSHRC at 1087-88. The Judge never draws any connection between asking a related company to see if it could hire some of the 133 employees laid off as a result of the two consolidations and discrimination against Riordan. I do not suppose the Judge could be implying that perhaps Patrick reached out after the closure of Roaring Forks and loss of 40 jobs but did not reach out after the closure of Laurel Mountain with a loss of 93 jobs because reaching out after the second consolidation might have helped Riordan — one of the 93 laid off employees. The more important point is that, if there were a conspiracy to layoff Riordan, the conspirators skipped the first opportunity — the layoffs associated with the closure of Roaring Fork. In sum, the Judge did not connect how any confusion over whether Patrick asked a related entity to try to find jobs for the 40 employees laid off because of the Roaring Fork closure is relevant to Riordan's discrimination claim.

[9] The Judge's opinion places weight on the absence of any written reprimands of Riordan other than the one for violating the mine's roof control plan. 37 FMSRHC at 1105. Of course, this continues to miss the point that the operator did not discharge Riordan for poor performance or misconduct. Undocumented deficiencies might well explain his placement fifth from the bottom in the assessment of performance.

mention in his analysis of the fact that three other foremen were ranked lower than Riordan and were also laid off in the consolidations. None of them filed discrimination complaints.[10]

Eighth, the evidence testimony and exhibits demonstrate that Superintendent Jessee ranked the foremen under his supervision in early August. Tr. 260; S. Ex. 3. Prior to that time, evidence shows Riordan only engaging in ventilation discussions with Jackson and, occasionally, with Jessee in the same manner essentially as one would expect of all underground foremen. Obviously, discussions between mine foremen and a general mine foreman are routine and regularly occurring. Wright Dep. Tr. 10, 32.[11] The Judge does not cite such conversations as the reason for his inferential decision. Instead, he explicitly finds the motivation for his finding of manipulation of rankings to layoff Riordan arose from the three-to-five minute conversation at the company picnic in late August. Essentially, the Judge hangs his speculative inference on that brief conversation in which Patrick, the senior mine official and layoff decision maker, encouraged communication.

There is not a scintilla of evidence that anyone altered the rankings to reduce Riordan's ranking points in any way after the picnic. The Judge below does not even deal with that

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[10] Among the trivialities relied upon by the majority to uphold the Judge's decision is the fact that the layoff occurred four months after the picnic. Slip op. at 11. Of course, the majority ignores the inconvenient fact that there was a layoff soon after the picnic that Riordan survived so that the purported animus was not strong enough to cause quick action but apparently in minds of the majority was strong enough to be a slow burn. They assert this is a factor of "close in time" to the picnic. For support, they cite two cases involving individual adverse action against specific individuals. Obviously, those cases provide no support for that proposition when the layoffs were part of a major contraction resulting in displacement of 133 employees.

[11] The majority states that only Jackson and Jessee gave such testimony. To the contrary, the testimony of the Secretary and Riordan's deposition witness Mike Wright fully supports the routine nature of such discussions. Mr. Wright discussed his conversations with virtually all section foremen about ventilation. Those conversations were along the same lines and in the same manner as his talks with Riordan. Wright Dep. Tr. 33, 34. Of course, Wright was testifying only about his conversations with the section foremen, but there is no reason to believe other foremen talked to Wright in the same manner as Riordan but acted differently in talking with Jackson or Jessee. Further, although Commissioners are lawyers not miners, we have sufficient familiarity with mining to realize that section foremen and general mine foremen must regularly discuss ventilation. It will be a sad day for mining and miners if section foremen are not routinely discussing ventilation issues with the general mine foreman. Nonetheless, here, the Judge bases his decision upon a conversation among Riordan, several other miners, and Patrick in which Riordan made a specific suggestion related to ventilation after another miner raised the subject. The Judge found Riordan's immediate supervisor, Jackson, became angry because Riordan made a safety recommendation to Patrick, and then became a driving force behind Riordan's layoff. 37 FMSHRC at 1086-87. For that reason, I will accept that protected activity occurred in this specific case during the brief conversation upon which the Judge bases his decision.

dilemma. He just infers there must have been manipulation stemming from the remark by Jackson. Yet, there is no evidence, none whatsoever, regarding how Jackson could have caused a change in a previously submitted ranking for Riordan.[12]

To their intellectual credit, the majority gamely attempts to deal with this fatal flaw. Slip op. at 13. Its effort, however, ends up only completing the trilogy of concessions that undercut its decision. It asserts that "evaluations" were "amended" after the picnic. That phrasing is important. In the context used by the majority, the term "evaluations" means follow-up notes made on a spreadsheet after Jessee entered the rankings in early August. The majority's focus on "evaluations" – that is, not the rankings that determined layoffs — constitutes an implicit concession that the actual rankings were made before the picnic and not changed afterwards. No witness suggested that any follow-up notes had anything to do with Patrick's decisions. Further, there is no evidence that the "evaluations" were "amended." Someone simply reviewed the evaluations and made supplemental notes as is normal for reductions in force. The case does not turn on when supplemental notes to the evaluations were made but rather upon the numerical rankings that determined the layoffs. Clearly, Jessee entered those rankings before the picnic.

[12] The majority suggests that the Judge could infer unlawful discrimination solely on the basis that he found all operator witnesses were lying. Slip op. at 16. This assertion amounts to a reversal of the burden of proof in which a Judge may base a discrimination finding solely upon an operator's alleged failure to prove a negative — that is, that the operator did not prove it did not discriminate against a claimant. The Secretary and Complainant bear the burden of establishing protected activity and that such protected activity motivated at least in part an adverse action. *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The United States Court of Appeals expressed an identical burden in National Labor Relations Board cases clearly when it said that "[T]he General Counsel must make a prima facie showing sufficient to support an inference that the applicant's protected conduct was a 'motivating factor' in the employer's decision." *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002). Because substantial evidence does not support a finding that protected activity was a motivating factor for the layoff, the Secretary and Complainant did not carry the initial burden of establishing a prima facie case.

Whether a sufficient prima facie case has been established is, of course, a question of substantial evidence. The problem for the majority in this case is that there is no substantial evidence that the "protected activity" of Riordan's cordial chat along with several other miners with Patrick at a company picnic motivated Jessee's ranking made before the picnic or Patrick's decision based upon the rankings. The majority posits that the operator waited, apparently patiently, for a massive realignment (even skipping a first round of layoffs) to layoff Riordan because Jackson was mad at him. However, they do not demonstrate how the Secretary or claimant carried their burden of proof. Having admitted the rankings were the basis of the layoff and that there is no evidence that Jessee ranked foremen after the picnic, the majority shifts the burden of proof to the operator to show it did not discriminate.

As noted, the majority's concession on this point is the final concession necessary to complete the trilogy: Patrick used the rankings to determine layoffs; the rankings predate the picnic; and, no evidence shows Jackson manipulating the rankings made before the picnic. With those concessions, the raison d'etre of the majority decision collapses.[13]

Ninth, despite discovery, the Secretary and Riordan did not introduce any evidence of any change in the rankings between the assignment of points by the four superintendents in early August and the layoffs in October and December. Further, there is no evidence that Jessee had any idea of the points being assigned other foremen by their respective superintendents. Additionally, there is no evidence offered as to how Jackson, identified by Judge as the progenitor of the discrimination, could have achieved such manipulation.[14]

Tenth, the majority observes, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res.*, Inc., 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38). Here, the asserted reason for the layoff is certainly not weak, implausible, or out of line with the operator's normal business practices.

The reason for the layoff flows from a normal business practice. Closure of two mines resulted in consolidation of workforces. The operator utilized a system to retain the better performing employees. One can only imagine the Commission's reaction and the number of

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[13] By footnote, the majority observes that among marked follow-up entries on the spreadsheet of employee evaluations (S. Ex. 3), there is a notation of discipline of Riordan for standing under unsupported roof. Slip op. at 13 n.18. However, follow-up notations did not appear only with respect to Riordan. Notes were made for many if not all other foremen. There is no evidence that the follow-up notes that were made with respect to the foremen being reviewed were made by the superintendents, who did rankings. Of course, if Jessee did not enter the notes personally, they are not evidence for when Jessee did his rankings and create no suspicion let alone proof of a post-picnic change in rankings. The Secretary's Exhibit 3 shows the date on which each of the four different superintendents entered their rankings. The exhibit shows that Superintendents Johnson, Ohlson, and Clevinger entered their rankings on August 8 and Superintendent Jessee entered his on August 9 — that is, weeks before the picnic. No evidence shows a later change to rankings as the majority effectively concedes by focusing on other entries on the evaluation forms. The follow-up entries on the ranked foremen are indicia of an ordinary reduction in force review, rather than any broad "manipulation" of the ranking point scores used by Patrick.

[14] The Judge and majority hint at something nefarious in Patrick's decision to keep a foreman who scored one point lower than Riordan because that foreman was a member of a mine rescue team. They assert that another arrangement could have been made to keep an active mine rescue team. 37 FMSHRC at 1090-91 & n.10; slip op. at 11. This is nothing more than second guessing a business judgment by Patrick that he wanted to keep an existing mine rescue team together rather than substitute personnel. Certainly, it does not show discrimination and is inconsistent with Patrick's favorable conversation with miners during the picnic and the Judge's focus on Jackson as the generator of some speculative manipulation.

discrimination cases that employees would file if an operator arbitrarily picked and chose among foremen without any means for an objective evaluation. The practice in this case is not out of line with normal business practices. Instead, it is fully in line with normal and expected business practices. It is a lawful and typical business practice to evaluate employees based upon performance in a reduction in force resulting from consolidation of operations or reduction in production.

Eleventh, as stated at the outset, the absolute absence of any evidence that Jackson, an underground foreman, could or did lead a conspiracy involving multiple managers, standing alone, demonstrates the erroneousness of the Judge's decision. According to the Judge, the generator of the "conspiracy" to manipulate the rankings was Mark Jackson. For the Judge, the specific animus resulting in discrimination against Riordan sprang from the heart and mind of Jackson when he, according to the Judge's findings, learned that Riordan and others spoke with Patrick about ventilation at the company picnic during the prior week. However, there is no evidence (none whatsoever) that Jackson was involved in ranking the employees by Jessee. There is no evidence (none whatsoever) that Jackson had anything to do with the many personnel decisions arising from the closure of two mines and the layoff of 133 workers. There is no evidence (none whatsoever) that Jackson had any relationship with individuals or access to records that would have permitted him, or others acting on his behalf, to manipulate rankings. In short, there is no evidence (none whatsoever) that Jackson played any role in compiling the rankings or in Patrick's consideration of the rankings. Yet, the Judge assigns Jackson the role as the generator of manipulation.

The majority strains to support an inference refuted by the Secretary's own exhibit. In doing so, the majority goes beyond reviewing the Judge's decision and the law. To infer that Jackson caused the manipulation of the rankings, one must simply blindly assert that Jackson somehow played a role in manipulating already prepared rankings and that all operator witnesses either had no knowledge of or lied about such manipulation. The finding that Jackson precipitated a manipulation in ranking is a bald and unsupported conclusory statement without evidentiary support or foundation.

II.

Conclusion

The Judge's speculative decision rests upon two unsupportable bases. First, the Judge evaluates the case as if this were a discharge for cause. In fact, of course, the operator laid off 133 employees in a reduction in force. The operator laid off four foremen based upon rankings calculated from 15 specific performance criteria entered by multiple superintendents and involving multiple mines.

Second, the Judge sums up as the rationale for his decision, "[w]hile the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79. This is equivalent to saying "I know there is no evidence that Jackson, a mid-level employee, had anything whatsoever to do with the rankings or

the layoffs. However, I think he said something mean to Riordan so I find Jackson managed to manipulate the operator's reduction in force rankings to achieve Riordan's layoff." That is an unfounded emotional sentiment; it is not an objective or judicious decision. The majority offers no reasonable basis for endorsing his sentiment. I respectfully dissent.

/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

August 25, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KENAMERICAN RESOURCES, INC.	Docket No. KENT 2013-211

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves a single citation issued to KenAmerican Resources, Inc. ("KenAmerican") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges that a communication during a mine inspection, in which a caller asked if there was "company outside" and the dispatcher responded "yeah, I think there is," conveyed advance notice of an inspection, in violation of section 103(a) of the Act.[1] 37 FMSHRC 1809, 1811 (Aug. 2015) (ALJ).

KenAmerican filed a motion for summary decision, which the Secretary opposed. The Judge found that there were no genuine disputes of material fact regarding the issue of whether a violation occurred, that the cited communication was vague and ambiguous, and that he was unable to conclude that it conveyed prohibited advance notice of an inspection. Accordingly, he granted KenAmerican's motion and vacated the citation. *Id.* at 1811-12. The Secretary seeks review of the Judge's grant of summary decision.

We conclude that the Judge erred in granting KenAmerican's motion. When the record is viewed in the light most favorable to the Secretary (the party opposing summary decision), an inference could reasonably be drawn that the communication was meant to convey advance notice of an inspection. Accordingly, we vacate the Judge's grant of summary decision and remand the matter for further proceedings.

[1] Section 103(a) states in relevant part that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). The Act does permit advance notice for certain activities, such as investigations to gather or information on health and safety conditions, or inspections in response to imminent danger complaints. *See* 30 U.S.C. §§ 813(a), 813(g)(1).

I.

Factual and Procedural Background

The following facts are undisputed. MSHA Inspector Doyle Sparks and six others traveled to KenAmerican's Paradise No. 9 Mine, to conduct an investigation in response to a hazard complaint. Before traveling underground, the inspectors took control of the mine's communication system. While monitoring the system, approximately 30-35 minutes after his arrival at the mine, Sparks overheard a call from underground. The caller asked if there was "company outside," and the dispatcher responded "yeah, I think there is."[2] Sparks asked who was on the line and received no response.[3] He determined that the communication was advance notice of an inspection and issued Citation No. 8502992, which states that "[d]uring a Hazard Compliant [*sic*] inspection conducted on 04/20/2012 . . . mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property."

KenAmerican contested the citation before the Commission and filed a motion for summary decision, requesting that the citation be vacated because the undisputed material facts "cannot and do not amount to a violation." KenAmerican argued that the citation fails on its face to allege *advance* notice of an *inspection* because it alleges only that a communication "during" an inspection conveyed notice that inspectors were "on mine property." KenAmerican also noted that inspectors can be on-site for many reasons, including some for which advance notice is permitted.[4] In addition, KenAmerican argued that the cited communications were general statements which did not indicate that inspectors were about to inspect the mine. Therefore the Secretary had no evidence to support the violation, and KenAmerican was entitled to summary decision.

KenAmerican also claimed that enforcing section 103(a) in these circumstances would constitute a content-based restriction of free speech, in violation of the First Amendment. KenAmerican stated that section 103(a) should be narrowly tailored to prohibit only communications that contain specific content concerning an inspection, and intentionally or knowingly convey advance notice.

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[2] KenAmerican accepts the dispatcher's alleged response for purposes of summary decision, but notes that it will dispute the content if a hearing becomes necessary.

[3] This fact only appears in the Secretary's version of events. Resp. to Mot., Ex. C. However, it has not been contested by KenAmerican, and in the summary decision context we look at the record in the light most favorable to the non-moving party. *See, e.g.*, *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). Accordingly, for these purposes, we accept the fact as true and undisputed.

[4] KenAmerican specifically noted that advance notice is encouraged when dealing with a hazard complaint involving an imminent danger. 30 U.S.C. § 813(g)(1). KenAmerican then argued that, because the inspectors were investigating a hazard complaint, the inspection at issue was exempt from the prohibition on advance notice. We find that the Judge properly rejected this argument, as there is no indication that an imminent danger was present. 37 FMSHRC at 1811.

The Secretary filed an opposition, stating that KenAmerican was not entitled to summary decision because "KenAmerican violated section 103(a) of the Mine Act and . . . there are genuine issues as to the material facts relating to the gravity and negligence of the citation issued." Resp. to Mot. at 3-4. The Secretary did not specifically identify any disputed facts, or offer a theory as to why the cited language conveyed prohibited advance notice of an inspection. The Secretary did restate the undisputed facts – that while inspectors were preparing to begin an inspection, a miner called to inquire if there was "company outside," and was told that there was. *Id.* at 4. The Secretary also noted that the inspection at issue constituted direct enforcement activity which included an impact inspection, and was therefore not exempt from the prohibition on advance notice. *Id.* at 5. As for the First Amendment claim, the Secretary noted that no court has ever found section 103(a) unconstitutional, and permitting advance notice would interfere with enforcement of the Act. *Id.*

In addressing KenAmerican's motion, the Judge first found that there were no genuine issues of material fact with respect to the existence of the violation, because the content of the cited communication was undisputed, and the Secretary only alleged disputes as to gravity and negligence. 37 FMSHRC at 1811. He then found that the undisputed statements were ambiguous and vague, and was "unable to conclude as a matter of law" that the statements conveyed prohibited advance notice. *Id.* The Judge stated that where (as here) the non-moving party would have the ultimate burden of proof at trial, summary decision is appropriate where the non-movant is unable to meet its ultimate burden. *Id.* at 1811 n.2. He found that the Secretary had failed to "marshal evidence that would at least support a reasonable inference" that the cited communications conveyed advance warning, and therefore concluded that a trial would serve no purpose, and that KenAmerican was entitled to summary decision as a matter of law. *Id.* Accordingly, he granted the motion for summary decision and vacated the citation. The Judge did not reach KenAmerican's First Amendment claim.

On appeal, the Secretary argues that the Judge erred by granting KenAmerican's motion for summary decision. Specifically, the Secretary states that the Judge erred by: interpreting section 103(a) to exclude advance notice conveyed through ambiguous language; failing to make an inference in the non-movant's favor regarding the intent of the cited communication; and finding insufficient evidence in the record to support a reasonable inference of advance notice. Ultimately, the Secretary argues that the Judge "should have . . . concluded that a hearing was necessary to develop the facts regarding the context for and intended meaning of the exchange." S. Br. at 1.

Also before the Commission is KenAmerican's motion to strike the majority of the Secretary's brief. KenAmerican argues that the Secretary has raised several theories on appeal which were never presented to the Judge, including issues of statutory interpretation, intent, coded or euphemistic language, and the proper drawing of inferences. The Secretary counters that his position on appeal is merely a refinement of his position below and that, regardless, where good cause exists, the Commission may consider new theories on appeal.

II.

Framework

Commission Procedural Rule 67 provides that summary decision shall only be granted if the entire record shows that there is no genuine issue as to any material fact, and that the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). We have long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). As with summary judgment under Rule 56, appellate review of summary decisions is *de novo*, in that the reviewing court applies the same standard as the trial court. *See, e.g.*, *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). When the Commission reviews a summary decision and determines that the record before the Judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995).

Addressing Rule 56, the Supreme Court has emphasized that the party moving for summary judgment bears the initial burden of showing that there are no genuine disputes as to material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If the moving party carries its burden of showing that there is no genuine dispute as to material fact and that the movant is entitled to judgment as a matter of law, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–587 (1986).

If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision, if the motion is not adequately supported. *See Adickes*, 398 U.S. at 159-61 (summary judgment must be denied where the evidence in support of the motion does not establish the absence of a genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55-56 (4th Cir. 1994).

In determining the universe of material facts and whether such facts are undisputed, the Judge should not rely solely on the parties' claims, but should conduct an independent review of the record. *See, e.g., Adickes*, 398 U.S. at 153; *Campbell*, 21 F.3d at 55-56; *Hanson Aggregates*, 29 FMSHRC at 10-11. When making such a determination, the Supreme Court has stated that "[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). Additionally, "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Central to our analysis in this case is the principle that "material fact" for purposes of defeating a summary decision can also be an inference, drawn from the evidence on record, as to a factual element of the claim. Accordingly, even if the basic factual scenario – the "actuality of

circumstances" – is undisputed, there may still be a genuine issue of material fact. *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 244-45 (2d Cir. 1984). Summary decision is precluded if, when the record is viewed and reasonable inferences are drawn in the light most favorable to the non-movant, "there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy Farms, Inc. v. John Labatt Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996) (quoting *Nathanson v. Med. Coll. Of Pa.*, 926 F.2d 1368, 1380 (3d. Cir. 1991).

Even intent or motive can be a material fact for summary decision purposes, where it is an essential element of the underlying claim. If opposing inferences regarding intent or motive can reasonably be drawn, summary judgment is inappropriate. In *Hunt v. Cromartie*, for example, the Supreme Court reversed a grant of summary judgment in favor of residents alleging that a redistricting plan violated the Equal Protection Clause. The Court found that "reasonable inferences from the undisputed facts" could be drawn in favor of either a legally permissible or an impermissible motivation for the redistricting. Accordingly, triable issues of material fact existed, and resolution at the summary judgment stage was inappropriate. A dispute as to motivation was sufficient to render summary judgment improper. 526 U.S. 541, 548-52 (1999); *see also Ideal Dairy Farms*, 90 F.3d at 744-45 (summary judgment regarding a time-barred contract claim was inappropriate where the facts could suggest intent to terminate in 1987 or 1990); *Katz*, 737 F.2d at 244-45 (summary judgment was inappropriate where there was a dispute as to intent to change domiciles).

Summary judgment should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Campbell*, 21 F.3d at 55 (quotation omitted). For summary judgment to be appropriate, the evidence must do more than *allow* the court to find in the movant's favor, it must "*require* that the court do so." *Hunt*, 526 U.S. at 552 (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.*; *Anderson*, 477 U.S. at 251-255.[5]

[5] Contrary to the dissent's suggestion, our holding below is consistent with *Celotex*. In *Celotex*, the Supreme Court noted that the "party seeking summary judgment always bears the initial responsibility" of identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323. The Court explained that the movant need not produce evidence, but may meet its burden by "pointing out to the district court [ ] that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Here, as discussed below, KenAmerican has failed to demonstrate an absence of evidence to support the Secretary's claim of a section 103(a) violation. The communication described by the Secretary (in his pleadings and in the inspector's affidavit) is sufficient to show a dispute as to the material fact of intent, i.e., whether the cited communication referred to the presence of MSHA inspectors at the mine. Significantly, the communication described by Inspector Sparks included not only the back-and-forth conversation between the underground miner and the dispatcher but also the inspector asking the miner for his name and the miner refusing to answer.

(continued…)

III.

Disposition

The Judge erred in granting KenAmerican's motion for summary decision. As explained below, when the record is viewed and inferences are drawn in the light most favorable to the Secretary (as the non-moving party), one could reasonably infer from the underlying facts that the cited communication was meant to convey advance notice of an inspection. There is a genuine dispute as to the meaning of the communication, resolution of which could allow the Secretary to prevail. As KenAmerican failed to establish that there was no genuine issue of material fact and that it was entitled to summary decision as a matter of law, the Judge erred in granting the motion.

We reverse the Judge, not because the Secretary established that summary judgment was improper, but because neither the record nor KenAmerican's motion establish that the requirements for summary decision have been met.[6] To meet its burden here, KenAmerican must show that the record *cannot* establish that the purpose of the communication was to convey prohibited advance notice of an inspection. We find that KenAmerican failed to meet that burden.

Although it is undisputed that a miner called the dispatcher to ask if there was "company outside," that the dispatcher responded, "yeah, I think there is," and that when Sparks took the phone and asked the caller who was on the line, he received no response, these facts do not encompass all material facts necessary to resolve the proceeding. *Cf. Hanson Aggregates*, 29 FMSHRC at 10-11 (the parties' stipulations did not encompass all material facts). The intent or meaning of the cited communication is also a material factual question – it is the ultimate question needed to be resolved in this case. *Cf. Hunt*, 526 U.S. at 549.

Intent is generally inferred from underlying facts; when making such an inference, the underlying facts are viewed, and the inference drawn, in the light most favorable to the party opposing summary decision. *See id.* at 548-52; *Ideal Dairy Farms*, 90 F.3d at 744-45. Here, when the undisputed circumstances surrounding the communication are viewed in the light most favorable to the Secretary, they suggest a miner underground may have become aware that inspectors were on site to conduct an inspection and called the dispatcher to confirm.

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[5] (…continued)
It is worth noting that *Celotex,* unlike the present case, involved an issue of pure physical fact – whether the plaintiff's deceased husband was exposed to a product containing asbestos which was manufactured or distributed by Celotex. There was no issue of intent. *Id.* at 319.

[6] Accordingly, we need not address KenAmerican's motion to strike. In the summary decision context, filings in opposition need not be considered if the moving party fails to meet its initial burden. *See Adickes*, 398 U.S. at 153; *Campbell*, 21 F.3d at 55-56. Having found that KenAmerican failed to meet its initial burden, the Secretary's opposition plays no part in our decision. As a result, any new issues raised on appeal would have no impact on the outcome of this analysis.

When viewing the record in this light, one could reasonably infer that "company outside" was meant to inquire whether MSHA was present to conduct an inspection. The dispatcher's affirmative response of "Yeah, I think there is" could be inferred as advance notice of an inspection in violation of section 103(a). Moreover, one could infer that the caller's failure to identify himself in response to the inspector's request is evidence that the caller's question was intended to determine whether an MSHA inspection was occurring.[7]

Inherent in our analysis is an understanding that ambiguous language can violate section 103(a), if context establishes that it conveyed advance notice of an inspection. Indeed, because the communication at issue does not explicitly discuss inspectors or inspections, its intent is only material if non-explicit language can be violative. This reading of section 103(a) is consistent with its plain language, which focuses on whether advance notice of an inspection was in fact provided. It is also consistent with the purpose of section 103(a), which is to ensure the efficacy of inspections by preventing operators from concealing hazards before an inspector can observe them. *See* S. Rep. No. 95-181, at 27 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 615 (1978) (noting the "ease with which many safety or health hazards may be concealed if advance

[7] Our dissenting colleagues acknowledge that when considering a motion for summary decision, a judge must give the non-moving party the benefit of every "reasonable inference." Slip op. at 13 (citations omitted). However, they apparently disagree that in this case the potential inference which could be drawn in the Secretary's favor – that the statement "company outside" referred to MSHA inspectors – is a reasonable one.

The use of coded language to warn of MSHA inspections is a documented problem in the mine industry. For example, in the recent criminal prosecution of former Massey CEO Don Blankenship (which in part involved charges stemming from the 2010 explosion at the Upper Big Branch "UBB" Mine), a federal district court judge discussed the use of coded language for the purposes of advance notice in denying the defendant's motion for judgement of acquittal on all counts. *U.S. v. Blankenship*, No. 5:14-cr-00244, 2015 WL 8731688 (S.D.W.Va. Dec. 9, 2015). Specifically, the judge stated:

> As to the issue of advance notice, the Court notes as a preliminary matter the evidence in the record that advance notice was a common practice at UBB and other mines during the time period of the indictment. Several witnesses . . . testified that in their work at UBB, they provided advance notice to underground miners and other UBB employees about the arrival of MSHA inspectors, and that they were instructed to do so by supervisors at UBB. . . . Stanley Stewart also testified that when the crews underground at UBB received advance notice of an inspection from a dispatcher, often by means of code words, such as "it's cloudy out there today," the crews would "[t]ry to clean up anything we could find." . . . Viewing these [and other] facts in the light most favorable to the United States, the Court finds them sufficient for a jury to infer that providing advance notice of MSHA inspections was a frequent practice at UBB . . . .

Id. at *6. Thus, a judge could reasonably infer that the use of coded language while mine inspectors were on KenAmerican's property was a reference to those inspectors.

warning of inspection is obtained"). KenAmerican does not disagree that coded or ambiguous language can support a violation of section 103(a), *if* the context establishes that it conveys advance notice of an inspection. *See* Resp. Br. at 15-17.

It its motion before the Judge, KenAmerican argued that the communication *was not necessarily* intended to convey advance notice of an inspection. KenAmerican stated that the conversation "easily could have been made in the context of determining the availability of transportation," was "consistent" with non-violative intent, and "easily could encompass" various activities which are exempt from the prohibition on advance notice. Memo Supp. Mot. at 6-8, Reply Supp. Mot. at 2. However, KenAmerican must do more than show that the record would *allow* us to conclude that the communication was non-violative; KenAmerican must show that the record *requires* us to resolve the matter in KenAmerican's favor, i.e., show that the communication was non-violative, or at least that the Secretary would be unable to prove a violation. *Cf. Hunt*, 526 U.S. at 552.

The Judge granted KenAmerican's motion, finding that the Secretary had failed to marshal evidence that would allow a reasonable person to conclude that the communication conveyed advance notice. At this stage, however, the Secretary did not bear the burden of showing that the communication had such a meaning, and viewing the record in the light most favorable to the Secretary, we infer that the communication could have conveyed advance notice of an inspection. Therefore a genuine issue of material fact exists, and summary decision was inappropriate. We note that we are holding only that the communication *could* be violative, not that it was violative. In other words, we do not hold that summary decision should have been granted for the Secretary, only that resolution prior to hearing was inappropriate. All that is required to defeat a motion for summary decision is a finding that the matter could be resolved in favor of the non-movant, when the record is viewed and all inferences are drawn in the non-movant's favor. *See Anderson,* 477 U.S. at 251-52.[8]

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[8] Our dissenting colleagues contend that "the majority completely disregards" *Anderson.* Slip op. at 15 n.3. As our colleagues state, intent was an issue in *Anderson,* but our colleagues miss the mark in equating *Anderson* with the present case. In *Anderson,* public figures (Liberty Lobby and its founder) sued investigative reporters for allegedly libelous magazine articles. Citing *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), the Court noted that a public figure plaintiff in a libel action must prove that the defendant acted with actual malice – knowledge that the allegedly defamatory statement was false or reckless disregard of whether the statement was false or not. 477 U.S. at 244. The Court further noted that the standard of proof of actual malice was the elevated standard of clear and convincing evidence. *Id.* In reversing the Court of Appeals, the Supreme Court held only that the clear and convincing standard of proof in libel cases applied on a motion for summary judgment. Our colleagues quote the statement in *Anderson,* 477 U.S. at 254: "When determining if a genuine factual issue as to actual knowledge exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.*" Slip op. at 15 n.3. The dissent also quotes a passage from *Anderson* that a plaintiff in a conspiracy or libel case, in response to a motion for summary

(continued…)

Thus we do not suggest that the existing record compels an inference that the communication *did* convey advance notice of an inspection. We only find that one *could* reasonably reach that conclusion, particularly with further development of the record. However, that is enough to establish that a genuine dispute as to a material factual inference exists and therefore summary decision is inappropriate. *Cf. Hunt*, 526 U.S. at 552-54 (noting that "[p]erhaps, after trial, the evidence will support a finding that race was the . . . predominant motive," but that the case was not suited for summary disposition because there was a genuine dispute as to motivation under the existing record). Where, as here, opposing inferences can be drawn from undisputed facts, a genuine dispute exists and summary decision is precluded. *Ideal Dairy Farms*, 90 F.3d at 744-45.

For this reason, the Judge erred in finding no genuine issues of fact regarding the existence of a violation. He failed to recognize that, when the undisputed factual scenario is viewed in the light most favorable to the Secretary, opposing inferences can reasonably be drawn as to the intended meaning of the communication. If the proper inference is drawn, the communication *could* have referred to an MSHA inspection, and a genuine dispute exists.[9]

Our dissenting colleagues argue that when a judge, rather than a jury, is acting as trier of fact he may reach the ultimate conclusions to be drawn from undisputed facts in considering a summary decision motion. In short, our dissenting colleagues believe that ultimate inferences regarding what was meant by the term "company" can be drawn in favor of the moving party when no other facts are in dispute.

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[8] (…continued)
judgment, must produce evidence that would support a jury verdict. Slip op. at 20 n.6. Our decision in this case is consistent with these principles. For purposes of resisting the motion for summary decision under Commission Procedural Rule 67 in this case, the Secretary need only show that under a standard of preponderance of the evidence, the communication could have conveyed advance notice. Considering that the communication included the unidentified miner refusing to provide his name to Inspector Sparks, a reasonable trier-of-fact could certainly conclude that the miner's question about "company outside" was a reference to the MSHA inspector he did not want to give his name to. This is "sufficient evidence to meet the [Secretary's] substantive evidentiary burden at trial." Dissent, slip op. at 15 n.3, *citing Anderson*, 477 U.S. at 254.

[9] The Secretary claims the Judge failed to draw an inference in the Secretary's favor as to whether "company" referred to MSHA. While we agree that the Judge failed to view the record and draw inferences in the light most favorable to the Secretary, we note that the Judge was not required to infer that company *did* refer to MSHA; it would have been sufficient and proper to infer that, based on the record, "company" *could* have referred to MSHA.

Despite the urging of our colleagues, we decline to adopt this approach,[10] which deviates from the traditional method of reviewing summary decision motions: that inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Poller*, 368 U.S. at 473. Drawing the ultimate conclusion in favor of the moving party in this case would be particularly inappropriate because here that conclusion rests on the state of mind of the dispatcher and the miner who were discussing the presence of "company" at the mine. In *Croley v. Matson Nav. Co.*, the court stated:

> The court should be cautious in granting a motion for summary judgement when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of witnesses testifying as to their own states of mind. In these circumstances the jury should be given the opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.

434 F.2d 73, 77 (5th Cir. 1970) (citing *NLRB v. Smith Indus., Inc.*, 403 F.2d 889, 895 (5th Cir. 1968); *Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp.*, 401 F.2d 526, 527 (5th Cir. 1968) (Rives, J., specially concurring); *Consol. Elec. Co. v. United States for Use and Benefit of Gough Indus.*, 355 F.2d 437, 438-439 (9th Cir. 1966)). We believe this to be an apt observation even when a judge, rather than jury, is deciding the issue.[11]

Aside from the issue of factual disputes, KenAmerican also raised various legal arguments before the Judge as to why the citation must be vacated as a matter of law. We are not persuaded by these arguments. KenAmerican claimed that the communication could not convey advance notice because it occurred "during" an inspection. However, the Commission has found violative advance notice where miners were warned after the inspectors had already proceeded underground and begun their inspection. *See Topper Coal Co.*, 20 FMSHRC 344, 346, 348 (1998). Advance notice can still occur once an inspection is underway. We also find

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[10] As our colleagues recognize, the principle that a Judge in a non-jury case may, on a motion for summary judgment, draw the ultimate inference is not applicable where the case involves a credibility determination. Slip op. at 21. Here, of course, the Judge at trial will have to make credibility determinations regarding the explanation by KenAmerican's witnesses about what the phone conversation between the underground miner and the dispatcher meant.

[11] The Commission's practice with regard to summary decision has generally been similar to that described by the cases cited above. As the Secretary noted in his opening brief, Commission judges have in the past held that a hearing, with the opportunity to observe a witness' demeanor, is the proper venue to determine intent and credibility, not a summary decision motion. See, e.g., *Pride v. Highland Mining Co*., 36 FMSHRC 1792, 1797 (June 2014) (ALJ) (declining to resolve on summary decision whether complainant engaged in protected activity because the complainant's motive was relevant to the inquiry, and because the ALJ would need to make a credibility determination when assessing motive); *UMWA v. Jim Walter Res. Inc.*, 24 FMSHRC 797, 799 (July 2002) (ALJ) (denying summary decision where operator's motive for mine closure was in dispute).

that the Judge properly rejected KenAmerican's claim that an exemption to the prohibition on advance notice applied. *See supra* note 1. As the Judge noted, direct enforcement activities (an impact inspection) were occurring, and there was no indication of an imminent danger. 37 FMSHRC at 1811. Finally, KenAmerican raised a First Amendment claim. As we reverse the Judge on other grounds, and the Judge declined to address this issue in the first instance (*id.* at 1812 n.3), we also decline to address this issue and find that it is more properly resolved by the Judge on remand.

IV.

Conclusion

For the foregoing reasons, the Judge's grant of summary decision is vacated, and the matter is remanded for further proceedings.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioners Althen and Young, dissenting:

The majority vacates and remands this case to the Administrative Law Judge. In doing so, it wholly discounts the failure of the Secretary to introduce any evidence supportive of his interpretation of the facts or contesting the facts set forth by Respondent. Because the Secretary failed to identify any disputed fact and did not submit any evidence to support a contrary interpretation of those undisputed facts, all that was left for the Judge to decide was the ultimate issue in the case. Overwhelming case law establishes that, under those circumstances, the Judge was entitled to draw an inference based upon the record before him. The Judge properly entered summary decision for Respondent. Accordingly, we respectfully dissent.

I. Summary of the Dissent

Federal courts of appeal uniformly hold that in a bench trial, the Judge may make an ultimate factual inference against the nonmoving party. Significantly, the District of Columbia Circuit and the Sixth Circuit, the courts with appellate jurisdiction in this case, have recognized that a dispute between the parties regarding the ultimate inference to be drawn does not preclude summary judgment when the trial court is the ultimate finder of fact.

The right of the Judge to make the ultimate inference in a case in which the facts are undisputed fulfills the purpose of summary judgment. When the nonmoving party fails to contest the material facts or to submit evidence raising a factual dispute — that is, submits to the summary judgment motion on uncontested facts — the Judge should not withhold summary judgment based on the possibility that the party might have introduced evidence to dispute the inference but failed to do so. The Judge cannot consider evidence that a party might have presented to create a dispute if the party does not introduce evidence of such dispute in response to the motion for summary judgment. Further, courts overturn a grant of summary judgment because of evidence not submitted before the summary judgment motion only if such evidence is *newly discovered*. Therefore, courts uphold summary judgment where a party later provides material, probative evidence when the party could have discovered and submitted that evidence at the summary judgment stage. To hold otherwise would allow a party to withhold material evidence at the summary judgment stage only to submit it at trial.

In addition to failing to recognize the right of the Judge to make an outcome-determinative inference when the Secretary did not contest the facts presented by the moving party, the majority also fails to recognize the importance of the Secretary's duties as the party bearing the burden of proof in responding to a summary judgment motion. The majority vacates the Judge's grant of summary decision on the basis that to grant summary judgment the Judge was required to conclude that the "record *cannot* establish that the purpose of the communication was to convey prohibited advance notice of an inspection." Slip op. at 6. That is error. The majority misconstrues the summary decision standard. It improperly reallocates the burdens of proof and production at the summary decision stage and fails to recognize that the Secretary's failure to produce any evidence in support of the citation at the summary decision unquestionably left the Judge in a position to make an inference based upon the uncontested material facts before him.

II. Summary Judgment

The Commission's summary decision standard states:

> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has analogized this rule to the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *see also* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). While the Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)) (alterations in original), it is a procedure with a purpose: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Use of summary judgment in Commission proceedings is thus consistent with the Commission's goal of streamlining its decision process where possible.[1] *See, e.g.*, 75 Fed. Reg. 81,459 (Dec. 28, 2010) (adopting rules to simplify certain civil penalty proceedings).

Under Rule 56, a "material" fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* When an inference from the facts must be drawn, "the nonmovant need not be given the benefit of every inference but only of every reasonable inference." *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *see also McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016) (stating that the court "draw[s] all reasonable inferences" in favor of the nonmoving party).

An inference is reasonable when a party provides sufficient evidence from which the court can make that inference: "Although the nonmoving party is entitled to have inferences drawn in his favor at summary judgment, such inferences must be supported by record

[1] Summary judgment promotes efficiency: "The nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried. This 'put up or shut up' feature forces the nonmovant and movant to advance cogent facts that either support or oppose summary judgment." Edward Brunet, *The Efficiency of Summary Judgment*, 43 Loy. U. Chi. L.J. 689, 691 (2012) (footnote omitted). Professor Brunet notes that federal courts had used the "put up" phrase 1,235 times by the date of his article. *Id.* at 691 n.7.

evidence." *Noll v. Int'l Bus. Mach. Corp.*, 787 F.3d 89, 97 n.6 (2d Cir. 2015). This is because "there is no issue for trial unless there is sufficient *evidence* favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely *colorable*, or is *not significantly probative*, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (emphasis added). Similarly, as the Supreme Court has stated, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

A. The Majority Misapprehends the Burdens of Proof and Production at the Summary Judgment Stage

The majority finds that KenAmerican failed to meet a burden as the party moving for summary judgment. Thus, the majority states, "summary judgment must be denied where the evidence in support of the motion does not establish the absence of a genuine issue." Slip op. at 4. For this proposition, the majority cites extensively to *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and to a lesser extent *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The majority takes the requirement that the movant must "establish" the absence of a genuine issue of fact from *Adickes*, 398 U.S. at 160. However, in *Celotex*, the Supreme Court specifically repudiated the notion of a requirement that the moving party establish the absence of a genuine issue of fact. The Court found that the moving party need only set forth uncontested facts supporting its motion and not containing evidence supporting the non-movant's case whereas the non-movant must identify facts creating a genuine dispute.

In *Celotex*, the plaintiff filed a claim against 15 defendants, alleging that the death of her husband was the result of exposure to asbestos-containing products manufactured or distributed to by the defendants. 477 U.S. 319. Several of the defendants, including Celotex, filed a motion for summary judgment. *Id.* Celotex's motion for summary judgment argued that the plaintiff had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court." *Id.* at 319-20. The district court granted summary judgment for Celotex, and the plaintiff appealed. *Id.* at 320-21. The court of appeals reversed, stating that the "summary judgment motion was rendered 'fatally defective' by the fact that [Celotex] 'made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." *Id.* at 321 (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)). Much like the majority in the present case, the court of appeals cited to *Adickes* for the proposition that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 756 F.2d at 184. The Supreme Court reversed.

The *Celotex* Court quoted its statement from *Adickes* that "the burden of the moving party [is] to show initially the absence of a genuine issue concerning any material fact." *Celotex*, 477 U.S. at 325 (quoting *Adickes*, 398 U.S. at 159). However, the Court explained the meaning of those words from *Adickes*:

> We think that this statement is accurate in a literal sense, . . . [b]ut we do not think the Adickes language quoted above should be

> construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, **the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.**

Id. at 325 (emphasis added). The Court also noted the well-recognized "power [of district courts] to enter summary judgments *sua sponte*, so long as the losing party was on notice that [the party] had to come forward with all of her evidence." *Id.* at 326. Accordingly, "[i]t would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it."[2] *Id*. After *Celotex*, federal courts recognize that a movant that does not have the burden of proof/persuasion need only make a minimal showing, whereas the nonmovant has the burden of showing there are issues for trial.[3]

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[2] The Court also noted that the standard for granting summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Celotex*, 477 U.S. at 323 (quoting *Anderson*, 477 U.S. at 250). Under Rule 50(a), as under Rule 56, the moving party need not present any evidence.

[3] The majority argues that its decision is consistent with *Celotex*, asserting Kenamerican failed to demonstrate an absence of evidence to support the Secretary's claim and distinguishing *Celotex* as involving an issue of "pure physical fact" rather than one of intent. Slip op. at 5 n.5. The majority states that the mere fact of the communication "is sufficient to show a dispute as to the material fact of intent." *Id.* Yet, the Secretary both did not dispute this "material fact of intent" and did not produce any piece of evidence to render that purported dispute genuine. To the majority, its apparently fixed view that the language could have been coded makes up for the Secretary's utter failure to contest the material fact or to submit any evidence in support of a contest of material fact.

Furthermore, in making this distinction, the majority completely disregards *Anderson*, 477 U.S. 242, in which intent was the disputed issue. In *Anderson*, the Court stated that "[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*." *Id.* at 254. In cases in which intent is at issue, the nonmoving party must provide sufficient evidence to meet the substantive evidentiary burden at trial. *Id.* That a dispute concerns intent rather than "pure physical fact" does not relieve the Secretary of this burden at the summary decision stage. *Cf. Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) ("Although summary judgment is often questionable in civil rights actions where the defendant's motive and intent are involved, . . . even in a civil rights action, [a] plaintiff may not survive a motion for summary judgment without offering some evidence in support of her claim." (citation omitted)); *Bagley v.*

(continued…)

The Secretary bore the burden of proof, and based on the uncontested facts before the Judge resulting from the motion by Respondent and the failure of the Secretary to introduce any evidence of a violative intent, there was no evidence upon which the Secretary could preponderate to show violative conduct. In short, the Secretary failed in the most elementary duty of a party in responding to a motion for summary judgment. He failed to introduce any

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[3] (…continued)
Blagoyevich, 646 F.3d 378, 389 (7th Cir. 2011) ("If a genuine dispute as to a material fact exists, such as intent, summary judgment is inappropriate. But that genuine dispute must be supported by 'sufficient evidence . . . [to permit] a jury to return a verdict for' appellants." (alterations in original) (quoting *Egonmwan v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 845, 849 (7th Cir. 2010)).

The majority asserts that we "miss the mark in equating *Anderson* with the present case." Slip op. at 8 n.8. They do so by arbitrarily restricting, without citation, *Anderson*'s applicability. In fact, courts have long relied on *Anderson* in summary judgment cases under the preponderance of the evidence standard. *See, e.g.*, *United States v. 2621 Bradford Drive*, 369 F. App'x 663, 665-66 (6th Cir. 2010) (civil forfeiture case); *Lemaire v. Danos & Curole Marine Contractors Inc.*, No. 00-31153, 2001 WL 872840, at *4 (5th Cir. 2001) (per curiam) (affirming memorandum opinion of district court in negligence action against employer); *Diaz v. Broglin*, No. 92-1507, 1993 WL 118066, at *2 (7th Cir. 1993) (affirming recommendation of magistrate judge in 42 U.S.C. § 1983 case); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992) (wrongful discharge case); *Winchester v. Prudential Life Ins. Co.*, 975 F.2d 1479, 1488 (10th Cir. 1992) (denial of insurance benefits case); *Thomas v. Digital Equip. Corp.*, 880 F.2d 1486, 1490 n.2 (1st Cir. 1989) (national origin discrimination case); *Richardson ex rel. Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 828 (D.C. Cir. 1988) (product liability case); *Sorba v. Penn. Drilling Co.*, 821 F.2d 200, 203 (3rd Cir. 1987) (age discrimination case). Further, they continue to not deal with the right of a trial judge to draw a reasonable inference based upon uncontested facts and arguments placed before him.

Elsewhere, the majority mistakenly asserts that upon the inspector asking the underground miner for his name, the miner refused to answer. Slip op. at 5 n.5, 8-9 n.8. The actual note is that "Sparks asked who was on the line and received no response." Slip op. at 2. The majority infers refusal from silence. However, the Secretary never asserted such an inference and most importantly did not do so in his response to the motion for summary decision. *See* slip op. at 2 n.3. The majority, therefore, draws an unrequested, unsupported inference and then piles upon it another inference that the miner's silence demonstrates advance notice.

evidence upon which to base the need for a subsequent trial. The majority's reliance on *Adickes* is misplaced.[4]

In *Grimes v. District of Columbia*, 794 F.3d 83 (D.C. Cir. 2015), for example, the plaintiff argued that the district court used an improper summary judgment standard. The plaintiff "fault[ed] the government for merely pointing out in its summary judgment motion that she lacked factual support for her claims, without citing to factual material in the record that supported the government's version of events." *Id.* at 93. The plaintiff, citing *Adickes*, stated that "it has consistently been held that the moving party bears the burden of demonstrating the absence of any genuine issue of material facts." *Id.* (quoting Appellant's Br. 8; Appellant's Reply 8).

Although the D.C. Circuit remanded on other grounds (the district court did not consider a claim that counsel had a conflict of interest prior to granting summary judgment), the court decided to "briefly reiterate the governing legal standard" for summary judgment because the district court may revisit the issue on remand. *Id.* The circuit court found that the plaintiff "fail[ed] to appreciate that the burden on a defendant moving for summary judgment may be discharged *without factual disproof of the plaintiff's case*." *Id.* (emphasis added). Thus, rather than "establishing" that there is no dispute of material fact, "[t]he burden that the movant 'always bears' is that of 'informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* at 93-94 (alteration in original) (quoting *Celotex*, 477 U.S. at 323) (citing *Celotex*, 477

[4] In addition to *Adickes*, the majority relies on *Hunt v. Cromartie*, 526 U.S. 541 (1999), *Campbell v. Hewitt, Coleman & Associates, Inc.*, 21 F.3d 52 (4th Cir. 1994), *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238 (2d Cir. 1984), and *Ideal Dairy Farms, Inc. v. John Labatt Ltd.*, 90 F.3d 737 (3d Cir. 1996). Contrary to the majority's position, the contexts of these cases further demonstrate that the majority's decision applies a legally incorrect summary judgment standard. In contradiction to the present case, there was ample evidence provided by the nonmoving party in each of the cited cases. *See Hunt*, 526 U.S. at 550 (highlighting specifically that the defendants submitted an expert affidavit that "weaken[ed] the probative value" of the plaintiffs' evidence by concluding that "the data as a whole supported a [valid] political explanation at least as well as, and somewhat better than, a racial explanation."); *Campbell*, 21 F.3d at 55-58 (stating that, in stamping motions for summary judgment "GRANTED WITHOUT OPPOSITION FILED," the judge failed to show he considered answers to interrogatories and the moving parties' evidence that itself supported inferences for the nonmoving party); *Katz*, 737 F.2d at 244-45 (listing affidavits and other evidence proffered by the nonmoving party to dispute the factual inference of intent); *Ideal Dairy Farms*, 90 F.3d at 744-45 (stating that the judge should have reserved the issue of the correct interpretation for the ***jury*** because the evidence supported three possible inferences). Other issues abound, including that *Hunt* and *Katz* were both cases in which the moving party had the burden of proof at trial. *See Katz*, 737 F.2d at 243-44 (noting that the moving party's burden was the "clear and convincing evidence" standard); *Hunt*, 526 U.S. at 553 ("Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.").

U.S. at 328 (White, J., concurring) (agreeing with the *Celotex* majority's summary judgment standard); 477 U.S. at 331-32 (Brennan, J., dissenting) (same)).

The First Circuit case of *Packgen v. BP Exploration*, 754 F.3d 61 (1st Cir. 2014), is also instructive. The plaintiff, Packgen, had "sought to sell oil containment boom" to two BP entities, the defendants, after the Deepwater Horizon Spill in 2010. *Id.* at 63. BP declined to purchase the boom after months of negotiations. *Id.* The defendants moved for and prevailed on summary judgment. *Id.* at 63, 64.

The plaintiff had sued on several grounds: negligent and intentional misrepresentation, breach of contract, equitable relief, quantum meruit, and promissory estoppel. Throughout the negotiations, BP agents at various times stated that they intended to purchase Packgen's full production capacity and that they would purchase the entire stock once certain specifications were met. *Id.* at 65. However, approximately two months into negotiations, BP capped the oil well, and no longer needed Packgen's product. *Id.* at 66. BP never told Packgen to stop producing the boom, and it did not pay for any that Packgen produced. *Id.*

For the intentional and negligent misrepresentation counts, Packgen was required to show that BP made a "false representation of present fact." *Id.* (quoting *Kearney v. J.P. King Auction Co.*, 265 F.3d 27, 33 n.8 (1st Cir. 2001)). The district court granted summary judgment for the defendants because there was "no evidence in the record that any of the alleged misrepresentations were false at the time they were made." *Id.* at 67. On appeal, Packgen argued that the district court "improperly weighed the evidence in BP's favor while overlooking reasonable inferences that the jury could have drawn in Packgen's favor." *Id.* In response, the First Circuit stated:

> None of the possible inferences raised by Packgen controvert the fundamental deficiency identified by the district court, however, because Packgen still does not identify specific evidence in the record showing that any of BP's statements were false at the time they were made. A party cannot survive summary judgment simply by articulating conclusions the jury might imaginably reach; it must point to evidence that would support those conclusions.

Id. (citing *Miss. Pub. Emps.' Ret. Sys. v. Bos. Sci. Corp.*, 649 F.3d 5, 28 (1st Cir. 2011) ("With respect to each issue on which [a] plaintiff has the burden of proof at trial, it must present definite, competent evidence to rebut the motion . . . ." (internal quotation marks omitted)) (alteration in original)). Packgen argued that "a jury could reasonably conclude that BP kept making changes to its specification during the spill so that manufacturers would continue to work for BP, acceding to different requests made by BP at different times, without BP actually having to pay for the boom." *Id.* (quoting Appellant's Br. 42-43). The court stated, simply, that "[i]f a jury reached that conclusion, it would be pure speculation," because nothing in the record indicated that BP's intentions or specification changes "reflect[ed] the bad intentions that Packgen describes." *Id.* The plaintiff offered merely a conclusory assertion, and conclusory assertions are not evidence. *Cf., e.g.*, *Teamsters Local Union No. 17 v. Wash. Dept. of*

Corrections, 789 F.3d 979, 994 (9th Cir. 2015) ("Argument without evidence is hollow rhetoric that cannot defeat summary judgment."). Similarly, here, the Secretary did not introduce any evidence into the record supportive of its proffered conclusion. The Secretary simply asserted the existence of a violation. In other words, nothing in the record reflected the words could have the meaning ascribed to them by the Secretary. The Secretary did not oppose any of the facts asserted by the operator but accepted them with only a naked claim that the words violated the regulation.

B. Inferences May Be Drawn from Record Evidence

In *Spierer v. Rossman*, 798 F.3d 502 (7th Cir. 2015), a university student went missing after a night of heavy drinking, and the parents of the student brought suit against three other students who were with the student in the hours before her disappearance. *Id.* at 504. The parents alleged negligence and violations of the Dram Shop Act. *Id.* The defendants moved for summary judgment prior to substantial discovery arguing that the plaintiffs could not prevail at trial on the issues of proximate cause or legal injury. The plaintiffs, rather than assert that discovery was required, stated: "We're not asking for anything to respond to summary judgment. We think that we are going to win . . . on the basis . . . that [the defendants] haven't met their burden." *Id.* at 507 (alterations in original). The district court granted summary judgment. *Id.* at 504.

On appeal, the plaintiffs argued, similarly to the majority's position here that the defendants did not meet their burden of production at the summary judgment stage. The Seventh Circuit rejected the plaintiffs' argument, stating that "[t]he actual requirement in Rule 56 is less specific: the moving party need only *inform* the court of the basis for the motion and *identify* supporting materials." *Id.* at 508 (citing *Celotex*, 477 U.S. at 323). Further, "[c]ontrary to plaintiffs' arguments, the only burden of production recognized in Rule 56 falls upon the nonmoving party once a basis for summary judgment has been established (and this can be initiated *sua sponte* by a court under Rule 56(f) with proper notice)." *Id.*

Thus, circuit courts agree that if the nonmoving party has the burden of production at trial, it has a burden of production at the summary judgment stage. A nonmoving party with the burden of production cannot simply assert that a trial court could make an inference from undisputed facts when that nonmoving party fails to submit evidence from which a finder of fact can draw that inference.

In addition, the Judge on summary judgment views the evidence according to the ultimate evidentiary standard. Under a preponderance of the evidence standard, "[t]he judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. Here, the

Secretary offered the Judge no evidence to raise a dispute regarding the meaning of the uncontested facts.[5]

Here, the Secretary did not challenge any fact offered by the Respondent and did not suggest that he desired to contest those facts or offer any evidence related to those facts or asserting any other facts. Thus, the only reason the majority can have in reversing the Judge would be to allow the Secretary to provide additional evidence — evidence that he failed to provide at the summary judgment stage. The majority actually admits their error. *See* slip op. at 7 ("We only find that one *could* reasonably reach that conclusion, *particularly with further development of the record*.") (second emphasis added).

In arriving at this result, the majority fails to recognize that the Secretary failed in the most basic duty of opposing a summary judgment motion. He did not provide evidence at the summary judgment stage from which the Secretary could preponderate on, or from which the Judge could find, advance notice. Simply stated, the Secretary did not offer any evidence of a genuine dispute. Yet, the majority requires only that the Secretary might provide sufficient evidence at some point in the future. This is antithetical to the very purpose of the summary

[5] The majority cites to *United States v. Blankenship*, No. 5:14-cr-00244, 2015 WL 8731688 (S.D.W.Va. Dec. 9, 2015), noting testimony in that case from several miners regarding the advance notice they provided as part of their work. Slip op. at 7 n.7 (quoting 2015 WL 8731688, at *6). "Thus," the majority asserts, "a judge could reasonably infer that the use of coded language while mine inspectors were on Kenamerican's property was a reference to those inspectors." *Id.* In relying on evidence not in the record and not provided to the Judge on summary decision to support an inference in this case, the majority tips its hand toward a desired outcome rather than adjudication of this case on the law and facts before us. The majority is not drawing a possible inference from the record in this case. Instead, based upon a different case, the majority speculates about what might be offered at trial that the Secretary failed to offer on summary decision. Under the correct summary judgment standard, the majority must find that *the uncontested record evidence* before the Judge on the motion for summary judgment *in this case alone* precludes the trial judge from drawing a reasonable inference.

The majority asserts that it is following "the traditional method of reviewing summary decision motions: that inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Slip op. at 9-10 (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). However, the majority's inferences are not made from evidence in the record but from the record of a wholly different case that went to hearing. The majority piles inference upon inference. The Secretary did not offer anything to support the Secretary's requested inference, that the statements made by KenAmerican's miners constituted advance notice. Moreover, as demonstrated, in our discussion, the trial Judge was entitled to draw a reasonable inference from the undisputed record before him.

judgment procedure.[6] As the Supreme Court states in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), when the moving party fulfills its duty under Rule 56,

> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.,* 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943, 70 S.Ct. 423, 94 L.Ed. 581 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is *a genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in

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[6] The majority, as it must, relies on pre-*Celotex*, *Anderson*, and *Matsushita* cases for its proposition that where a conclusion rests on the credibility of a witness regarding his state of mind, summary judgment is perforce inappropriate. Slip op. at 10. The majority believes that this is an "apt observation" and quotes from *Croley v. Matson Nav. Co.*, 434 F.2d 73, 77 (5th Cir. 1970), to support its contention. Slip op. at 10. *Croley*, in turn, relied in part on *Riley-Stabler Constr. Co. v. Westinghouse Electric Corp.*, 401 F.2d 526, 527 (5th Cir. 1968) (Rives, J., specially concurring), which cited to *Poller*, 368 U.S. at 473. The Supreme Court addressed precisely this aspect of *Poller* in *Anderson*.

The respondents in *Anderson* argued, almost identically to the majority in this case, that "the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue," citing *Poller*. *Anderson*, 477 U.S. at 256. The Court stated:

> We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering *any* concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.

Id. (emphasis added).

> order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.

Because the Secretary did not provide any evidence from which the Judge could find for the Secretary, the court properly concluded that there was no genuine issue of fact in dispute. In the federal system, summary judgment is the "put up or shut up moment." *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). Here, the Secretary did not put up.

III. When the Judge is the Ultimate Trier of Fact, the Judge May Draw the Ultimate Inference in a Summary Judgment Proceeding

The majority's summary judgment standard also is incorrect in that it fails to apply the correct summary judgment standard in a nonjury proceeding before a judge as the ultimate trier of fact. Virtually every federal circuit court explicitly and repeatedly has stated that where the Judge alone is the trier of fact and there is no genuine dispute of material fact or credibility determination, the court may draw the ultimate inference in the case, even if it is a "question of fact."[7] Therefore, in a nonjury case, a court need not withhold judgment on the basis that a

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[7] *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995); *Posadas de P.R., Inc. v. Radin*, 856 F.2d 399, 400-01 (1st Cir. 1988); *Federacion de Empleados del Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.); *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986); *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 593 n.3 (6th Cir. 2001); *Cent. States, Se. & Sw. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373-74 (7th Cir. 1992); *Tripp v. May*, 189 F.2d 198, 200 (7th Cir. 1951); *U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153, 156 (8th Cir. 1978); *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684-85 (9th Cir. 1990); *Harris v. Railway Express Agency*, 178 F.2d 8, 10 (10th Cir. 1949); *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1509-10 (11th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); *Preseault v. United States*, 100 F.3d 1525, 1546 (Fed Cir. 1996); *Loglan Inst., Inc. v. Logical Language Grp., Inc.*, 962 F.2d 1038, 1040 (Fed. Cir. 1992); *Connors v. Incoal, Inc.*, 995 F.2d 245, 251-52 (D.C. Cir. 1993); *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 736-37 (D.C. Cir. 1942). Of the two circuits that have not recognized this procedure, the Third Circuit has not had an opportunity to rule on it, and the Second Circuit has established a substantially similar procedure in ERISA cases. *See, e.g.*, *O'Hara v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 642 F.3d 110, 116 (2d Cir. 2011) (allowing a judge to make findings of fact at the summary judgment stage, but stating that "it must be clear that the parties consent to a bench trial on the parties' submissions"). Lower courts in both jurisdictions, however, have recognized the right of the judge to make the ultimate inference in a nonjury case on undisputed facts. S*ee, e.g.*, *SEC v. Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 392 (S.D.N.Y. 2010) ("Where the only issues remaining concern the legal consequences of undisputed facts, summary judgment is appropriate."); *Chao v. Local 54, Hotel*

(continued…)

hypothetical reasonable jury could make the ultimate inference for one side or the other — the court itself is the trier of fact.

For example, in *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 610 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995), the First Circuit affirmed a grant of summary judgment finding that a union's membership policy discriminated against minorities.[8] The parties cross-moved for summary judgment, "the Union voiced no disagreement with the facts on which the EEOC had constructed its case[, and i]t gave no indication either that it intended to introduce any additional evidence or that any such evidence existed." *Id.* at 603 (footnote omitted). Instead, "the Union's contentions centered entirely around the ultimate legal significance to be accorded to conceded facts," and the circuit court considered the dispute as submitted as "a case stated." *Id.* The circuit court provided the following summary judgment standard:

> Circuit precedent teaches that in such a situation—where, in a nonjury case, "the basic dispute between the parties concerns the factual inferences . . . that one might draw from the more basic facts to which the parties have drawn the court's attention," where "[t]here are no significant disagreements about those basic facts," and where neither party has "sought to introduce additional factual evidence or asked to present witnesses"—the district court is freed from the usual constraints that attend the adjudication of summary judgment motions.

Id. (alterations in original) (quoting *Federacion de Empleados del Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.)). In affirming the judgment on liability, the court allowed summary judgment to stand even though the union sought to rebut the EEOC's case with an alternative theory of causation in the case. The First Circuit stated that "[a]lthough this twist, if believed, might conceivably furnish an alternative theory of causation, *it is unsupported by any cogent evidence*, and, in all events, did not foreclose the district court from making a contrary, inference-based determination of causation." *Id.* at 607 n.15 (emphasis added).

The D.C. Circuit applies the same rule, first stated in *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 737 (D.C. Cir. 1942): "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court." The issue in that case was whether a resolution of a board of directors to redeem preferred stock was a binding contract or a mere statement of policy

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[7] (…continued)
Emps. & Rest. Emps. Int'l Union, 166 F. Supp. 2d 109, 116 (D.N.J. 2001) (stating that a court is allowed to resolve the factual question of "reasonableness" on undisputed facts "if a bench trial would not enhance its ability to draw inferences and conclusions").

[8] The court, however, vacated in part and remanded the case for a reconsideration of the district court's remedial ruling, since the partial motion for summary judgment filed by the EEOC addressed only the question of liability. *Steamship Clerks Union*, 48 F.3d at 609-10.

by the board. *Id.* at 733. The court admitted that "the resolution conceivably could be given the meaning for which each [party] contends." *Id.* Nevertheless, the court found that summary judgment was appropriate: "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But here was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute." *Id.* at 736.

More recently, the D.C. Circuit, although finding legal error in the case, stated that "*if* all the material facts underlying the ultimate fact of whether the operation at issue rises to the level of a 'trade or business' were undisputed, then the case might have been ripe for disposition on summary judgment." *Connors v. Incoal, Inc.*, 995 F.2d 245, 251-52 (D.C. Cir. 1993) (emphasis in original). The District Court of the District of Columbia follows this rule:

> Where . . . the Court would be the trier of fact if the case were to proceed to trial, "the 'Court is not confined to deciding questions of law, but also may . . . draw a derivative inference from undisputed subsidiary facts, even if those facts could support an inference to the contrary, so long as the inference does not depend upon an evaluation of witness credibility.'"

Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 14-15 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1032 (2011) (quoting *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 39 (D.D.C. 2005) (quoting *Cook v. Babbitt*, 819 F. Supp. 1, 11 & n.11 (D.D.C. 1993))).

Judge Posner of the Seventh Circuit has explained that any superficial tension between these precedent and Rule 56 is illusory:

> Factual disputes are not supposed to be resolved on summary judgment. The purpose of the summary judgment procedure is to determine whether there is a (material) factual dispute, in which event there must be a trial. That is the general rule, all right, but it doesn't make much sense in a case in which the only "factual" issue is one of characterization, that is, of application of undisputed lay facts, *and* the opponent of summary judgment claims no right to a jury trial. For then both the record and the factfinder are the same in the summary judgment proceeding as they would be in a trial. There is no more evidence to put in and no different trier to evaluate it. When both these conditions are satisfied, the formally "factual" dispute is properly resolved on summary judgment.

Cent. States, Se. & Sw. Areas Pension Fund v. Slotky, 956 F.2d 1369, 1373-74 (7th Cir. 1992) (internal citation omitted) (citing *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1192 (7th Cir. 1986); *May v. Evansville–Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986)).

Accordingly, in nonjury cases, where the lay, evidentiary, or historical facts are not in dispute, even if the ultimate inference to be drawn remains in dispute, courts allow that issue to be resolved on summary judgment. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978) ("If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved."). Thus, judges may on summary judgment conclude "that there was or was not negligence, or that someone acted reasonably or unreasonably, or . . . that delay under the circumstances proved is justified or unjustified, even if that conclusion is deemed 'factual' or involves a 'mixed question of fact and law.'" *Id.* at 1124. Here, the Secretary did not raise any factual dispute, and the Judge was entitled to infer whether the uncontested facts constituted advance notice of an inspection.

IV. Summary Judgment for Respondent Is Supported by the Record

Applied to the facts of this case, the summary judgment standard compels one conclusion: the Judge properly granted summary decision for Respondent.[9] The evidentiary facts were not in dispute for the purposes of the motion for summary motion. Respondent and the Secretary both restate the facts from the MSHA inspector's citation and notes: Inspector Sparks heard a voice from the #4 unit ask if there was "company outside," and the dispatcher responded, "Yeah, I think there is." Mem. Supp. Mot. at 3; Resp. to Mot. at 2. Sparks then asked who was on the line and received no response. Resp. to Mot., Ex. C.

Respondent argued in its memorandum in support of its motion for summary judgment that "taking the undisputed material facts as alleged by the Secretary . . . as true, the facts cannot and do not amount to a violation of Section 103(a)." Mem. Supp. Mot. at 4. Respondent also argued that company being outside was a "general statement that easily could encompass any of [several] exempted activities," *id.* at 6 n.2, and that no one discussed where an inspector would be heading, the target of any inspection, or use words such as "inspection," "investigation," "inspector," or any other words regarding inspection activities. *Id.* at 5.

The Secretary, therefore, was clearly on notice of the material facts that were undisputed and the conclusion to drawn from those facts — namely, that the uncontested facts did not demonstrate a violation. It was, therefore, the Secretary's responsibility to set forth any disputed material facts supporting a violation. Yet, the Secretary offered nothing. The Secretary simply assumed the occurrence of a violation and "assert[ed] that KenAmerican violated Section 103(a) of the Mine Act and that there [were] genuine issues as to the material facts relating to the gravity and negligence of the citation issued. Therefore, KenAmerican is not entitled to summary decision." Resp. to Mot. at 3-4.

With respect to the possible violation, therefore, the Secretary merely made a conclusory argument that based on the undisputed facts KenAmerican violated section 103(a)'s proscription

[9] While the circuit courts are split in the applicable standard of review for ultimate inferences made on summary judgment — *de novo* or abuse of discretion — that issue need not be decided in this case, because the Judge should be affirmed under either standard.

against advance notice. The Secretary disputed the legal conclusion; he did not dispute the facts from which such conclusion would or would not be drawn. Further, the Secretary did not submit any evidence supporting a contradictory interpretation of the facts and, thus, submitted the motion to the court's review on the facts set forth by the Respondent.[10]

Respondent, in its reply to the Secretary's response, gave the Secretary another opportunity to provide evidence that could support a different inference:

> The Secretary . . . does not allege any dispute of material fact as to the fact of the violation itself. Any dispute of fact as to gravity and negligence should not preclude summary disposition as to the fact of the violation. . . . KenAmerican . . . has pointed out that, indisputably, "company" being "outside" (i.e., the allegedly violative communication here) is a very general statement that easily could encompass any of the exempted investigatory activities, further warranting summary decision.

Reply Supp. Mot. at 2. The Secretary did not seek to file a sur-reply in the weeks prior to the Administrative Law Judge's decision.

Reviewing the evidence provided on summary decision, the Judge properly found no disputed facts. 37 FMSHRC 1809, 1809 (Aug. 2015) (ALJ). There was one witness identified, Doyle Sparks, the Judge had his complete declaration, and there was no issue of witness credibility alleged by the Secretary regarding his one witness. Thus, summary judgment was appropriate.

Additionally, the Secretary had over three years to gather sufficient evidence to overcome a motion for summary decision. The citation in this case was issued on April 20, 2012. The Secretary's penalty petition was received by the Commission on January 3, 2013. The Secretary's response to the motion for summary decision was filed on August 3, 2015. Despite the three years in which the Secretary had time to investigate and support his allegation, there were only three items of support for the citation in the record, and he provided those as exhibits to his response: (1) the original citation, issued by Doyle Sparks; (2) the inspector's notes, written by Doyle Sparks; and (3) a declaration restating the inspector's notes, also written by Doyle Sparks. No depositions were taken. The Secretary in his response did not identify any additional witnesses that would provide more illuminating testimony. Thus, the Judge heard a motion and response asserting the same, uncontested material facts, and the Secretary failed to state any material factual dispute regarding the occurrence of a violation. Thus, the facts were undisputed, and there was no issue of witness credibility to justify a hearing: Doyle Sparks was the only witness, and the Judge had his statement in triplicate.

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[10] *See also* PDR at 9 ("The Secretary agreed that the words Inspector Sparks overheard were not in dispute. The Secretary argued that summary decision was not warranted, however, because the statements violated Section 103(a) of the Act and KenAmerican was therefore not entitled to summary decision as a matter of law." (citations omitted)).

The courts are clear — in a nonjury trial, a Judge, faced with undisputed material facts and no issues of witness credibility, may make the ultimate inference in the case without subjecting the parties to the time and expense of a trial. The Secretary, in response to a motion alleging undisputed facts, responded not with evidence, or even an argument, but merely a legal conclusion that the Respondent committed a violation: "The Secretary asserts that KenAmerican violated Section 103(a) of the Mine Act." Resp. to Mot. at 3-4. The Secretary did not assert any rebuttal evidence in responding to the motion and, thus, the motion was ripe for final adjudication regarding the inference to be drawn.

V. The Secretary's Attempt to Introduce New Evidence Before the Commission Must Be Rejected

Contrary to precedent cited above, the majority remands the case presumably to allow the Secretary to present additional evidence through affidavits, exhibits, or trial testimony that was not in the record and not presented to the Judge in opposition to the motion for summary judgment. The majority, therefore, provides the Secretary an opportunity to present evidence that it failed to produce in response to the motion for summary judgment. That decision is contrary to well-established and long-standing precedent precluding a post-decision proffer of additional evidence not provided before a court on summary judgment. Indeed, courts regularly uphold summary judgments and deny motions for reconsideration where the losing party attempts to introduce additional, material evidence along with an argument that it would have affected the outcome of the case. The majority's decision undermines the purpose of summary judgment.

The Supreme Court has stated that at the summary judgment stage:

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, . . . Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324. In such a case, "the burden on the *moving* party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325 (emphasis added).

Because the nonmoving party must provide sufficient evidence from which the party can meet the burden of proof, a party has no excuse for not producing material and relevant evidence when challenged by a summary judgment motion. Courts have long recognized that one of the purposes of summary judgment, in fact, is to permit a party to pierce the allegations of fact in the pleadings, or, in other words, to require the party with the burden of production to produce evidence to support its claim.

In *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 470 (2d Cir. 1943), for example, a plaintiff sued to collect as a beneficiary of three insurance policies, and the defendant contended that in

applying for the insurance the deceased husband had misrepresented the facts of his consultations with physicians. The defendant tried to depose two of the physicians, but the plaintiff claimed privilege, asserting that the conversations were confidential. *Id.* The district court granted summary judgment, and the plaintiff appealed, contending that "she was not compelled to disclose her case in advance of trial . . . and thus could rely until then upon the possibility that the doctors might show the consultation to have been on inconsequential ailments." *Id.* The Second Circuit affirmed the grant of summary judgment. *Id.* at 473. In doing so, the court noted that the plaintiff's argument would defeat the purpose of the summary judgment standard:

> If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Id. To allow a party to withhold evidence on summary judgment and still proceed to trial is anathema to the purpose of the procedure. *Cf. Teamsters Local Union No. 117*, 789 F.3d at 994 (stating that the nonmoving party "may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim" (quoting *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987))).

Furthermore, as the Seventh Circuit has repeatedly stated, summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Steen*, 486 F.3d at 1022 (quoting *Hammel*, 407 F.3d at 859). Where a party has ample time to conduct discovery and develop his or her case, but fails to produce admissible evidence, courts are not required to give that party a "do over." *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007).

The Secretary attempts to introduce additional evidence on appeal that he failed to submit to the Judge below. *See* S. Br. at 23; Apps. B, C (providing evidence from MSHA handbooks that were not submitted to the judge on summary decision). The Secretary could and should have presented the evidence in opposition to summary judgment.

On appeal from a summary judgement, a party is permitted to rely upon only "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). In *Useden v. Acker*, 947 F.2d 1563, 1571-72 (11th Cir. 1991), for example, the circuit court upheld the district court's decision to strike an affidavit from a key witness submitted after a deadline, but prior to a hearing on the motions for summary judgment. The court refused to consider it in its review of the grant of

summary judgment, stating that "[t]he content of the affidavit was not newly discovered evidence extracted from a previously missing source[, and t]he affiant was available to the appellant throughout the course of discovery and in fact provided extensive deposition testimony apart from the affidavit." *Id.* at 1572.

Here, the Secretary seeks to introduce appendices to his opening brief. However, the two MSHA handbooks and a district court order denying a motion to dismiss were available well before summary decision was entered in this case. Appendix A, the district court order, was issued in September 2002, and it was easily available with a diligent search (one the Secretary chose not to conduct until this case was on appeal). Appendix B, a coal inspection procedure handbook, was published in February 2013 by the Secretary. Appendix C, a metal/non-metal inspection procedure handbook, was published in April 2013 by the Secretary. Summary decision was entered on August 25, 2015. The Secretary obviously could have provided in the summary judgment proceeding the material he now attempts to provide to the Commission.[11]

CONCLUSION

Under the proper summary judgment standard, the Judge's decision was correct. It is possible that the Secretary could have provided evidence to support his allegations at the summary decision stage, but he did not. By filing a perfunctory response, the Secretary risked and received an adverse judgment. We disagree with the majority's decision to give the Secretary a second chance. Such action in this case encourages insufficient pleadings by the Secretary. We respectfully dissent.

Michael G. Young
Michael G. Young, Commissioner

William I. Althen
William I. Althen, Commissioner

[11] For these reasons, we would grant KenAmerican's motion to strike with respect to the appendices.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 25, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE AMERICAN COAL COMPANY and UNITED MINEWORKERS Of AMERICA and UNITED STEEL, PAPER and FORESTRY, RUBBER MANUFACTURING, ALLIED and INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION	Docket No. LAKE 2011-13

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), a Commission Administrative Law Judge denied a motion to approve a settlement between The American Coal Company ("AmCoal") and the Secretary of Labor because no factual support had been provided for a 30% penalty reduction for each of the 32 citations issued to AmCoal by the Secretary. 35 FMSHRC 515 (Feb. 2013) (ALJ). The Secretary subsequently filed a motion for reconsideration, in which the Secretary refused to provide further factual support and challenged the basis for the Judge's action. The Judge again denied the motion. 36 FMSHRC 1489 (May 2014) (ALJ).

In this interlocutory appeal of the Judge's denial, the Secretary seeks to change the course of more than 35 years of administrative practice and case law. The Secretary has chosen this case to be the "test case" for advancing his position that the Commission's authority to review settlements of contested penalties under section 110(k) of the Mine Act, 30 U.S.C. § 820(k),[1] is

[1] Section 110(k) provides in relevant part that a proposed penalty that has been contested can be settled only if approved by the Commission.

much more limited than that described in *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64 (Aug. 2012). *See* Intervenor's Br., Ex. D (Memorandum from Heidi Strassler, Assoc. Solicitor for Mine Safety and Health, to Regional Solicitors (May 2, 2014)). The Secretary also seeks to have the Commission import and apply the consent decree standard of review employed by the Second Circuit in *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014) ("*Citigroup II*"). For the reasons that follow, we decline to do so and affirm in all respects the Judge's denial of the motion to approve settlement.

I.

Factual and Procedural Background

This case involves 32 contested citations issued to AmCoal between July 13 and August 12, 2010, 14 of which were designated as significant and substantial ("S&S").[2] In February 2013, the Secretary filed a motion to approve a proposed settlement and dismiss the proceedings. Under the proposed settlement, AmCoal would accept the citations as written, including the allegations regarding gravity and negligence, but pay a 30% across-the-board penalty reduction. The proposed settlement states as the rationale for the reduction in penalties:

> After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties' interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.

Mot. to Approve Set. at 2-3.

The Judge issued a decision denying the settlement motion based upon his reading of section 110(k), its legislative history, and the Commission's decision in *Black Beauty*. 35 FMSHRC at 515-17. He reasoned that the motion failed to provide adequate factual support for the penalty reductions, and stated that the across-the-board reduction for each of the citations was itself a "red flag." *Id.*

The Secretary subsequently filed a motion for reconsideration. In the motion, the Secretary requested that the Judge reconsider his conclusions that section 110(k) compelled him to reject the settlement for lack of factual support, and that section 110(k) does not permit the

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

Secretary to negotiate settlement agreements structured as a uniform percentage reduction of penalties. S. Mot. for Recon. at 4. The Secretary's counsel stated that:

> Exercising her professional judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial. The Secretary, through the undersigned counsel, represents that the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals.

Id.

The Judge again denied the motion to approve settlement. 36 FMSHRC at 1502. The Judge concluded that the Secretary had not altered the terms of the original settlement agreement or provided further explanation to justify it. *Id.* at 1489.

The Secretary subsequently filed a motion requesting that the Judge certify his ruling for interlocutory review. The Judge denied the motion and issued a certification for interlocutory review on his own motion. The Secretary then filed a petition for interlocutory review with the Commission. In light of the Judge's certification and the Secretary's petition, we issued an order granting interlocutory review on the issue of whether the Judge erred in denying the Secretary's motion to approve settlement.

We also issued an order permitting intervenor participation by the United Mine Workers of America ("UMWA") and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steel Workers"), and amicus curiae participation by former U.S. Representative George Miller.[3] In addition, we heard oral argument.

II.

Disposition

On review, the Secretary argues that the Judge erroneously denied the settlement proposal and rejected across-the-board percentage penalty reductions based on an incorrect reading of section 110(k). He contends that section 110(k) should be interpreted in light of the separation of powers principle that settlement decisions involve policy choices that the U.S. Constitution vests in political branches, not in court-like agencies like the Commission.

The Secretary asserts that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. Citing *Heckler v. Chaney*, 470 U.S. 821, 834 (1985), he submits that such a presumption can be overcome only where the controlling statute both (1) indicates an intent to circumscribe agency enforcement discretion; and

[3] AmCoal decided not to file a brief in this case.

(2) provides meaningful standards for defining the limits of that discretion. The Secretary argues that section 110(k) does not satisfy the second prong of the *Chaney* test because the statute provides no meaningful standards for judicial review of settlements, and that the Commission's role is no different than that of a "generalist court." S. Br. at 19-22; S. Reply Br. at 6-7.

The Secretary further contends that section 110(i) of the Act, 30 U.S.C. § 820(i),[4] cannot supply the standard that section 110(k) does not provide, that the Act's legislative history does not provide a standard for limiting the Secretary's prosecutorial discretion, and that to the extent Commission Procedural Rule 31, 29 C.F.R. § 2700.31, provides a substantive standard, the rule exceeds the Commission's authority to promulgate only procedural rules. He asserts that when reviewing settlement proposals, the Commission should apply the consent decree standard of review applied by the Second Circuit in *Citigroup II.* Under the Secretary's theory, the Judge was not entitled to request any additional information supporting the reduction in penalties.

The UMWA and United Steel Workers respond that the Judge correctly denied the settlement motion. They argue that section 110(k) plainly requires that proposed settlements be approved by the Commission and delegates to the Commission the authority to effectuate that mandate. Former Congressman Miller supports the position of the intervenors.

A. The Commission's Role in Approving Settlements

Section 110(k) of the Mine Act sets forth the requirements for the approval of proffered settlements of contested penalties. It provides:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C § 820(k). Thus, section 110(k) states in very clear language that the Commission has the exclusive responsibility for approving all proposed settlements of contested civil penalties.

The legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("*Legis. Hist.*"). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned "that to a great extent the compromising of assessed penalties [did] not come under public scrutiny," and that "[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are

[4] Section 110(i) of the Act provides that the Commission is to assess all final civil penalties under the Act.

not on the record." *Id.* It noted that even after a petition for civil penalty had been filed, "settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge." *Id.*

In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that "the purpose of civil penalties, [that is,] convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public," where miners, Congress, and other interested parties "can fully observe the process." *Id.* at 633. "To remedy this situation," section 110(k) "provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission" and that a "penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court." *Id.*

Congress explained that "[b]y imposing [the] requirements" of section 110(k), it "intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations* are avoided." *Id.* (emphasis added). Congress expressed its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties."[5] *Id.*

Based on the language of section 110(k) and its legislative history, the Commission reaffirmed in *Black Beauty* that Congress authorized the Commission to approve the settlement of contested penalties in section 110(k) "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest." 34 FMSHRC at 1862 (citations omitted). In effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest.

The Commission's consideration of proffered settlements has worked well for more than 35 years.[6] Indeed, a majority of proceedings under the Mine Act have been settled, and the vast

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[5] The Secretary downplays the significance of the legislative history. S. Br. at 30-31 ("the statements about collection and litigation expenses and the Commission's role in determining the public interest are highly specific criteria that . . . should not be construed as legal restrictions"), 32-38; *see also* Oral Arg. Tr. at 10, 24. However, Congress chose to explain the purpose of section 110(k) and the Commission's role in approving settlements in unusually specific terms. That legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so.

[6] The Secretary's position in this case represents a reversal of a long-standing institutional position. *See* Amicus Br. at 13 (quoting the Secretary's response to an audit by the General Accountability Office in which the Secretary explains that supporting reasons for settlements are presented to the Commission and that "MSHA and SOL agree that transparency in any resulting civil penalty settlement agreement is essential to ensure public confidence").

majority of settlement agreements submitted for approval have been approved by Commission Judges.[7]

The Secretary argues that the Commission's review should be more limited than that described in *Black Beauty* because section 110(k) should be interpreted in light of the separation of powers principle that settlement decisions involve policy choices that are vested in political branches, not in court-like agencies like the Commission. He further argues that the Commission's function in reviewing settlement proposals is no different than that of a generalist court.

The Commission is an independent federal agency that shares a unique split enforcement scheme under the Mine Act with the Secretary of Labor. Under the split enforcement scheme of the Mine Act, Congress has given the Secretary and the Commission separate roles and functions, particularly with respect to civil penalties. Section 110(i) describes the distinct roles of the Secretary and the Commission with respect to the proposal and assessment of penalties: the Secretary proposes penalties based on an available summary of information and need not make factual findings, while the Commission assesses "all" penalties under the Act, based upon its consideration of six specified criteria.

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i). *See Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d, 1147, 1151-52 (7th Cir. 1984)) (other citations omitted) (noting "split-function" of penalty scheme under the Mine Act); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) ("Only the Commission has authority actually to impose civil penalties proposed by the Secretary, § 820(i), and the Commission reviews all proposed civil penalties *de novo* according to six criteria.").

[7] Former Congressman Miller noted that "[i]n the past five years, Commission ALJs have approved 38,501 settlements and rejected only 17 (excluding the settlement in this case), or 0.04% of all settlements submitted for approval." Amicus Br. at 14. Counsel for the UMWA aptly described the Secretary's position in this proceeding as "a solution in search of a problem." Oral Arg. Tr. at 30.

The Commission cannot accurately be compared to a generalist court or any other judicial or administrative entity owing deference to the unreviewable settlement decisions of an executive agency. Section 113(a) of the Mine Act requires Commissioners to have certain qualifications to carry out the Commission's functions under the Act.[8] 30 U.S.C. § 823(a) (stating that the Commission shall be comprised of "five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act"); *see Thunder Basin*, 510 U.S. at 214 (noting the "Commission's expertise" in construing the Mine Act).

It is also noteworthy that civil penalties under the Mine Act ultimately become final orders or decisions "of the Commission," not of the Secretary. Uncontested penalties, that is, penalties that have been proposed by the Secretary but have not been contested by an operator or miner under section 105(a) or 105(b) of the Mine Act, are "deemed a *final order of the Commission*" 30 days after the operator or miner receives the penalty notification from the Secretary. 30 U.S.C. §§ 815(a), 815(b) (emphasis added). Contested penalties that are the subject of proceedings before the Commission and its Judges ultimately become part of final decisions of the Commission under section 113(d) of the Act, 30 U.S.C. § 823(d). Similarly, in cases in which an operator has defaulted on a proposed penalty assessment by failing to timely answer the Secretary's penalty petition, the Judge's default order on the penalty becomes a "*final decision of the Commission*" 40 days after its issuance. 30 U.S.C. § 823(d)(1); *see, e.g., Horton v. Coal River Mining,* LLC, 38 FMSHRC ___, slip op. at 2, No. WEVA 2013-1183-D (June 28, 2016) (emphasis added). Under section 110(k), courts of appeals may review a proffered settlement of a "penalty assessment which has become a *final order of the Commission*." 30 U.S.C. § 820(k) (emphasis added).

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[8] The Senate Report explains:

> The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.
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> The Commission is to have five members, who shall be selected from among those who by reason of training, education, or experience are qualified for consideration. This qualification is not intended to limit the selection of members to technicians. It is the Committee's expectation that nontechnicians with requisite administrative experience or persons whose qualifications are based upon either formal training or practical experience in mine safety and health or related matters would qualify for appointment.

S. Conf. Rep. No. 95-181, at 47 (1977), *reprinted in Legis. Hist.* at 635.

With respect to settlements of contested penalties, section 110(k) explicitly grants approval authority to the Commission.[9] The very existence of section 110(k) makes comparisons between the Commission's review of settlement proposals with settlement review by other agencies and courts inappropriate. The Department of Labor and the Occupational Health and Safety Review Commission ("OSHRC") share a split-enforcement scheme under the Occupational Safety and Health Act of 1970 ("OSHAct"), while other agencies that follow this model are rare. However, there is no provision similar to section 110(k) in the OSHAct. Indeed, the parties have not revealed a single provision in any federal statute that is similar to section 110(k).

Accordingly, the Secretary's contentions that separation of powers principles are relevant have no merit. First, because the Department of Labor and the Commission are wholly separate Article II agencies, such principles do not come into play. Second, although Congress gave the Secretary most of the enforcement powers under the Act, it expressly chose to give to the Commission the authority to assess penalties and approve settlements – powers that usually are given to an enforcement agency. Congress spoke clearly in this regard.

B. Reviewability

We similarly find unavailing the Secretary's challenge to the scope of the Commission's review of proposed settlements. The Secretary argues that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. He contends, "[t]he default presumption of unreviewability is overcome, however, only where the controlling statute both (1) 'indicate[s] an intent to circumscribe agency enforcement discretion,' and (2) 'provide[s] meaningful standards for defining the limits of that discretion.'" S. Br. at 19, *quoting Heckler*, 470 U.S. at 834. He states that section "110(k) does not, however, satisfy the second part of the *Heckler* test because the statute provides no meaningful or substantive standards that limit the Secretary's prosecutorial discretion when the Secretary negotiates settlement agreements." S. Br. at 19-20. The Secretary concludes that because Congress gave the

[9] Because the language of section 110(k) is clear, concepts of deference are not relevant. The Secretary does not argue that his interpretation of section 110(k) is owed deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Even if we were to consider the language of section 110(k) to be silent or ambiguous, our reading of the provision would be entitled to deference under *Chevron* because the Commission is charged with administering that provision. *See North Am. Drillers, LLC*, 34 FMSHRC 352, 356 n.5 (Feb. 2012). If a Court were to decide that section 110(k) was not clear and declined to give the Commission deference under *Chevron*, any interpretation of section 110(k) advanced by the Secretary may be entitled to a lesser degree of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944), since the Secretary's interpretation is not embodied in a citation or rules promulgated by MSHA. *See, e.g., Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 316 (7th Cir. 2012). Under *Skidmore*, the Secretary's position that he need not provide factual support for reduced penalties in settlements would not be persuasive since it is a reversal of a contrary position held for decades. *Id.* (considering whether an interpretation had the power to persuade based in part on the consistency in an agency's earlier and later pronouncements).

Commission "no law to apply" when reviewing settlement agreements, "the scope of [the Commission's] reviewing function is, at best, limited." *Id.* at 20.

As the Secretary argues, courts have determined that the presumption of nonreviewabilty generally extends to an agency's decision to settle an action. *See Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008), *citing Baltimore Gas and Elec. Co. v. FERC*, 252 F.3d 456, 461-62 (D.C. Cir. 2001). However, a "presumption of nonreviewability may be overcome by congressional limitations." *Baltimore Gas and Elec.*, 252 F.3d at 459.

Section 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability. The Commission does not review the Secretary's *decision to settle*. Rather, the Commission reviews the proposed reduction of civil penalties in settlements.

Moreover, the Secretary misreads *Heckler v. Chaney* to support his argument that the Commission's review is "at best, limited." In *Heckler*, the Supreme Court explained that if a statute does not set forth a meaningful standard against which to review an agency's exercise of discretion, the statute may be read to make the agency's decisionmaking unreviewable.

> [R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely.

470 U.S. at 830. The Court did not speak in terms of "limited" review but, rather, spoke in terms of an agency's actions under a statute being *reviewable or not* depending upon whether there are manageable standards for that review.[10]

Section 110(k) explicitly *limits the Secretary's authority* to reduce contested penalties in settlement and *grants the Commission authority* to approve proposed settlements. If the statute fails to set forth a meaningful standard for the Commission's review of reduced contested penalties in settlement, section 110(k) could be read to make the *Commission's* exercise of discretion unreviewable.[11] As discussed below, however, there are meaningful standards for the Commission's review of settlement proposals.

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[10] The Secretary has acknowledged "that the *Chaney* presumption of unreviewability is rebutted by the existence of [s]ection 110(k)." S. Reply Br. at 4.

[11] We note that the Commission's exercise of discretion in granting or denying petitions for discretionary review under section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A), is unreviewable. *See Eagle Energy, Inc. v. Sec'y of Labor*, 240 F.3d 319, 324-25 (4th Cir. 2001).

C. The Commission's Standard for Reviewing Proposed Settlements of Contested Penalties

As discussed above, in *Black Beauty* the Commission stated that the legislative history of section 110(k) reveals that Congress authorized the Commission to approve the settlement of contested civil penalties in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest. 34 FMSHRC at 1862.

The Commission and its Judges must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that "[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). The requirements to provide factual support in the settlement proposal and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979. *See* 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).[12]

The Commission has recognized that standards for such factual support may be found in section 110(i). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. 34 FMSHRC at 1864 ("The Judge did not abuse her discretion in requiring the Secretary to provide further factual support to demonstrate the penalty criteria as they relate to the subject penalties.").

The Secretary asserts that it is inappropriate for a Judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement. We disagree. Congress

[12] Contrary to the Secretary's argument, Rule 31 is not a substantive provision. *See* S. Br. at 40-41. The Commission has explained that a "critical feature" of a procedural rule is that "it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency." *Drummond Co.*, 14 FMSHRC 661, 688 (May 1992) (citations omitted). In contrast, substantive or legislative rules "grant rights, impose obligations, or produce other significant effects on private interests" and "constrict the discretion of agency officials by largely determining the issue addressed." *Id.* at 684 (citations omitted). The requirement in Rule 31 for parties to provide factual support is clearly procedural in that it directs parties to conform with a requirement in the manner in which they present their settlement to the Commission without constricting the Commission's discretion in determining whether to approve the settlement.

recognized that the approval of a proposed penalty reduction in settlement is part of the assessment and collection process. As stated in the Senate Report:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when **the process by which these penalties are assessed and collected** is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
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> **To remedy this situation,** Section 111(l) [later codified as section 110(k)] provides that a **penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission.**

S. Conf. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.* at 633 (emphasis added). Thus, in *Black Beauty*, the Commission reasoned that its authority to "assess all civil penalties provided in [the] Act" under section 110(i) "clearly includes contested penalties that are the subject of a settlement agreement." 34 FMSHRC at 1862.

Upon reviewing information supporting a reduced penalty agreed to by the parties, the Commission Judge need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing. Rather, the Judge considers such information in the evaluation of whether the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest.

We note that parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement. For instance, parties may provide factual support demonstrating that the operator has provided additional training or made relevant engineering or personnel changes. As the Commission observed in *Black Beauty*, section 110(k) "contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal." 34 FMSHRC at 1865. Such a conclusion does not mean that the Commission's review is unbounded. Rather, it means that there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest.

Although the language of section 110(k) contains no explicit restrictions on the Commission's review, the Commission's review of proposed settlements of contested penalties is bounded. Such boundaries are provided by section 110(i) of the Mine Act, the Act's legislative history, and the Commission's Procedural Rules. *See, e.g., Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (citations omitted) ("Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes."); *Cargill, Inc. v. United States*, 173 F.3d 323, 335 (5th Cir. 1999) (considering legislative history to discern meaningful standard for an agency's exercise of discretion).

D. The Second Circuit's Consent Decree Standard

The Secretary argues that when reviewing settlement proposals, the Commission should apply the consent decree standard of review applied by the Second Circuit in *Citigroup II.* Under that standard, the Commission would consider whether the proposed settlement (1) is legally sound, (2) is clear, (3) resolves the claims in the penalty petition, and (4) is not tainted by improper collusion or corruption. 752 F.3d at 294-95. The Secretary argues that, under this standard, he is entitled to deference with respect to his determination that the proposed settlement is in the public interest.

The Secretary's application of the *Citigroup II* standard to the 32 citations at issue in this case is set forth in approximately five pages of his brief. S. Br. at 49-53. He asserts that the proposed settlement is legally sound because section 110(k) does not prohibit uniform percentage reductions in penalties; that the settlement is clear because there is no doubt about the penalties AmCoal has agreed to pay or the effect of the conceded violations on AmCoal's history of violations; that the settlement reflects a resolution of the actual claims because no citations have been erroneously added or omitted; and that there have been no allegations of improper collusion or corruption. *Id.*

In *Citigroup II*, the Second Circuit broke with nearly three decades of practice by eliminating the consideration of the "adequacy," or the substantive validity, of a consent decree entered into by the Securities and Exchange Commission ("SEC"), and by focusing instead on the procedural propriety of the decree. 752 F.3d at 294-95. The court explained that it was excluding the requirement that a consent decree must be adequate because the adequacy factor was borrowed from the review standard applied to class action settlements, and that the factor was inapt in the context of a proposed SEC consent decree. *Id.* at 294. The court noted that if the decree involves injunctive relief, the court must determine that the "public interest would not be disserved" by the decree. *Id.* at 294. It stated that since the SEC has the "job of determining whether the proposed S.E.C. consent decree best serves the public interest," the SEC's decision merits "significant deference." *Id.* at 296.

Adoption of the Second Circuit's consent decree standard would effectively render section 110(k) meaningless. "[A] fundamental rule of construction is that effect must be given to every part of a statute . . . , so that no part will be meaningless." *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 194 (Mar. 1998) (quoting *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994). Because penalties become final orders or decisions "of the Commission," Commission Judges must necessarily determine the basic procedural propriety of proposed settlements requested by the Secretary even if section 110(k) were absent from the Mine Act.

As discussed above, Congress enacted section 110(k) in order to remedy a problem involving abuses involved in behind-the-scenes compromises by MSHA's predecessor, and to ensure that penalties serve as an effective enforcement tool. Congress explicitly stated its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties." S. Conf. Rep. No. 95-181, at 45 (1977), *reprinted in Legis. Hist.* at 633. Thus, Congress intended that the Commission have the job of determining whether a reduced penalty in settlement serves the public interest.

The *Citigroup II* standard is also distinguishable because a settlement agreement involving violations of mandatory safety standards affects all miners working in the cited mine. Thus, the miners may be likened to a class affected by a settlement. In addition, under the Mine Act, violations accepted by an operator in a settlement agreement may be considered as part of the operator's history of violations in the assessment of future civil penalty assessments. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 978-79 (June 1982).

The D.C. Circuit applies a consent decree standard of review that, unlike the Second Circuit's, includes the adequacy factor. *See, e.g., Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (citations omitted) (considering whether the "settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties."); *United States v. MTU America, Inc.*, 105 F. Supp.3d 60, 63 (D.D.C. 2015) (noting that courts must "consider both procedural and substantive fairness in their analysis of proposed consent decrees."). The Secretary did not note or discuss this standard.

Finally, the lack of detail required by the Second Circuit's consent decree standard, as evident in the Secretary's terse application of the standard, is completely inconsistent with the need for transparency that section 110(k) was enacted to address.[13] Indeed, the Secretary's counsel asserted during oral argument that "uncertainties of litigation," if proffered as the only rationale for settlement, would be sufficient factual support for the Commission's review. Oral Arg. Tr. at 67. Of course, the phrase "uncertainties of litigation" is devoid of content; all litigation contains uncertainties. Accordingly, we decline to adopt the *Citigroup II* standard in the Commission's review under section 110(k).

E. The Judge's Denial of the Proposed Settlement

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) (citations omitted) ("If an agency 'announces and follows – by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed,' that exercise may be reviewed for abuse."). An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Shemwell*, 36 FMSHRC at 1101.

We conclude that the Judge did not abuse his discretion by denying the motion to approve the subject proposed settlement. As discussed above, a Judge must have information

[13] We find revealing the observation with respect to the *Citigroup II* standard that "between the court's explicit exclusion of the adequacy factor and its emphasis on procedural propriety, the court likely foreclosed all meaningful substantive review," and that the *Citigroup II* standard will "practically speaking, result in the rubber-stamping of consent decrees." *Securities Regulation – Consent Decrees – Second Circuit Clarifies that a Court's Review of an SEC Settlement Should Focus on Procedural Propriety*, 128 Harv. L. Rev. 1288, 1291, 1292 (2015).

sufficient to carry out the Commission's responsibility under section 110(k). Parties are required to provide facts in support of a penalty agreed to in settlement by the Commission's Procedural Rules. 29 C.F.R. § 2700.31(b)(1).

Here, the Secretary provided no facts to support the proposed penalty reductions agreed to by the parties. When the Secretary initially filed the motion to approve the proposed settlement, the Secretary noted that the original allegations regarding the subject penalties would remain unchanged, but that the parties wished to settle the matter by a uniform penalty reduction of 30% "[i]n recognition of the nature of the citations at issue, and the uncertainties of litigation." Mot. to Approve Set. at 2. Upon the Judge's denial of the motion based on insufficient factual support, the Secretary filed a motion for reconsideration with the Judge but refused to provide further factual support. Rather, the Secretary merely represented to the Judge that "the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals."[14] S. Mot. for Recon. at 4.

This is not a case where the Commission Judge has impermissibly substituted his views of enforcement policy for those of the Secretary.[15] Rather, the Judge requested facts to support the proposed settlement of 32 reduced penalties, and the Secretary refused to provide any facts whatsoever. The Judge did not abuse his discretion by denying approval of the settlement without any supporting facts.

Nor did the Judge conclude that the Secretary's ability to structure settlements as uniform penalty reductions was impermissible under the Mine Act. Rather, the Judge stated that the percentage reduction was a red flag, and that "*information* is needed to justify any reductions." 36 FMSHRC at 1501 (emphasis in original). The Mine Act does not prohibit uniform penalty reductions, nor has the Commission rejected the structuring of settlements based on uniform penalty reductions, and nothing in our decision should be construed as implying that they are improper *per se*. The Judge did not err in requesting facts supporting the reduction.

In sum, the Secretary's repeated failure to provide any facts to support the proposed reduction of 32 penalties through a settlement agreement is inconsistent with the requirements of the Act, Congressional intent, and Commission procedure. Accordingly, we conclude that the Judge did not err in denying the proposed settlement.

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[14] The Secretary's counsel made this representation after stating, "Exercising her professional judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial." S. Mot. for Recon. at 4. We note the Committee's statement in the Senate Report that, "the need to save litigation and collection expenses should play no role in determining settlement amounts." S. Conf. Rep. No. 95-181, at 44-45 (1977), *reprinted in Legis. Hist.* at 632-33.

[15] The Secretary stated during oral argument that Judges "second-guess[] the kinds of enforcement and prosecutorial decisions that the Secretary present[s] for approval." Oral Arg. Tr. at 71. The Secretary may seek appellate review of any perceived abuses by the Commission's Judges. *See, e.g., Knox Cty. Stone Co.*, 3 FMSHRC 2478 (Nov. 1981).

III.

Conclusion

For the reasons discussed above, we conclude that the Judge did not err in denying the proposed settlement, affirm the denial, and remand this matter for further proceedings.

/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

August 26, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE AMERICAN COAL COMPANY	Docket Nos. LAKE 2011-701 LAKE 2011-881 LAKE 2011-962 LAKE 2012-58

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

DECISION

BY: Young, Cohen, and Althen, Commissioners

In these proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Administrative Law Judge affirmed five citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The American Coal Company ("AmCoal"), including the significant and substantial ("S&S") designations for each violation, but with reductions in the penalties.[1] 35 FMSHRC 3077 (Sept. 2013) (ALJ).

On appeal, AmCoal challenges the civil penalties assessed by the Judge. It argues that those penalties were derived in part from MSHA's proposed penalties, which were specially assessed pursuant to MSHA's penalty regulations. It further maintains that those specially assessed proposed penalties are not supported in the record and therefore should not have been considered by the Judge.

For the reasons that follow, we remand for further proceedings consistent with this decision.

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

I.

Facts and Proceedings Below

A. Factual Background

Between October 2010 and March 2011, MSHA inspectors issued ten citations to AmCoal for alleged safety violations at its New Era Mine in Saline County, Illinois. MSHA proposed penalties for the citations using its special assessment regulations set forth at 30 C.F.R. § 100.5. AmCoal contested the proposed civil penalties. The parties reached a partial settlement with regard to five of the citations. The remaining five citations—all specially assessed by MSHA—were the subject of a hearing before a Commission Administrative Law Judge in May 2013. The citations are summarized below.

Docket No. LAKE 2011-701

Citation No. 8428508 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a)[2] consisting of roof bolts that were not supporting the roof. The citation alleged that: (1) the violation was the result of AmCoal's high negligence; (2) an injury was reasonably likely to occur; (3) any such injury could reasonably be expected to be permanently disabling; and (4) one person would potentially be affected. MSHA proposed a special assessment of $40,300.

Docket No. LAKE 2012-58

Citation No. 8432118 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a) consisting of a rib that was cracked, broken, and leaning away from the pillar. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $9,100.

Citation No. 8432126 alleged a section 104(a) S&S violation of 30 C.F.R. § 75.202(a) consisting of damaged roof bolts in a crosscut. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $7,700.

Citation No. 8432129 alleged an S&S section 104(a) violation of 30 C.F.R. § 75.202(a) consisting of roof bolts that were too far from the pillar. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $7,700.

[2] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Docket No. LAKE 2011-962

Citation No. 8432052 alleged a section 104(a) S&S violation of a safeguard that was previously issued to the mine pursuant to section 314(b) of the Mine Act and 30 C.F.R. § 75.1403,[3] involving a transformer parked less than 25 feet away from a curtain. The citation alleged that: (1) the violation was the result of AmCoal's moderate negligence; (2) an injury was reasonably likely to occur; (3) the injury could be expected to result in lost workdays or restricted duty; and (4) one person would potentially be affected. MSHA proposed a special assessment of $4,800.

For each citation, AmCoal contested (1) whether a violation had occurred; (2) the Secretary's S&S designation; and (3) the appropriate civil penalty.

B. The Judge's Decision

The Judge affirmed all five violations and the associated S&S designations. 35 FMSHRC at 3099-122. For four of the five citations, the Judge reduced the level of negligence alleged by the Secretary. *Id.* at 3108-09, 3114-15, 3118-19, 3122. For one of the citations, the Judge reduced the level of gravity alleged by the Secretary of Labor. *Id.* at 3108. For all five of the citations, the Judge reduced the penalty amounts proposed by the Secretary. *Id.* at 3105, 3111, 3115, 3119, 3122. In total, the Judge assessed penalties of $43,200 for the five violations at issue, rather than the total of $69,600 proposed by MSHA by special assessment. *Id.* at 3123.

The Judge declined to address AmCoal's arguments about the validity of MSHA's special assessments process and the appropriate standard for reviewing the Secretary's proposed penalties. The Judge explained that AmCoal's challenges to the special assessment scheme failed to raise cognizable claims because the Commission alone is responsible for assessing final penalties. *Id.* at 3078 n.2, 3109-11. He concluded that whether the Secretary proposes a regular assessment or a special assessment is "not relevant" to the Commission's determination of a penalty amount. *Id.* at 3110 (citation omitted). The Judge explained that "[r]egardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used, — this Court is guided in its final determination by the polestar of 30 U.S.C. § 820(i) penalty considerations." *Id.*

[3] Both section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403 provide: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

II.

Disposition

AmCoal argues that MSHA's proposed penalties were arbitrary because the Secretary failed to meet a burden of proof of substantiating enhanced special assessments in these cases. According to AmCoal, the Secretary must prove by a preponderance of the evidence that specially assessed proposed penalties are warranted or appropriate under the circumstances in each case. AmCoal argues that the "practical result" when proposed penalties are specially assessed is that Judges rely on those elevated proposed penalties as a "baseline" for their assessments. PDR at 11. AmCoal also contends that Judges must utilize the penalty amounts that would have resulted from the regular assessment process as the baseline for determining penalty amounts and in explaining any substantial divergences under *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

As explained below, the Secretary is not required to prove by a preponderance of the evidence that it was appropriate to utilize the special assessment procedures to arrive at a proposed penalty amount rather than using the regular assessment formulas. In turn, however, Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a de novo assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment.

In these cases, the Judge did engage in a significant discussion of the evidence. However, his opinion could be read to indicate that he used the Secretary's special assessment as a starting point. In order to assure the independence of the assessment, we remand the cases to the Judge for reconsideration and further explanation.

A. The Secretary's Broad Discretion in Proposing Penalties Under the Mine Act

The Mine Act establishes a bifurcated scheme for the proposal and assessment of penalties for violations. The Mine Act requires the Secretary to propose a penalty initially. In doing so, the Act grants the Secretary latitude. Section 105(a) of the Mine Act states only that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). Moreover, section 110(i) provides that "[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and *shall not be required to make findings of fact* concerning the [six factors above]." 30 U.S.C. § 820(i) (emphasis added).

Although Congress did not require MSHA to issue regulations governing its proposal of penalties, MSHA has chosen to promulgate such regulations. The Secretary's Part 100 provides

for two types of proposed assessments: (1) regular formula assessments and (2) special assessments.

Regular formula assessments are made pursuant to 30 C.F.R. § 100.3. Under section 100.3, the Secretary proposes a penalty by applying specific penalty tables established by regulation to the allegations contained in the citation or order. A specific number of points are assigned to each penalty criterion and then a penalty amount is derived from Table XIV in 30 C.F.R. § 100.3(g). When MSHA proposes regular assessments, MSHA's Office of Assessments provides operators and, in turn, Judges with an "Exhibit A" that consists of a penalty report detailing the penalty points assessed under each statutory factor. This exhibit provides the operator and the Judge an explicit explanation of the bases for the proposed penalty.

Special assessments are governed by 30 C.F.R. § 100.5. Section 100.5(a) states that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." Section 100.5(b) states that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." The regulation does not state conditions warranting a special assessment. Therefore, the decision to issue a special assessment rather than a regular penalty is wholly within MSHA's discretion.

When MSHA elects to specially assess violations under section 100.5, its Office of Assessments sends operators a special assessment version of "Exhibit A" that includes Narrative Findings for a Special Assessment ("Narrative") purportedly to explain the agency's rationale for the proposed special assessment. S*ee* R. Exs. 4, 10, 18. It also sends a special assessment penalty report containing some factual allegations pertaining to the statutory penalty factors. S*ee* R. Exs. 3, 9, 17. In these cases, the Narrative Findings do not state specific reasons for the decision to issue a special assessment and provide little or no substantive information. For instance, the Narratives in these cases simply state that "MSHA has carefully evaluated the conditions cited and the inspector's relevant information and evaluation. The proposed penalty reflects the results of an objective and fair appraisal of all the facts presented." Then, the Narratives continue to provide a cursory and summary treatment of the penalty criteria for each violation.[4] R. Exs. 4, 10, 18.

MSHA has not promulgated a regulation explaining the calculation of special assessments. However, it has issued informal General Procedures explaining how the Assessment Office adds penalty points in specially assessing a penalty. Although there are exceptions, especially for flagrant violations, most commonly the Assessment Office adds points to the regular negligence and gravity points based upon the specific circumstances of the violation, such as the seriousness of any injury, unwarrantable failure, imminent danger, etc. *See*

[4] In response to an issue raised at oral argument before the Commission, the Secretary's counsel represented that MSHA is working on ways to make Narrative Findings more informative "by including a more detailed explanation of the rationale for its decision to specially assess a violation." Sec'y Suppl. Statement dated May 2, 2016, at 2; Oral Arg. Tr. 59-61.

MSHA General Procedures (Special Assessment), https://www.msha.gov/sites/default/files/Compliance_Enforcement/Special-Assessment-Table_Sept-2-2015.pdf) (outlining general procedure for calculating special assessments). This report prepared by MSHA provides information on the addition of penalty points but does not provide, at least in these cases, any explanation about the basis for the decision to specially assess the penalty.

In summary, the Mine Act does not require the Secretary to explain the basis for the proposed penalty, beyond its establishment of the penalty criteria. Otherwise, the Secretary has discretion to propose penalties that are now subject only to his own regulations. Those regulations, in turn, do not require the Secretary to explain the basis for the proposed penalty when he makes the discretionary decision to specially assess, beyond the requirements in 30 C.F.R. § 100.5(b) that MSHA base the penalty on the criteria set forth in section 100.3(a)[5] and that "[a]ll findings shall be in narrative form." If an operator ultimately disagrees with an assessment, the remedy is a hearing before the Commission.

B. The Commission's Independent Authority to Assess Penalties under the Act

Under the Mine Act's bifurcated penalty assessment scheme, the Commission possesses independent authority to assess all contested 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."). When an operator contests the Secretary's proposed assessment pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), a Commission Administrative Law Judge "issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's . . . proposed penalty, or directing other appropriate relief." *Id.*

Section 110(i) of the Mine Act provides that the Commission is authorized to assess all penalties under the Act and that the penalties must reflect consideration of six statutory factors:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the [operator] charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). *See also* 30 U.S.C. § 815(b)(1)(B) (enumerating the same six factors that the Secretary "shall consider" when proposing penalties pursuant to section 110(b), 30 U.S.C. § 820(b)).

[5] The criteria in section 100.3(a) are substantively identical to the six criteria in section 110(i) of the Act.

The Commission considers the same statutory penalty criteria as the Secretary in assessing penalties. In doing so, a Judge is bound neither by the Secretary's proposed penalty nor by the Part 100 regulations governing his penalty proposal process. *See Sellersburg Stone Co.*, 736 F.2d at 1151-52 ("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"); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) ("[U]nder 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.") (citations omitted); *Walker Stone Co., Inc.*, 12 FMSHRC 256, 260 (Feb. 1990).

Congress has thus conferred broad discretion upon the Commission and its Judges in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Of course, such discretion is not unbounded. Penalty assessments must reflect proper consideration of the penalty criteria set forth in section 110(i). *Id.* (citing *Sellersburg*, 5 FMSHRC at 290-94). Under *Sellersburg* and the Commission's Procedural Rules, an Administrative Law Judge must make findings of fact under each of the statutory penalty factors. 5 FMSHRC at 292; 29 C.F.R. § 2700.30(a); *see also Cantera Green*, 22 FMSHRC 616, 621 (May 2000). The Judge then independently assesses a penalty. *See, e.g.*, *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012) ("[T]he penalty assessment for a particular violation is within the sound discretion of the administrative law judge.").

C. The Secretary's Evidentiary Burden for Proposed Penalties

AmCoal argues that when the Secretary chooses to use the special assessment process, he should be required to prove by a preponderance of the evidence that the violation warranted specially assessed penalties. AmCoal further contends that, if a Judge decides to use a baseline or starting point for his independent assessment, he should begin with a penalty calculated using the regular assessment formulas, not the special assessment regulations. It also argues that MSHA's special assessment narratives are deficient because they contain only "conclusory statements of a legal nature" without identifying the reasons justifying the special assessment, or the quantitative basis for the resulting proposed penalty.

The Secretary's authority to issue a special assessment is plenary. He is not required to explain the reasons for his decision to specially assess a violation to the Commission. The Secretary has authority to choose to propose a special assessment based on the alleged facts pertaining to the violation known to him at the time of the proposal.

The Secretary, however, does bear the "burden" before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed that obligation may be considerable. While the Secretary may provide a narrative that explains why a special assessment has been sought in a given case, no regulation or statutory provision provides criteria to guide that decision. Thus, Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge's findings and conclusions.

Hence, the decision to specially assess the penalty, and the rationale supporting that decision, may be relevant if the Judge appears to rely upon it, expressly or implicitly. This is true because the Commission Judge makes the final determination of the appropriate penalty based upon the evidence and arguments of the parties. In all civil penalty cases under the Act, the operator and the Secretary have the opportunity to persuade the Judge as to the amount constituting an appropriate penalty for a violation. The Secretary's proposed assessment is a proposal. Each party may and should present evidence on each penalty criteria in support of its positon.[6] After the hearing, as we have emphasized, it is the Judge's responsibility to assess the penalty independently.

There is one caveat—a caveat upon which resolution of these cases centers. While the Commission has emphasized the right of the Judge to impose the appropriate penalty based upon the Judge's application of the penalty criteria, the Commission has recognized that the Secretary plays an important role in the penalty process. Therefore, in an early case, the Commission held that Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. The rationale was plain and continues to be important. "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." *Sellersburg*, 5 FMSHRC at 293. The Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process. *See id.*; *Cantera Green*, 22 FMSHRC at 621.

Accordingly, the Secretary's decision to propose a penalty under his regular assessment formulas or under his special assessment regulations does not negate the Judge's duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria. In either instance, however, the Judge must also explain a substantial divergence from the proposed penalty amount.

It is relatively easy for the Judge to give such explanation when the Secretary uses the regular point system. Any modifications by the Judge to the Secretary's proposal with respect to penalty criteria, such as negligence or gravity, are likely to explain the divergence. The situation is somewhat more complicated with special assessments. Because the Secretary has proposed a penalty that may be substantially higher than would have been proposed under the regular system, the Secretary presumably will introduce evidence to support what is essentially an

[6] A lack of explanation or justification for the Secretary's special penalty proposal may fail to provide sufficient notice to the operator of the facts upon which the Secretary relied to specially assess the penalty to prepare its rebuttal. However, any notice issue that may exist from a special assessment narrative can be cured through discovery and/or a pretrial order by the Judge.

elevated assessment under the Secretary's regulations.[7] Evaluation of the evidence to support the elevated assessment will certainly be central to any substantial deviation from the proposed penalty. Therefore, a full discussion of the evidence bearing upon the appropriate penalty must be the basis for any explanation of a substantial deviation.

For either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

D. The Judge's Findings in These Cases and Reason for Remand

In specifically challenging the Judge's penalty assessments in these cases, AmCoal argues that the Judge cited no aggravated circumstances—such as extraordinarily high negligence or gravity, an imminent danger, an accident, or conditions likely to lead to fatal injury—warranting elevated penalties for the violations. AmCoal contends that the only statutory criterion mentioned or relied upon by the Judge to warrant increasing penalties beyond the regular assessment mechanism is its history of previous violations, which he referenced in relation to the four section 75.202(a) violations.

In fact, the Judge did substantially consider the section 110(i) criteria with regard to the violations and explained his reduction of the penalties, at least in part. 35 FMSHRC at 3105, 3111, 3115, 3119, 3122. In particular, the Judge made explicit findings as to negligence and gravity for each violation. The parties stipulated to good faith abatement. *Id.* at 3079; Jt. Ex. 1. The operator does not contend that the penalties would affect its ability to remain in business. Although the Judge did not make an explicit finding in the record, there is undisputed evidence that this was a large mine. Tr. I 92; Ex. R-37.

For all but one citation the Judge did discuss the evidence as it applied to the penalty. Thus, the Judge considered the section 110(i) criteria and evidence supporting his penalty assessments. The exception is the history of violations criterion pertaining to the safeguard violation, Citation No. 8432052.[8]

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[7] Here, for example, had the Secretary used the regular point schedule, the total penalties proposed for the five violations at issue would have been $19,961. The Secretary's special assessment proposal was $69,600. As stated above, the Secretary need not explain his decision to specially assess, but must support the proposal he makes.

[8] As to Citation No. 8432052, which involved a safeguard violation for parking a transformer less than 25 feet from a curtain, the Judge did not make a finding with regard to the mine's violation history. The Secretary proposed a penalty of $4,800, which the Judge reduced to $3,800 despite affirming the Secretary's gravity and negligence findings. The evidence indicates that the operator has a history of 19 violations of the same standard. R. Ex. 9.

On the other hand, however, the Judge also stated that he "reduced the [Secretary's proposed] penalty to [the Judge's assessment]," *see* 35 FMSHRC at 3105, 3111, 3115, 3119, 3122, thereby suggesting that he may have used the Secretary's specially assessed proposed penalties as a benchmark for calculating his ultimate assessments. For most violations, he lowered the penalty by approximately 20% from the Secretary's special proposal.

As we have repeatedly held, Judges must make independent assessments of the final penalty. *Sellersburg*, 5 FMSHRC at 291; *Wade Sand and Gravel*, 37 FMSHRC 1874, 1876 (Sept. 2015). We are unable to discern with assurance whether the Judge did in fact rely on the Secretary's specially assessed proposed penalties or made an independent assessment. In order to assure the credibility of the administrative scheme, we require that Judges explain a substantial divergence from the penalty proposed by the Secretary. However, that requirement does not constrain the independence of the Judge to make a final penalty assessment with upwards or downward adjustments as the Judge determines circumstances warrant.

Here, MSHA issued a special assessment without explaining the basis in its Narrative Findings. At trial, AmCoal introduced the Secretary's "Special Assessment Narrative Form" ("SANF"), which assigns points for each of the section 110(i) criteria under both the regular and special assessment formulas and calculates a penalty amount based on those points. R. Ex. 5, 19. These exhibits do not conform with the Secretary's stated rationale provided at trial for the increased proposed assessments in these cases. While the Secretary's witnesses testified that the operator's excessive history of violations and repeated noncompliance with the roof standard justified MSHA's decision to specially propose penalties in these cases, the SANFs assign no extra points for the history criterion, but rather increase the points assigned for negligence and gravity.[9] R. Ex. 5. Thus, the points added to determine the proposed penalty bore no relationship to the asserted basis for the special assessment. They did nonetheless dramatically increase the proposed assessment. [10]

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[9] At the hearing, the operator's counsel did try to question the Secretary's witness about the fact that the form did not indicate a higher point value for history although the inspector testified that the operator's history was a basis for recommending these violations for special assessment. The Secretary's witness claimed he was not involved in calculating the assessment and did not know the answer. Tr. 325-28.

[10] The contrast between the proposed and final assessments in these cases provides an interesting perspective on the special assessment process. It is evident from the calculations provided by the Secretary in discovery that the calculation of specially assessed penalties is mechanically the same as regular assessments, including use of the same penalty points table. As an example, in Citation No. 8428508 (issued for roof bolts that failed to support the roof), the Secretary's special assessment procedures added 19 penalty points to the points that would have been assigned under the regular schedule for a total of 138 points, which converts to a $53,858 penalty. R. Ex. 5; *see* MSHA General Procedures (Special Assessment) at 3-8. As permitted in the special assessment procedures, MSHA then reduced that amount by 25% to $40,300. R. Ex. 5. After the hearing, the Judge reduced negligence from high to moderate and reduced severity

(continued…)

The Judge's decision only summarily addressed the history of violations criterion in a general context as to the roof and rib violations and explicitly stated that he was reducing the penalties from the Secretary's proposed amounts to his ultimate assessments. In addition, the Judge failed to make any finding on the violations history relative to the safeguard violation. As a result, we are unable to determine exactly what the Judge did and whether he abused his discretion. *See Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011) (vacating and remanding the penalty assessment to the Judge to address each of the statutory criteria, especially the negligence criterion, where the Commission could not determine from the Judge's decision whether the reduction in penalty was supported by the application of the statutory criteria).

In order to assure fairness, therefore, it is important for us to know whether the Judge made an independent assessment or felt constrained to making his assessment as an adjustment to the Secretary's proposal. In this unique case, if the Judge did rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record.

Essentially, we are affirming the right and duty of Commission Judges to make assessments independently. Without undercutting the administrative credibility value of asking Judges to explain any substantial variance from MSHA's proposed penalty, we must be able to understand that the Judge made an independent final assessment. This does not impose a burden or any new obligations on the Judge; it merely conforms to our established law that the Judge must show he/she considered the six penalty criteria and assessed the penalty based upon his/her evaluation. We simply fulfill our obligation to know the Judge decided his/her penalty assessment based upon consideration of the penalty criteria.

Accordingly, we vacate the Judge's decision in part and remand the cases to him for further clarification of his penalty assessments. On remand, the Judge should explain whether he relied on the Secretary's specially assessed proposed penalties and provide an adequate explanation for the bases of his assessments, in light of the record evidence and his section 110(i) findings. If the Judge relied on the Secretary's proposed assessment as a starting point for his assessments, then he should specifically address the discrepancies noted in the record pertaining to the operator's history of violations, and explain how he considered this criterion in assessing

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[10] (…continued)
from permanently disabling to lost work days/restricted duty. If the Secretary had used those findings with his special assessment procedures, the total points assessed would have been 113 for a penalty of $7,774. The Judge reduced the proposed penalty of $40,300 to $20,000. This means that, while the Judge substantially reduced the proposed penalty, his penalty was more than double the penalty that would have resulted under the Secretary's special assessment procedures had the Judge's findings been used. In citing this example, we do not mean to undercut the Judge's assessment or require a change. We use it only to illustrate the need to consider whether the Judge independently assessed the penalty or used the Secretary's proposed special assessment as a benchmark.

the penalties. On remand, the Judge must also make a finding as to the history of violations pertaining to the safeguard violation, Docket No. LAKE 2011-962.

III.

Conclusion

For the foregoing reasons, we vacate the Judge's decision in part and remand these cases for further proceedings consistent with this opinion.

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

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

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

Commissioner Nakamura, concurring and dissenting:

Although I agree with much of the majority's discussion of the governing principles underlying the assessment of penalties under the Mine Act, I disagree with the new requirement my colleagues impose on Judges, who must now provide an additional rationale for the penalties they assess in cases where they have taken the Secretary's special assessment into account.

All Commissioners agree on several central concepts underlying the penalty assessment process:

- Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a).

- There is no requirement in the Mine Act mandating that the Secretary explain the basis for this proposed penalty when he makes the discretionary decision to specially assess. 30 C.F.R. § 100.5.

- The operator has the right to challenge the Secretary's proposed penalty assessment. 30 U.S.C. § 815(a). This contest results in a penalty proceeding before the Commission.

- An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider the six penalty criteria listed in that provision and the deterrent purpose of the Mine Act.

- Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not binding in any way in Commission proceedings).

- The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983).

- The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citation omitted).

Applying these principles to the litigation of a penalty proposal at a hearing before a Commission Judge, it is clear that at trial the question of what penalty should be assessed unfolds on a level playing field. The Judge has broad discretion to assess a penalty *de novo*, *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986), and is in no way bound by the Secretary's penalty proposal.

When a penalty amount is in dispute, both parties should offer evidence and argument to support their positions; the Secretary must show that the amount he is requesting is warranted

under the facts of the case, and the operator must rebut these contentions. Specifically, each party must offer evidence and argument in support of how the Judge should apply the section 110(i) penalty criteria to the facts of the case at hand. The parties fail to do so at their peril.

Subsequently the Judge has the authority to assess a penalty de novo. As noted above, his or her discretion in setting the penalty amount is circumscribed by only two legal requirements: (1) he or she must make the appropriate findings consistent with section 110(i) of the Mine Act and (2) any substantial deviation from the Secretary's penalty proposal must be explained.

Historically, this is the sum total of what a judge must do when assessing a penalty. My colleagues, however, have now added an additional requirement, one supported neither by statute nor Commission precedent: notwithstanding their acknowledgement that the Secretary's proposal is not a baseline for the Judge, slip op. at 9, the Judge must be "attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision," if he or she relies on that special assessment. *Id.* at 7. But given that my colleagues recognize that "it is the Judge's responsibility to assess the penalty independently," *id.* at 8, I fail to understand why they believe that the Secretary's decision to issue a special assessment and the reasons supporting that decision are relevant if the Judge relies on that proposal. Either the Judge's penalty assessment is independent or it is not.

My colleagues remand these cases because, they say, they do not know whether the Judge relied on the specially assessed proposed penalties as a starting point. *Id.* at 10. If he did so rely, the Judge must address any inconsistencies in the record regarding the basis for the Secretary's proposed assessments and the Secretary's penalty criteria findings. *Id.* at 11. They impose this requirement despite their acknowledgement that "[t]he Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record." *Id.* at 9. In short, the majority demands that a Judge explicitly state whether he or she used the special assessment as a benchmark, while at the same time recognizing that the Secretary's proposal is not a baseline. And if the Judge confesses to having taken the special assessment into account, he or she will have a new burden: review the Secretary's rationale (as expressed in the special assessment narrative and at trial) and ensure that it is internally consistent. As we have not previously required a Judge to discuss or explain how the Secretary may have allocated points to arrive at her or his penalty proposal, we find our colleagues claim that their ruling "does not impose . . . any new obligations on the Judge" unconvincing. *Id.* at 11.

Under a statutory scheme where a Judge is free to disregard the Secretary's penalty proposal, and where a Judge need only explain how his or her penalty assessment conforms to the section 110(i) criteria and the appropriateness of any substantial deviation from the penalty proposal, he or she must now embark on an additional analysis to satisfy the majority's new inquiry. Little wonder that our Judges will be puzzled as to how they must meet this new requirement, and why they need to look behind the Secretary's special assessment and at times review the narrative form accompanying it.

In my view, the penalty analysis traditionally applied by our Judges (discussing the six section 110(i) criteria and explaining any substantial deviation from the Secretary's penalty

proposal) provides sufficient information for the assessment and, if the penalty is appealed, permits the Commission to determine whether there has been an abuse of discretion. The extra layer of explanation now required by the majority (forcing the Judge to look behind the mechanics of the Secretary's special assessment process) adds nothing to our understanding of whether a Judge conformed to his or her duty to independently assess a penalty in accordance with the provisions of section 110(i) of the Mine Act.

I join my colleagues in the majority in vacating and remanding the penalty for the safeguard violation. That citation involved a safeguard violation for parking a transformer less than 25 feet from a curtain. The Secretary proposed a penalty of $4,800, which the Judge reduced to $3,800 despite affirming the Secretary's gravity and negligence findings. In his penalty assessment analysis, the Judge did not make a finding with regard to the mine's violation history, and thus failed to provide a complete explanation as to how his assessment comported with all of the section 110(i) criteria. As the majority correctly notes, this omission impedes our determination as to whether the Judge's reduction in penalty was supported by the application of the statutory criteria.

I depart from my colleagues, however, in their decision to remand the four penalties for the roof control violations.[1] I would affirm these penalties, finding that the Judge did not abuse his discretion in assessing these penalties.

The Judge explained how, applying the six penalty criteria in section 110(i), he arrived at his penalty determinations. He made explicit findings as to negligence and gravity for each violation (reducing the level of negligence for all four). The parties stipulated to good faith abatement. 35 FMSHRC at 3079; Jt. Ex. 1. The operator does not contend that the penalties would affect its ability to remain in business. Although the Judge did not make an explicit finding in the record, there is undisputed evidence that this was a large mine. Tr. I 92; Ex. R-37.

Thus, the history of violations is the only criterion really in dispute and it is on that issue that the majority remands the penalty determination to the Judge. However, the Judge made findings and addressed that criterion in his decision. Specifically, the Judge stated: "With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties." 35 FMSHRC at 3111 (footnote omitted); *see also id.* at 3115 ("in light of Respondent's previous violations history . . ."), 3119 (same), and 3122 (same)). The Judge explicitly adopted the Secretary's allegation that the operator had an excessive history. Thus, it appears that the Judge concluded that AmCoal had a significant history of violations, particularly due to its history of repeat violations of section

[1] The Secretary proposed a $40,300 penalty for Citation No. 8428508 and the Judge reduced it to $20,000. The Secretary proposed a penalty of $9,100 for Citation No. 8432118 and the Judge reduced it to $7,200. For Citations Nos. 8432126 and 8432129, The Secretary proposed penalties of $7,700 and the Judge reduced them to $6,100. 35 FMSHRC at 3111, 3115, 3119, 3122.

75.202(a), and considered this to be aggravating. I believe that substantial evidence supports the Judge's findings.

The record contains evidence of the operator's repeated history of noncompliance. With respect to Citation No. 8432118, Inspector Edward Law "recommended the citation for special assessment because the operator had a 'lot of issues with ribs' and roofs and had been cited a 'pretty high' number of times for 202(a) violations." *Id.* at 3089. Citation No. 8428508 stated that "Standard 75.202(a) was cited 109 times in two years at mine." *Id.* at 3106. The inspectors acknowledged consideration of AmCoal's excessive history as influencing the decision to propose special assessments. "Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment." *Id.* at 3090. Regarding Citation Nos. 8432126 and 8432129, the inspector again testified that he recommended special assessments due to the operator's history violations. *Id.* at 3092 ("Law had again recommended a special assessment because . . . of Respondent's past violation history."); 3096 ("Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations that existed for the other citations testified to.").

As explained, the Judge must make findings on the penalty criteria, but has the discretion to assign varying weight to each criterion and need only explain any substantial deviation from the Secretary's proposed assessment, not from the assessment value the penalty would have been under the regular assessment formula, as the operator suggests. The Judge appropriately considered the evidence here in the context of the penalty criterion pertaining to the operator's history of violations.

The Judge's explanation merely must reflect proper consideration of the penalty criteria and the deterrent purpose of the Act. *Sellersburg*, 5 FMSHRC at 294. In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC 616, 621 (May 2000). *See also Lopke Quarries, Inc.*, 23 FMSHRC 705, 713-14 (July 2001) (holding that Judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Here, the Judge noted that the operator's violation history served as an aggravating circumstance in consideration of the penalty assessment. Addressing the operator's history of violations, the Judge agreed "with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties." 35 FMSHRC at 3111. His penalty reductions were undoubtedly due to the fact that he lowered the negligence level for all the roof control violations (and, in addition, reduced the gravity level for one of them).

In short, I conclude that the Judge adequately explained how he applied the section 110(i) history of violations criterion, as well as the other statutory penalty criteria, that he did not abuse his discretion in assessing the penalties, and that accordingly his penalty determinations should be affirmed.

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

Chairman Jordan, dissenting:

I join the opinion of Commissioner Nakamura regarding the extent of the penalty analysis a Judge must make when the Secretary has proposed a special assessment. I also join the section of his opinion affirming the penalties for the four roof control violations. I part ways only regarding the penalty for the safeguard violation, which I would affirm.

The Secretary proposed a $4,800 penalty for this violation, which involved parking a transformer less than 25 feet away from a ventilation curtain. The gravity was marked as serious, and the negligence as moderate. The Judge affirmed both of these findings and assessed a penalty of $3,800. Based on this record, I cannot conclude that in so doing he abused his discretion. *See Broken Hill Mining Co*., 19 FMSHRC 673, 676-77 (Apr. 1997) (a Judge's assessment of a penalty constituting an abuse of discretion is not immune from reversal) (citation omitted).

In fact, the operator did not even argue as much. Placing all of its eggs in the regular assessment vs. special assessment basket, the operator argues that the Judge's five penalty assessments represent significant increases over what would have been proposed under a regular assessment formula and thus are not supported by substantial evidence. Nowhere in its submissions to us has it argued that the Judge abused his discretion by not making requisite findings on the six 110(i) penalty criteria.

My colleagues in the majority insist on vacating the penalty and remanding it to the Judge because, since he did not address the operator's history of violations for this penalty, they are "unable to determine exactly what the Judge did and whether he abused his discretion." Slip op. at 11.

I have no such problem. The Judge assessed a penalty of $3,800 against the operator of a large mine for a violation of moderate negligence and serious gravity for which the Secretary had proposed a $4,800 penalty. True, the Judge did not make a finding regarding the history of violations for this penalty (but the evidence indicates that the operator has a history of 19 violations for this standard, R. Ex. 9). Having reviewed the record and the Judge's other findings on the statutory penalty criteria, I am reluctant to hold that this single omission constitutes an abuse of discretion necessitating a remand of the penalty.[1]

[1] Although I am mindful that under *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984), a Judge should explain any substantial divergence between the Secretary's proposed penalty and the Judge's assessment, I do not find the penalty reduction here substantial enough to vacate the Judge's assessment on this basis.

In sum, I dissent from the majority's holding requiring an additional explanation from a Judge when it appears that the Judge might have relied on a proposed special assessment, and I also dissent from the majority's ruling to vacate and remand all five penalties at issue.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 26, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS McGARY and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. THE MARSHALL COUNTY COAL CO., McELROY COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION[1]	Docket No. WEVA 2015-583-D

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

DECISION

BY: Young, Nakamura, and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), and involve complaints of interference brought by the Secretary of Labor on behalf of six miners pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[2] The Respondents are five underground coal mines in West Virginia and associated corporate entities, including the owner and operator of the five mines, Murray Energy

[1] Additional captions are listed in Appendix A to this order.

[2] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this [Act].

Corporation.[3] The interference complaints all involve a largely common fact pattern concerning meetings Respondents held with their miners at each of the five mines. One of the subjects addressed by Respondents at the meetings was miners contacting the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(g) of the Act, 30 U.S.C. § 813(g),[4] to alert the agency to perceived safety and health issues at the mines.

In her decision on the complaints, the Judge largely ruled in favor of the Secretary and the complainants, finding that interference with miners' section 103(g) rights had been established. 37 FMSHRC at 2608-10. However, she also dismissed one count of the Secretary's complaint. *Id.* at 2609. The Commission granted the cross petitions for discretionary review filed by the Respondents and the Secretary, and later granted the UMWA's motion to intervene.

I.

Factual and Procedural Background

In December 2013, a subsidiary of Murray Energy acquired the five mines from CONSOL Energy, Inc. Shortly thereafter, MSHA received a number of complaints from miners alleging safety hazards and violations at the mines, which MSHA investigated. At all of the mines, hourly production and maintenance workers are represented by the UMWA through local unions. 37 FMSHRC at 2600.

On April 10, 2014, Robert Murray, the Chief Executive Office of Murray Energy Corporation, wrote to UMWA President Cecil Roberts about that "rash" of complaints from "disgruntled employees" and union officials, which he believed were being made not for safety reasons, but rather to strike back at the mining companies. Mr. Murray took the position that this was a misuse of the section 103(g) process that was wasting the inspection resources of both MSHA and the mines. He stated that while the company would "never interfere with a miner's right to file 103(g) complaints," he went on to request that management "be given the

[3] As shown in the five case captions, each of the cases was brought on behalf of United Mine Workers of America (UMWA) International Safety Representative Ronald Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 37 FMSHRC 2597, 2599 (Nov. 2015) (ALJ).

[4] Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by MSHA. It further provides that the name of the person requesting an inspection shall not be revealed.

opportunity to also simultaneously be informed [of] safety issues in place of the 103(g) complaints, or afterwards." Gov't Ex. 18.[5]

Two weeks later, Respondents began a series of what they refer to as "Awareness Meetings" at their mines. Miner and management attendance is mandatory at such meetings for each shift at each mine. The five mines employed approximately 3500 workers in total during the time in question. 37 FMSHRC at 2600.

At each of the meetings held at those mines between April and July 2014, CEO Murray would speak while giving a PowerPoint presentation. *Id.* at 2600-01. There were between 69 and 77 PowerPoint slides, including three slides which further addressed the section 103(g) issues Murray had previously raised in his letters. Gov't Ex. 4-7. CEO Murray also sent a copy of the PowerPoint presentation to Cecil Roberts prior to the first meeting. Gov't Ex. 20.

At one of the Marshall County Mine Awareness Meetings, a miner made a recording of CEO Murray's remarks given in conjunction with the PowerPoint presentation, including his remarks regarding the section 103(g) issue slides. Recordings of Murray's statements were not made at the other Awareness Meetings. 37 FMSHRC at 2601-02.

On June 23, 2014, Bowersox filed a discrimination complaint with MSHA with regard to the Awareness Meetings and the letters sent to local union officials, alleging that management at the five mines was trying to intimidate miners and interfere with the miners' right to file section 103(g) complaints with MSHA while keeping their identities confidential. Gov't Ex. 1. On July 21, 2014, the five other complaints were filed with MSHA based upon the same allegations. Gov't Ex. 2.

On March 24, 2015, the Secretary filed with the Commission the five actions on behalf of the six complainants, and on July 14, 2015, amended the actions. The Secretary alleged that Respondents interfered with the exercise of miners' rights at each of the mines by coercively imposing a requirement that miners who make section 103(g) complaints report the same complaint to management. The Secretary argued that this undermined a miner's right to make a section 103(g) complaint to MSHA on a confidential basis. The Secretary further identified the threat of reprisal against the Marshall County miners and the threat to close the Marshall County Mine as a separate count of interference. Discovery subsequently ensued, including Respondents' deposition of each of the six complainants. 37 FMSHRC at 2602.

The witness list which the Secretary submitted for the hearing included three of the six complainants: Bowersox, Michael Payton, and Ann Martin. On the Friday prior to the hearing scheduled for Tuesday, September 22, 2015, Respondents and related mining companies filed a

[5] Similar letters were sent to each of the local union presidents, safety committee officers, and mine committee officers at the five mines. Those letters requested that miners inform the company of safety issues instead of, or in conjunction with, making a section 103(g) complaint. The letters emphasized that the company did not intend "to chill the exercise by concerned miners of their rights under Section 103(g)"; rather, the reporting policy was intended to serve "the most effective means to address and correct safety issues." Gov't Ex. 19.

complaint in the United States District Court for the Northern District of West Virginia against the UMWA, its District 31, and Bowersox. The complaint alleged a breach of the National Bituminous Coal Wage Agreement of 2011, the collective bargaining agreement between the UMWA and coal mine operators, including Respondents (hereinafter "CBA"). The court complaint contended that the CBA and past practice under it were being continually breached by miners making section 103(g) complaints to MSHA without first raising the issues with mine management. The complaint included quotes from the depositions of Bowersox, Payton, and Martin taken in this case. Gov't Ex. 31.

Shortly before the hearing, the Secretary moved to cancel the hearing and submit the case for summary decision, on the ground that the three complaining witnesses were intimidated by the federal court complaint. The Secretary stated, and reiterated at hearing, that the three were not aware at the time of their depositions that their testimony would be used in a separate law suit filed against the union, and subsequently did not wish to testify further. Tr. 16-18.[6] Consequently, at the hearing no witnesses were called by either the Secretary or the Respondents, and Joint Stipulations of Fact and 28 agreed-to exhibits were admitted into the record by the Judge, along with four exhibits admitted over Respondents' objections.

In her decision, the Judge found that miners had a protected right under section 103(g) to make anonymous complaints to MSHA regarding health and safety violations at the five mines, and that under section 105(c), CEO Murray's presentations at the Awareness Meetings constituted unlawful interference with the miners' exercise of that right. She further concluded that in this case the harm to the miners' protected rights was not outweighed by the mine operators' asserted interests. 37 FMSHRC at 2603-08. As relief, the Judge ordered that a number of remedial measures be taken, some of which are at issue on review. *See id.* at 2609.

II.

Disposition

A. Whether Interference Was Established

Section 105(c) of the Mine Act contains multiple references to the prohibition against interference with miners' protected rights. Section 105(c)(1) states that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant, or representative of miners "who believes that he has been discharged, *interfered with*, or otherwise discriminated against," and states that the Secretary's complaint to the Commission may allege "discrimination or interference." 30 U.S.C. § 815(c)(2) (emphasis added). Section 105(c)(3) also permits an

[6] The suit was recently dismissed by the federal district court on the ground that the subject matter of the complaint is subject to arbitration under the CBA. *See Consolidation Coal Co. v. United Mine Workers of America*, Civ. Action No. 1:15CV167, 2016 WL 3248427 (N.D.W.Va. June 10, 2016).

individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3).[7]

The statutorily protected right at issue in this case is the right of a miner, under section 103(g)(1) of the Mine Act, to contact MSHA in writing with concerns about the safety of his or her working conditions and to have MSHA investigate those concerns without the mine operator learning the miner's identity.[8] The legislative history of the Mine Act makes clear that section 103(g) was adopted as a means of protecting miners who make safety-related complaints, in addition to the protection provided by section 105(c). S. Rep. 95-191, at 29, *Leg. Hist.* at 617 ("While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.").

[7] The legislative history of the Mine Act expressly mentions that section 105(c) reaches interference. *See* S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal.").

[8] Section 103(g)(1), 30 U.S.C. § 813(g), states:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

1. The Appropriate Test for Interference

In evaluating whether the miners here had established interference with their statutory rights, the Judge applied the two-step test articulated by Chairman Jordan and Commissioner Nakamura in their opinion in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014) (hereinafter "*Franks* interference opinion").[9] *See* 37 FMSHRC at 2603-08. The test, suggested by the Secretary in his amicus brief in that case and drawn from National Labor Relations Board precedent, provides that interference is established when

> (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.

36 FMSHRC at 2108.[10] Here the Secretary reiterates his support for the test, and the UMWA endorses it.

Respondents argue that the *Franks* interference opinion two-step test is not binding upon the Commission, because it has not been approved by a Commission majority. They contend that until it is, the Commission only has its prior interference cases on which to rely. R. Reply Br. at 2-3 (citing *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th

[9] A majority of Commissioners in that section 105(c)(3) case upheld the decision of the same Judge that the two complaining miners had been discriminated against. However, because the majority split as to the rationale for the affirmance, the decision was vacated and remanded by the court of appeals. *See Emerald Coal Res. LP v. Hoy*, 620 F. App'x 127 (3rd Cir. 2015). The Commission thereupon remanded the proceedings to the Judge "to conduct the interference analysis in the first instance." 38 FMSHRC 226, 228 (Feb. 2016). The Judge applied the same test she applied in this case, and found interference. 38 FMSHRC 799, 804-10 (Apr. 2016) (ALJ). The parties subsequently filed a joint petition for review of the Judge's decision and settled the case. *See* Decision Approving Settlement (May 17, 2016).

[10] The Commission has drawn on case law interpreting analogous provisions of the National Labor Relations Act for guidance in construing Mine Act provisions. *See Sec'y on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69, n.11 (Dec. 2000). Here the analogous provision is section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" rights by the NLRA. Threats of reprisal, force, or promise of benefits can be considered to constitute interference, restraint, or coercion. 29 U.S.C. § 158(c).

Cir. 1985)). We conclude that the *Franks* two-step test is consonant with the Commission's decisions in *Gray* and *Moses* and thus it was not error for the Judge to apply it in this instance.

The language of the first prong of the *Franks* interference opinion test is entirely consistent with *Moses* and *Gray.* In *Moses*, the Commission concluded that the operator's conduct constituted interference because it would "chill the exercise" of miners' protected rights. 4 FMSHRC at 1478-79. Consequently in *Gray*, the Commission analyzed "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of [protected] rights." 27 FMSHRC at 9 (citation omitted).

The second prong of the *Franks* interference opinion two-step test is similarly grounded in Commission precedent. In *Moses*, the Commissioner recognized that an operator may have legitimate and substantial reason for its conduct in question. *See* 4 FMSHRC at 1479 n.8 ("This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem . . . .").[11]

[11] Commissioners Young and Althen do not find it necessary to settle upon a final, specific test of interference in this case. They find that in *Secretary on behalf of Pepin v. Empire Iron Range Mining Partnership*, 38 FMSHRC ____, 2016 WL 3226148, Docket No. LAKE 2015-386-DM (June 6, 2016) (ALJ) (not appealed to Commission), the Commission Judge wrote a thoughtful analysis of the specific wording of section 105(c) in the context of interference claims. Based upon his analysis and the differing management-employee contexts of the NLRA and Mine Act, the Judge formulated a test for interference that would require the Secretary to show the alleged interfering actions were motivated by the exercise of protected rights. In this case, the filing of complaints under section 103(g) clearly motivated the offending portions of the Respondent's presentations. Consequently, the elements of the test formulated in *Empire Iron* are present, and it is not necessary to adopt the *Franks* test. Because of the procedural posture in *Franks*, the issue was not briefed before the Commission in that case — and in fact, the issue never has been fully briefed to the Commission. Under the circumstances, Commissioners Young and Althen do not believe it is appropriate to settle upon a specific test of interference in this case in which either of competing tests would arrive at the same result.

Commissioner Nakamura affirms the Judge's application of the *Franks* text. Regarding the question of whether section 105(c)'s prohibition against discrimination and interference "because of" protected activity" requires a plaintiff to show a retaliatory motive, he observes that the Supreme Court has often recognized that statutes prohibiting discrimination "because of" congressionally designated criteria need not include a motive element. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (stating that proof of discriminatory motive is not needed to demonstrate liability under the Fair Housing Act, even though that statute includes "because of" language, and noting that in prior cases the Court upheld disparate-impact liability under Title VII and the ADEA, which contain similar language); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005). The Court noted that these statutes contained lengthy sentences that, while initially discussing prohibitions on actions taken with discriminatory motivation, also used results-oriented "catchall phrases looking to consequences, not intent." *Tex. Dep't of Hous.*, 135

(continued…)

2. A Reasonable Miner Would View the Operator as Having Interfered with His Rights in This Instance.

a. Miners' Rights Under Section 103(g)

In her decision, the Judge ably summarized the rights that section 103(g) provides miners and their representatives, and the policy reasons behind those rights. *See* 37 FMSHRC at 2604-05. Beginning with the Federal Coal Mine Health and Safety Act of 1969, a miners' representative has had the right, by providing written notice to a representative of the enforcer of that Act (then the Secretary of the Interior), to request an immediate inspection of a coal mine when that miners' representative had reasonable grounds to believe there was a violation of a mandatory health or safety standard, or an imminent danger. Pub. L. No. 91-173 § 103(g); 83 Stat. 742, 750.

With the subsequent enactment of the Mine Act, this right was extended to miners lacking representatives, and to include alleged violations of the Mine Act itself. The legislative history of the Mine Act emphasized that the right to request an agency inspection was based on the firm 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. No. 95-181, at 30 (1977), *reprinted in Legis. Hist*. at 618.

The Coal Act also provided that a miners' representative could request that his name, as well as the names of any miners referred to in the notice, not be included in the copy of the request to be provided to the mine operator. The Mine Act strengthened this right to expressly state that "[t]he name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification." 30 U.S.C. § 813(g)(1). The legislative history of the Mine Act stressed the importance of maintaining confidentiality:

> The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the compliant not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict

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[11] (…continued)
S. Ct. at 2518-19. The shift in emphasis from the intent of the actor to the consequences of the actor's actions was signaled by the use of the word "otherwise" and implied that intent was not a factor in the analysis. *Id.* Commissioner Nakamura believes that, in light of the text and purpose of section 105(c), this line of Supreme Court cases provides support for the *Franks* test.

> confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

S. Rep. No. 95-181, at 29, *reprinted in Legis. Hist*. at 617; *see also* III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 43, at 8 (2003), *available at* http://arlweb.msha.gov/REGS/COMPLIAN/PPM/PMVOL3A.HTM#3 ("Information received about violations or hazardous conditions should be brought to the attention of the mine operator without disclosing the identity of the person(s) providing the information.").

The reasoning behind this right to confidentiality is considered so persuasive that the Commission adopted a version of the right for Commission proceedings, recognizing that witnesses who qualify for it should generally be protected by the informant's privilege. *See Sec'y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524-25 (Nov. 1984); *see also* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 ("A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.").

The court in *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368 (7th Cir. 1989), explained the informant's privilege in a way that is in many respects applicable to miners cooperating in mine safety investigations:

> The doctrine of the informer's privilege is not a recent phenomenon, having its roots in the English common law. . . . The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. . . . The privilege recognizes the responsibility of citizens to cooperate with law enforcement officials and, by providing anonymity, encourages them to assume this responsibility. With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers. The threatened reprisal may be physical, but the privilege also recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism. . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Id. at 372 (citations omitted).

In light of the foregoing, we agree with the Judge in this case that "[i]f confidentiality is not guaranteed, a miner is forced to weigh . . . competing interests when deciding whether to report a dangerous condition to MSHA. For a miner to be truly free to exercise his statutory

rights under section 103(g), then, confidentiality is essential." 37 FMSHRC at 2605; *see also Moses*, 4 FMSHRC at 1479 (concluding operator interfered with miner's exercise of section 103(g) rights when it repeatedly and accusatorily questioned him as to whether he was the source of complaint to MSHA); *Franks*, 38 FMSHRC at 2095 (opinion of Comm'rs Young and Cohen) (stressing that substance of the section 103(g) confidential reporting right must be preserved, lest it be rendered illusory).

b. Respondents' Interference with Miners' Section 103(g) Rights

In her decision, the Judge applied the first prong of the *Franks* interference opinion test — whether Respondents actions 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. Citing the PowerPoint slides from the Awareness Meetings that miners at the Marshall County Mine were required to attend, the Judge was persuaded that a reasonable miner would have left a presentation thinking that mine management was hostile to the section 103(g) complaint process, particularly with regard to how miners were exercising their section 103(g) right at the mine at that time. The Judge found that a reasonable miner would have also concluded that the Marshall County Mine had established a rule requiring that any section 103(g) complaint be reported to mine management as well, thereby vitiating that miner's right to make such complaints without exposing his or her identity to the mine operator. 37 FMSHRC at 2605-07. Her conclusions applied to the other four mines as well. *See id*. at 2600 n.1 (slides presented at other mines were largely the same, and the ones addressing miners' exercise of section 103(g) rights were identical).

Respondents contend that the Judge failed to properly apply the "totality of the circumstances" test, and thus her finding on the first prong of the *Franks* interference opinion is not supported by substantial evidence.[12] They argue that the overall tenor of the Awareness Meetings reflected the need for mutual trust between miners and mine management, so that the two sides could cooperate to keep the mine safe and economically competitive. According to Respondents, fostering such cooperation in the area of mine safety is consistent with the Mine Act, which calls for involvement of miners and their representatives in the process.

While certain of the slides at the Marshall County Coal Awareness Meetings stressed the subject of miner-management cooperation (Gov't Ex. 4 at slides 3, 6, 48-52, 71-75), the common subject matter of the slides presented there involved the issues that Respondents believed were preventing that mine and other unionized mines from being competitive in the present energy markets, including with non-union mines. The slides outlined Respondents' belief that if such impediments continued, Marshall County miners would eventually lose their jobs in an area in which there is no alternative employment paying nearly as much. *Id.* at slides 14-18. In addition to discussing political, regulatory, and outside economic forces, the slides addressed labor-

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

related topics, such as the inefficiency and lack of productivity of the mine's continuous miner sections, downtime with belts and their slow moves within the mine, poor relations with the UMWA, miner drug and alcohol abuse, and excessive employee absences. *Id.* at slides 34-51, 53-60.

This led into the three slides addressing section 103(g). The first slide stated, in a large font, that "You Must Report Unsafe Situations and Compliance Issues to Management so that they Can Be Addressed By Management." The next slide then stated, in bullet point format, that miners had the right to make 103(g) complaints to MSHA, and that the company "will never interfere with this in any way," but that miners are "Required to Make the Same Report to Management." The final of the three slides alleged that a high percentage of the section 103(g) complaints were resulting in MSHA finding no violations. This supposedly indicated that miners were using the section 103(g) process to get back at management for issues other than safety, which diluted mine and MSHA resources, hurt the company, and threatened the survival of miners' jobs. Many of the underlined terms were highlighted in red or yellow. *Id.* at slides 61-63.

Respondents attack on several fronts the Judge's conclusion that the presentation of the three slides constituted interference with their miners' section 103(g) rights. Primarily they question how the Judge could have found that "requiring miners to also inform management of complaints" made to MSHA pursuant to section 103(g) "removes th[e] guarantee of confidentiality." *See* 37 FMSHRC at 2606.

The answer to that is simple. Absent Respondents having a reliable system by which a miner could, without revealing his identity, inform mine management of the conditions that led the miner to make a section 103(g) complaint to MSHA — evidence of which is entirely missing from this record — basic common sense dictates that management can "put two and two together." Respondents could readily learn the identity of a miner making a section 103(g) complaint when that miner "make[s] th[at] same report to management" under Respondent's announced "requirement." Gov't Ex. 4 at slide 62.

Respondents point to the slide that included the statement that they would not interfere with section 103(g) rights (No. 62). That slide, however, was bookended by information from which miners could easily conclude that their right to make confidential section 103(g) complaints was being substantially undercut, and that Respondents viewed the issue of miner section 103(g) complaints to MSHA as one that could have severe consequences for miners' continued employment. Where an interference claim is made, examining in isolation the literal meaning of the language used is contrary to the totality of the circumstances test. *See Gray*, 27 FMSHRC at 8 ("Whether an operator's . . . comments concerning a miner's exercise of a protected right constitute coercive . . . harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'") (quoting *Moses*, 4 FMSHRC at 1479 n.8); *see also Gray*, 27 FMSHRC at 10.

Respondents also argue that what was discussed at the Awareness Meetings did not rise to the level of a company "policy" with respect to section 103(g) complaints made to MSHA. Under the totality of the circumstances test, however, we cannot ignore that all of the Awareness Meetings in question were personally conducted by CEO Murray. Jt. Stips. 20-29. In *Gray*, the

Commission stated that one of the most important circumstances in any interference analysis is the position within the company that the communicator of the statements alleged to constitute interference holds relative to the recipients of the communications. 27 FMSHRC at 10.

That consideration takes on even greater significance in a case where the operators' CEO is traveling to the various mines and in essence putting on a PowerPoint-backed "roadshow" that all miners at each mine are required to attend. Presumably, a CEO who takes the time to hold 10 to 20 meetings, each lasting two or more hours, is serious about the points he makes during those meetings. *Cf. Gray*, 27 FMSHRC at 11 n.10 (locus of statements can be important contextual factor).

Respondents nevertheless contend that its miners, being union members, could have confidently ignored the import of CEO Murray's presentation, because the terms of the CBA require that Respondents negotiate with the local union any new work rule, such as a reporting requirement for section 103(g) complaints outlined in the Awareness Meetings. The Judge rejected this argument below on the ground that "[t]he relevant perspective on the issue is that of the reasonable miner, and I find that a reasonable miner would have thought that a statement made by the CEO of the company at an all-staff mandatory meeting constituted binding company policy." 37 FMSHRC at 2607.[13]

Respondents continue to maintain that their miners would have ignored any new reporting policy, but we find the Judge's reasoning persuasive. Apart from the clear contradiction this position poses to that taken by the Respondents when they instituted their related federal court suit,[14] to accept Respondents' argument would be to assume that an average miner at the mines in question would be so confident in his or her understanding of the applicable CBA that the miner would ignore the clear statements made in the slide presentation given by the company's CEO. Under a "totality of the circumstances" approach, it is simply unreasonable to assume that degree of confidence on the part of a miner.

Moreover, the new reporting policy would only be declared a new work rule under the CBA after the dispute over it had been resolved through the grievance procedure of the CBA. As can be seen from the arbitration decisions appended to the UMWA's brief, under this procedure a miner seeking to vindicate his section 103(g) right by ignoring the reporting requirement would have to wait weeks, if not months, for a decision upholding his position. During that time, miners choosing to ignore Respondents' requirement that they report to management those conditions

[13] Respondents object to the Judge using a "reasonable miner" standard in this instance on the ground "that all of named Complainants in this matter are officials of the UMWA, and have experience and knowledge of not only the provisions of the [CBA], but the actual rulemaking process." R. Br. at 10 n.6. However, each of the complaints those officials filed with MSHA plainly state that the complaints were being brought "on behalf of all miners at the" mine in question. Gov't Ex. 2.

[14] As the Secretary points out, Respondents alleged in the federal court complaint that the CBA already establishes the position Respondents took at the Awareness Meetings with regard to reporting safety concerns to management.

that prompt them to make section 103(g) complaints to MSHA would be faced with uncertainty. Further, miners would be risking discipline, including loss of pay they may never recover, for failing to comply with Respondents' reporting policy. Expecting miners to take such a risk is patently unreasonable on the part of the Respondents.

In this instance, the chilling effect of the Respondents' reporting requirement was amplified by the PowerPoint slide unequivocally communicating that if the miners did not change their use of section 103(g), the consequence could be loss of the miners' jobs. This slide was not an outlier in the presentation. Many of the slides question whether, without changes, the five mines can continue to employ their present miners. Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59. With regard to the miners' exercise of section 103(g) rights, it was stated that, when a section 103(g) complaint was made but MSHA did not issue a citation, "[i]t Hurts your Company and Job Survival." *Id.* at slide 63.

It would have been quite reasonable for Respondents' miners to conclude that management was linking use of section 103(g) by miners to the future of employment at the mine. Such "threats of reprisal" were specifically identified in the legislative history of section 105(c) as a form of unlawful interference. S. Rep. 95-191, at 36, *reprinted in Leg. Hist.* at 624. Thus, in *Gray*, the Commission quoted the Supreme Court's holding that, in the context of an interference case under the NLRA, the analysis "must 'take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'" 27 FMSHRC at 10 (quoting *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 617 (1969)). Tying the survival of employment opportunities at the mine to use of the section 103(g) process only when it is vindicated by the issue of a citation by MSHA would tend to discourage a reasonable miner from making a section 103(g) complaint in the first instance.

Consequently, we conclude that three section 103(g) PowerPoint slides shown to the Respondents' miners, in the context of the many other slides included in the Awareness Meeting presentations, provide ample evidence to establish Respondents' interference with their miners' rights under section 103(g) to make confidential safety complaints to MSHA. Nothing in the presentations to miners explained how the confidentiality of their section 103(g) complaints could be preserved when miners were expected to make the same report to mine management. Without the guarantee of confidentiality, the protection section 103(g) provides miners becomes little more than a fiction. The Judge was thus correct in concluding that Respondents' PowerPoint presentations would tend to chill the exercise of section 103(g) rights by miners.

In light of our affirmance of the Judge on these grounds, we need not consider the further evidence the Judge considered in this case.[15] Specifically, she found additional evidence of interference from the recording made of CEO Murray. She characterized the tone of his remarks as "serious and at times threatening," and found that he had stated that if miners did not stop disagreeing over issues at the mine and using the section 103(g) process as a way of indicating displeasure, the mine would be closed. 37 FMSHRC at 2606.

By that point in the presentation, however, the slides had made it abundantly clear that closure of the Marshall County Mine could result if certain matters at the mine did not change. Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59; *see also* 37 FMSHRC at 2606 ("Throughout the two-hour presentation, miners were repeatedly reminded that their jobs, futures, and family livelihoods were at risk."). The frequency of the miners' use of section 103(g) was just one of those matters. Gov't Ex. 4, at slide 63. Because the slides alone constitute substantial evidence supporting the Judge's decision that the first prong of the *Franks* interference opinion test had been met, we need not address Respondents' evidentiary arguments regarding the recording.

3. Respondents' Justification for the Reporting Policy Does Not Outweigh the Resulting Interference with Miners' Rights.

Under the second prong of the *Franks* interference opinion, an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." 36 FMSHRC at 2108. The Judge correctly identified Respondents' proffered reason as their right to be informed of unsafe conditions at their mines. 37 FMSHRC at 2607. The *Franks* opinion quoted *Moses*, where the Commission stated that an operator may comment upon a miners' exercise of a protected right when it is "necessary to address a safety or health problem." 36 FMSHRC at 2106 (quoting 4 FMSHRC 1479 n.8). Concern for mine safety or health problems clearly can provide a legitimate motivation for an operator's actions. However, our review of the record does not reveal any evidence that demonstrates that the policy at issue here served the purported goal.

Moreover, Respondents' argument that their justification for this program is supported by Commission case law is unavailing. They maintain that any reporting requirement established at the Awareness Meetings is consistent with the situation in the Commission's decision in *Secretary on behalf of Pack v. Maynard Branch Dredging Co*., 11 FMSHRC 168 (Feb. 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990). In *Pack*, the Commission found that a mine operator did not discriminate against a mine security guard in violation of section 105(c) of the Act when, in terminating him, the operator took into account that the guard had not notified it of the

[15] The Judge accepted into the record the recording of CEO Murray's remarks at the Marshall County Mine, edited to omit the recording that occurred before and after the presentation, along with a transcript of that portion of his remarks that addressed the section 103(g) complaints being made to MSHA by Marshall County miners. Gov't Ex. 29, 30. With regard to the recording, the Judge had earlier ruled that the redacted version of the recording was admissible, after listening *in camera* to a complete version of the recording. Order Denying Motion to Compel (July 20, 2015) (ALJ); Tr. 23-27.

dangerous mine condition posed by improperly stored explosives. The guard had instead waited more than eight hours after discovering the explosives and then brought the circumstances of their storage to the attention of MSHA, which cited the operator. *Id.* at 169, 171-73.

Pack is distinguishable from the present case because it relied heavily on the fact that Pack was a security guard and that one of his primary duties was to report security breaches to his employer. *Id.* at 171. Moreover, the Commission observed that "[t]he company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-à-vis MSHA[,] and the Secretary's position fail[ed] to take into account an operator's right to require the reporting of dangerous conditions." *Id*. at 173.

That right of an operator clearly remains legitimate for purposes of an interference analysis under section 105(c), and consequently was affirmed in the *Franks* interference opinion. *See* 36 FMSHRC at 2116 (discussing operators' right under *Pack* to require that miners report "dangerous conditions"). Indeed, it appears from the record that a version of the right is reflected in the CBA governing the relationship between Respondents and their miners. *See* Gov't Ex. 31, at 6 (quoting CBA, an excerpt of which was appended as Exhibit 2 thereto, to require any miner to "immediately notify his supervisor" when he "in good faith believes that he is being required to work under" conditions that are "abnormally . . . dangerous to himself . . . which could reasonably be expected to cause death or serious physical harm before such condition . . . can be abated").

At the same time, however, the Commission in *Pack* was careful to articulate that the right must be accommodated with miners' rights under section 103(g):

> It is important to point out what . . . did not happen here. Maynard Branch did not have a policy that prohibited miners from reporting dangerous conditions to MSHA, a policy that clearly would have been prohibited by the Mine Act. Nor did Maynard Branch have a policy that required miners to notify the company prior to contacting MSHA. . . . . [Thus, t]he specter raised by the Secretary of miners being intimidated from exercising their rights under sections 103(g) or 105(c) of the Mine Act simply is not presented by this case.

11 FMSHRC at 172-73.

In contrast, this case plainly presents an instance in which miners may be "intimidated from exercising their rights under section 103(g)." That is due to both the parameters of Respondents' reporting policy and the circumstances in which it was established. The reporting requirement was not in any way limited to just "dangerous conditions." According to the slide presentation, it extended to "Compliance Issues" and "103(g) Complaints." Gov't Ex. 4 at slides 61-62. Section 103(g) complaints can be brought not just when a miner perceives a dangerous situation, but when he reasonably believes that any violation of the Act or a mandatory health or safety standard exists. 30 U.S.C. § 813(g)(1). Thus, the Judge here correctly observed that unlike

in *Pack*, the Respondents' policy placed special emphasis on conditions that miners chose to report to MSHA. 37 FMSHRC at 2608.

Even when an employer establishes a justification under the second step, the operator's actions must be "narrowly tailored" to promote that justification as part of the balancing of the operator's interests with the protected rights of employees. *Franks*, 36 FMSHRC at 2118 n.14 (citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007). The evidence establishes that Respondents did not narrowly tailor their reporting policy to avoid undue interference with the rights of miners. Nothing was presented that indicated that the Respondents were prepared, for instance, to institute a reporting system that preserved a miner's anonymity from the mine operator, as section 103(g) provides with respect to complaints made to MSHA. Indeed, based on the method in which the policy was communicated, it appeared that preserving miner anonymity was not a concern of Respondents at all. The reporting policy as communicated to miners made no mention that it included measures designed to preserve the miners' anonymity guaranteed by section 103(g). In fact, the Awareness Meetings left the opposite impression, when it was stated that, with regard to section 103(g) complaints, miners are "Required To Make the Same Report to Management." Gov't Ex. 4, at slide 62. By requiring miners to make the "same" report to Respondents as miners to do to MSHA, Respondents would entirely eliminate the critical anonymity component in section 103(g).

In addition, the Respondents justified the reporting policy to miners on the ground that "High Percentages" of section 103(g) complaints were not resulting in citations to the Respondents, which indicated to Respondents that miners were using their section 103(g) rights as a way of addressing matters other than mine safety. *Id.* at slide 63. Without more in the way of evidence supporting this claim, we can only conclude that Respondents were motivated more by the effect that Respondents' reporting policy would have on miners than in actually objectively justifying the policy.

If any question remained at that point in the Awareness Meetings as to whether Respondents were trying to intimidate miners from using section 103(g), it was answered by Respondents' statement to them that, as the right was being used presently, it threatened those miners' "Job Survival." *Id.* We thus agree with the Judge that the foregoing statements "went beyond what was necessary to establish a safe environment at the mine. Rather, they were calculated to discourage miners from using the MSHA complaint process." 37 FMSHRC at 2608.

For the foregoing reasons, we hold that Respondents have failed to justify their actions here with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of miners' protected rights.

B. The Judge's Decision to Dismiss the Second Marshall County Count

The Secretary's complaint in these cases charged Respondents with one count of interference for promulgating their coercive reporting requirement at each of the five mines. It included an additional count for threatening reprisal and mine closure at the Marshall County Mine. Upon her finding that the additional count "involves the same facts and analysis" as the

Marshall County Mine reporting requirement count, the Judge held that the additional count merged into the reporting requirement count and dismissed the additional count. 37 FMSHRC at 2609. The Commission granted the Secretary's petition challenging the Judge's dismissal of the second charge of interference against the Marshall County Mine.

The Secretary contends that threats of closure and other forms of reprisal are qualitatively different from an unlawfully imposed rule and thus in this case merits a separate charge of interference against the Marshall County Mine. The Secretary argues that in dismissing the separate threat count, the Judge in essence held for the Respondents on an affirmative defense they did not raise. Respondents counter that the Judge's dismissal was well within her authority to manage the docket before her.

The Secretary's parsing of the evidence does not support overturning the Judge's merging of the second count of interference with respect to the Marshall County Mine into the first. As the Awareness Meeting slides indicate, miners at all five of the mines were threatened with reprisal for exercising their section 103(g) rights. Gov't Ex. 4, at slide 63; 5, at slide 58; 6, at slide 59; 7, at slide 58; 8, at slide 58. In addition, each of the presentations contained numerous statements threatening job losses should miners not cooperate on various issues. *See, e.g.*, Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59. Such threats were also made with respect to the miners exercising section 103(g) rights at each of the mines. Gov't Ex. 4, at slide 63; 5, at slide 58; 6, at slide 59; 7, at slide 58; 8, at slide 58.[16] Of course, broaching the subject of mine closure is another way of threatening miners' jobs.

Accordingly, we find that the evidence submitted regarding Respondents' actions at the Marshall County Mine was not that different from the evidence submitted regarding their actions at the other four mines. In these circumstances, we conclude that the Judge, having considered that evidence, did not err in finding that a separate second count with respect to the Marshall County Mine was unjustified.[17]

[16] Below, the Secretary, in arguing in support of the second count against the Marshall County Mine, cited the Awareness Meetings' inclusion of the slide mentioning "job survival." S. Post-Hearing Br. at 17. A version of that slide was used not just at the Marshall County Mine, but at all five mines.

[17] We do not agree with the Secretary's characterization here that the Judge raised an affirmative defense on behalf of the Respondents. The Judge's dismissal was not based on separate facts establishing a defense to the charge that Respondents had threatened reprisal against the Marshall County miners, or that such conduct could not violate section 105(c) as a matter of law. Rather, it was based on her view that the Secretary's case, with respect to the Marshall County Mine, could not be broken down to support two separate counts of interference as cleanly as the Secretary contended it could.

C. The Monetary Penalty Issues

The Secretary proposed a civil penalty of $20,000 for each alleged violation. After addressing all six section 110(i) penalty criteria,[18] the Judge held that "a high penalty is appropriate and I assess a penalty of $30,000.00 for each of the five violations" found to have been established. 37 FMSHRC at 2609-10. The Judge found that Respondents are large operators with no history of interference violations, and cited to the stipulations, where the parties agreed that neither the Secretary's proposed penalty of $20,000 for each of six violations, nor an increase in each penalty to the maximum of $70,000, would affect Respondents' ability to continue in business. *Id.* at 2609; Jt. Stips. 34, 35. In finding that interference with a miner's right to make confidential complaints pursuant to section 103(g) to be "a very serious matter that undermines the safety of the mine," the Judge addressed the gravity criterion, and further found that Respondents' negligence was high in this instance. 36 FMSHRC at 2609-10.

"Penalties assessed by Commission Judges can be greater than, less than, or the same as those proposed by the Secretary. . . . When it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed." *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151- 52 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000)).

The Judge's increase in the penalties for the individual mines by 50 percent is best explained by her conclusion that

> Respondents did not demonstrate good faith in abating any violation. Instead, they exacerbated the situation by filing a complaint in federal court that named the three individuals the Secretary had named as witnesses in this case. The timing of the filing of the complaint, along with the fact that the deposition testimony taken in this case was attached, tends to indicate that the mine attempted to intimidate the witnesses. The filing of a legal action is an extension of the intimidation at Murray's awareness meetings and shows that Respondents did not wish to make any good faith effort to eliminate the interference.

37 FMSHRC at 2609-10.

Over Respondents' objections, the Judge had accepted into the record the federal court complaint, of which the Judge took judicial notice (Gov't Ex. 31), along with a press release announcing the filing of the suit, put out by Murray American Energy (Gov't Ex. 32). Tr. 27-29. Respondents continue to challenge here the admissibility of that evidence.

[18] In assessing civil penalties, the Commission must consider 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).

Commission Procedural Rule 63(a) governs the admissibility of evidence in Commission proceedings, stating that "relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). A Judge's evidentiary rulings are reviewed under an abuse of discretion standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC at 1366 (citing *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

The Judge in this instance plainly did not abuse her discretion in admitting the two exhibits. The court complaint is a publicly-filed document regarding a dispute over the reporting of mine safety and health hazards at Respondents' mines, an issue that is at the heart of this case. It involves the CBA between Respondents and the UMWA, representing the Respondents' miners. As discussed earlier, Respondents raised the terms of the CBA as relevant to this proceeding.

In addition, the Secretary submitted the federal court complaint as evidence of animus on the part of Respondents. Tr. 27. Respondents contend that operator animus towards the exercise of miner rights is not a consideration in interference cases, citing *Gray*, 27 FMSHRC at 8 n.6. *Gray*, however, only stands for the proposition that evidence of such animus is not necessary to establish interference with those rights. Evidence of operator animus nevertheless remains relevant under the "totality of the circumstances" approach to determining whether interference with miners' rights occurred.[19]

Respondents take issue with the conclusion the Judge reached with regard to the good faith abatement penalty criterion, in light of the filing of the federal court complaint. The criterion at issue requires that the Commission consider "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). In reviewing the Judge's factual findings supporting the consideration of the various penalty criteria, the Commission applies the substantial evidence test. *Hubb Corp*., 22

[19] As discussed in their separate opinion, Chairman Jordan and Commissioner Cohen join in affirming the Judge's ruling on the admissibility of the federal court suit exhibits. Slip op. at 22-23. Commissioners Young and Althen would reverse the Judge on this issue. They note that on the day of the hearing, the Judge did not have any evidence or briefing regarding the merits of the federal court complaint filed by Respondents. Without doubt, access to the courts is a fundamental First Amendment right. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983). When disputes arise, all parties have a right to pursue their positions vigorously. Unless the filing of a court complaint is demonstrated to be an unwarranted attempt to harass, it is inappropriate to consider such a filing as facial evidence of animus. Here, there was no evidence that the suit was filed in bad faith. Further, the parties — a major coal operator and the international union representing its miners — are relatively sophisticated, and the suit was grounded on the statute governing their ongoing bargaining relationship. Therefore, it was not relevant to a showing of animus, and Commissioners Young and Althen would rule that the admission of the exhibits was error.

FMSHRC 606, 609 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000).

The Judge considered the filing to be nothing more than an extension of the Respondents' interference with miners' protected rights.[20] She drew an inference that Respondents' sole motivation for the filing of the complaint was to intimidate the three witnesses scheduled to testify at the hearing in this case. Inferences drawn by a Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (citations omitted).

The Judge raised the issue of Respondents' good-faith abatement sua sponte, yet never requested the parties to develop the evidentiary record or even submit argument regarding the extent, if any, of Respondents' "attempt[s] to achieve rapid compliance after notification" of the Secretary's interference complaint against them. We note that the Secretary's complaint was filed in March 2015, and thus six months prior to the filing of the federal court complaint.

Moreover, the Secretary stipulated that, as of September 2015, he was unaware of any of Respondents' miners having been investigated or disciplined for violating the reporting policy in the seventeen months since it was first announced at the Marshall County Mine Awareness Meetings. Jt. Stips. 20, 36-37. This was pertinent to the issue of Respondents' good faith, and thus should have been considered by the Judge. *See Sec'y on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 555, 560 (Apr. 1996) (under substantial evidence standard, Judge must consider all evidence relevant to good faith abatement of discrimination violation prior to reaching conclusion on the criterion). Yet she made no mention of it in her "good-faith abatement" analysis.

Given these circumstances, we cannot conclude that the inference the Judge drew in this instance provides sufficient evidence in support of her finding of a lack of good faith on Respondents' part in abating the violation of section 105(c). The Secretary suggests remand to the Judge for further record development, particularly on the issue of whether the federal court suit was baseless or otherwise a sham. He contends that the federal suit may be one of those "objectively baseless retaliatory lawsuits [that] fall outside of the protection of the First Amendment." *See Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1106 n.3 (May 2014) (Comm'rs Young and Cohen, dissenting) (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 530-31 (2002)).

In light of the federal court's recent dismissal of the suit on jurisdictional grounds, in favor of permitting the dispute to be decided by the CBA's arbitration procedure, we do not find the Secretary's solution to be feasible at this time. Consequently, we are vacating the Judge's

[20] To the extent that the Judge, when she stated that three complainants in this case had been "named" in the federal court complaint meant that the three were listed as defendants to the complaint, she was mistaken. Only Bowersox was named as a defendant; the other two complainants here, Payton and Martin, were not named as defendants, though excerpts from their depositions in this case appear in the federal complaint. Gov't Ex. 31, at 1, 8-10.

penalty assessments and remanding the case to her to reassess penalties without considering Respondents' filing of the federal court suit.[21]

D. The Details of the Statement to Be Read to Miners

As part of the remedy in this case, the Secretary requested that the Judge order a Murray Energy corporate officer to read a notice to all miners regarding section 105(c) violations, and to order the company to mail that notice to all miners and post it at the mine for one year.

The Judge, relying on section 105(c)(2) of the Mine Act, which authorizes the Commission to require a person who has violated section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate," 30 U.S.C. § 815(c)(2), granted the Secretary's request in part. The Judge required Respondents "to post for one year on a document that is at least 8 1/2 by 11 inches in a public and conspicuous place at each mine a notice to all miners detailing the miners' rights pursuant to section 103(g) of the Act and stating that there is no requirement or expectation that miners will make the same complaint to management." She further required CEO Murray "to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA." 37 FMSHRC at 2609.

Respondents challenged the Judge's remedial order on a number of grounds, some of which have been resolved due to a partial stay issued by the Commission. *See* Order dated Feb. 10, 2016. The sole remaining issue involves the details of the "prepared and approved statement" CEO Murray is required to read to miners. The Secretary agrees with Respondents that the Judge's decision with respect to this aspect of the remedy is not clear as to who should prepare and approve the statement Murray is to read,. The Secretary suggests that he prepare it, and that, if necessary, the Judge resolve any disputes and approve the statement. In reply, Respondents complain that this will permit the Secretary to include in the statement material that is beyond the scope of what the Judge's order described. In sur-reply, the Secretary details what he views as the shortcomings of the notice that the Respondents were required to post, and maintains that the Commission needs to clarify the manner in which the statement is to be "prepared and approved."

While the Secretary's proposed solution has merit, because this case is being remanded, we will permit the Judge to further clarify what she meant in requiring CEO Murray to read the "prepared and approved" statement. The Judge can then structure the proceedings on remand accordingly and in light of prior experience in this case.

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[21] If the Secretary agrees with the Judge that the filing of the suit constituted an extension of Respondents' interference with miners' protected rights, filing one or more additional complaints alleging that would seem to be a more appropriate method of vindicating miners' rights in this instance. In fact, the Judge suggested as much at hearing, when she stated that the circumstances surrounding the federal court complaint could be the subject of a separate interference complaint by the UMWA to MSHA. Tr. 42-43.

III.

Conclusion

For the foregoing reasons, we (1) affirm the Judge's decision upholding five counts of interference against Respondents and dismissing the second count of interference against the Marshall County Mine; (2) vacate the penalties she assessed for those counts; and (3) remand the penalty determinations and consideration of the statement CEO Murray is to read to miners for further proceedings consistent with this decision.

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

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

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

Chairman Jordan and Commissioner Cohen, concurring in part and dissenting in part:

We join our colleagues in affirming the Judge's decision that the Respondents interfered with the miners' rights in violation of section 105(c) of the Mine Act. We agree with the Judge's application of the test for interference articulated by Chairman Jordan and Commissioner Nakamura in *UMWA on behalf of Franks v. Emerald Coal Resources, Inc.,* 36 FMSHRC 2088, 2104-19 (Aug. 2014).[22] In addition, we join the majority in affirming the Judge's decision to dismiss the second count of interference against Marshall County Mine, and in directing the Judge to clarify what she meant in requiring CEO Murray to read the "prepared and approved" statement. We write separately, however, because we would affirm the penalties assessed by the Judge in this case.

The Secretary proposed a penalty of $20,000 for each violation. The Judge assessed a penalty of $30,000 for each of the five violations. 37 FMSHRC at 2609-10. Reviewing the statutory criteria for penalty assessments in section 110(i) of the Mine Act against the Judge's findings in this case, we find that the penalties she assessed did not constitute an abuse of discretion.

Congress has conferred broad discretion upon the Commission and its Judges when assessing penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). In concluding that the operators' actions "were calculated to discourage miners from using the MSHA complaint process," 37 FMSHRC at 2608, and in emphasizing that "interference with the right to make anonymous complaints [is] a very serious matter that undermines the safety of the mine," *id.* at 2610, the Judge was well within the bounds of her discretion to significantly raise the penalty. She carefully set forth her findings on all six of the 110(i) criteria (finding, for instance, that the mines and Murray entities were large operators, *id.* at 2609, and determining that the level of negligence was high. *Id.* at 2610).

Our colleagues, however, insist on remanding the case to the Judge. They believe she erred because, after admitting evidence of a federal court complaint that named the three individuals the Secretary had identified as witnesses in the case before her, she drew an inference that Respondents' only reason for filing the lawsuit was to intimidate these three witnesses. She found this to be evidence to support a finding of a lack of good faith in abating the section 105(c) violation.

In analyzing this question, we turn first to the issue of the admissibility of the evidence of the court suit, as that evidence plays a key role in our colleagues' decision to vacate the penalty

[22] Chairman Jordan joins with Commissioner Nakamura's footnote 11 in the majority opinion. Slip op. at 7 n.11.

Because Respondents did not challenge the application of the *Franks* interference test in the proceedings before the Judge, Commissioner Cohen would apply the *Franks* test in this case. Absent briefing from the Secretary, the regulated community and miners, however, Commission Cohen does not believe it prudent to settle upon a specific test for interference under the section 105(c) of the Mine Act at this time.

assessments. We agree that the Judge did not err in admitting into the record the federal court complaint and a press release announcing the filing of the suit, distributed by Murray American Energy. We review such rulings under an abuse of discretion standard. *Shamokin Filler Co*., 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1549 (2015). Under our fairly flexible evidentiary standards, Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), we discern no abuse of discretion in the Judge's ruling.

Turning to the Judge's use of this evidence to support her finding of a lack of good faith abatement, we are unable to agree that vacating and remanding her penalty determinations is warranted. As the Judge noted in her explanation of her penalty assessment, the timing of the filing of the complaint, together with the fact that the deposition testimony in the Mine Act case was included, would lead one to believe that the mine was trying to intimidate the witnesses.[23]

Unlike our colleagues, we consider this a permissible and inherently reasonable inference, with a logical and rational connection between the fact of the federal court case filing and the Judge's inference. The lawsuit was filed on the Friday before the Tuesday when the Commission hearing was scheduled to begin. The lawsuit named Ron Bowersox as a defendant and quoted the deposition testimony of Michael Payton and Ann Martin in this case. Bowersox, Payton, and Martin had all been identified by the Secretary as witnesses in the scheduled Commission hearing. Interestingly, the other three complainants in the Commission case — Thomas McGary, Rick Baker, and Raymond Copeland — were not identified as witnesses on the Secretary's witness list, nor were they mentioned or quoted in the Respondents' federal court complaint. *See* Gov't Ex. 31; S. List of Witnesses & Exhibits. It was certainly reasonable and permissible for the Judge to draw the inference that the Respondents' federal court lawsuit represented a lack of good faith in abating the violation.

We further note that the Judge's increase of the penalties was not predicated solely on the Respondents' filing of the federal court complaint. Near the end of her opinion, the Judge stated, "I find interference with the right to make anonymous complaints to be a very serious matter that undermines the safety of the mine. The negligence is high." 37 FMSHRC at 2610. Negligence is one of the factors identified for the assessment of penalties in section 110(i) of the Mine Act. The Judge's finding of high negligence in this case is based on the Respondents' acts of interference with the right of miners to make anonymous complaints under section 103(g) of the Mine Act. These acts occurred in the Awareness Meetings which constitute the basis for the finding of interference which the Commission affirms, not in the filing of the lawsuit. The Judge's findings

[23] Our colleagues are incorrect in asserting that the Judge concluded that the "sole motivation" for the Respondents' filing of the complaint was "to intimidate the three witnesses scheduled to testify." Slip op. at 19. The Judge did not state that intimidation was the "sole reason" for the filing of the lawsuit. 37 FMSHRC at 2609.

of high negligence, together with the other factors she considered separate from the lawsuit, justify her increase in the penalties to $30,000 each.

For the above reasons, we would affirm the penalties assessed by the Judge, and thus respectfully dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Appendix A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RICK BAKER and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	Docket Nos. WEVA 2015-584-D WEVA 2015-585-D WEVA 2015-586-D WEVA 2015-587-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANN MARTIN and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of RAYMOND COPELAND and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

MONONGALIA COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of MICHAEL PAYTON and RON
BOWERSOX

and

UNITED MINE WORKERS OF
AMERICA INTERNATIONAL UNION,
Intervenor

v.

MARION COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
and MURRAY ENERGY CORPORATION

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2011-283
NEWTOWN ENERGY, INC.	

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

DECISION

BY THE COMMISSION:[1]

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a section 104(d)(1) citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Newtown Energy, Inc. ("Newtown"). The citation alleges that Newtown violated 30 C.F.R. § 75.511 by failing to lock out a shuttle car's[2] trailing cable cathead while it was being physically inspected and repaired.[3]

[1] A majority of the Commissioners joins in each section of this opinion, and therefore it constitutes the Commission's decision in this case. A footnote at the beginning of each section and subsection explains which Commissioners join in that section.

[2] A shuttle car is a vehicle on rubber tires or continuous treads used to transfer material such as coal and ore, from loading machines in trackless areas of a mine to the mine's main transportation system. Am. Geological Institute, *Dictionary of Mining, Minerals, & Related Terms* 504 (2d ed. 1997).

[3] 30 C.F.R. § 75.511 states:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

The Administrative Law Judge affirmed the violation but determined that the gravity of the violation and the negligence of Newtown was less than alleged. 35 FMSHRC 2494 (Aug. 2013). The Judge vacated the "significant and substantial" and "unwarrantable failure" determinations in the citation and reduced the negligence to "low." The Secretary filed a petition for discretionary review of the Judge's negligence, gravity, "significant and substantial," and "unwarrantable failure" determinations, which we granted.

For the reasons that follow, we reverse the Judge's findings on S&S, and vacate and remand the Judge's unwarrantable failure determination and civil penalty assessment.

I.

Factual and Procedural Background

In May 2010, MSHA Inspector Russell Richardson conducted a regular inspection of the No. 2 section of Newtown Energy's Coalburg No. 2 Mine, an underground mine in West Virginia. Richardson was accompanied by Mine Superintendent Robert Herndon, a certified electrician. At the time of the inspection, the section had stopped production due to a problem with the section's continuous miner. All miners on the section except the shuttle car operator were located at the site of the continuous miner.

Upon arriving at the section, Richardson spoke briefly with the miners there, and then continued on with the shuttle car operator to inspect the nearby shuttle cars. Richardson directed Superintendent Herndon to lock out the shuttle car's cathead[4] at the power station so that he could inspect the shuttle car's trailing cable. Herndon informed Richardson that he did not have a lock, but he agreed to obtain one from another miner. After several attempts, Herndon procured a lock owned by a roof bolt operator.

While the shuttle car operator and Richardson proceeded to the shuttle cars, Superintendent Herndon went to the power center, de-energized the cathead for the shuttle cars, and locked the cathead with the roof bolter's lock. However, Herndon found that he was unable to remove the lock's key without possibly breaking it. So, he left the key in the lock and rejoined the inspection party. He left the locked cathead with the key still in it lying on the floor of the mine. Herndon did not tell Richardson that he left the key in the lock.

While inspecting the shuttle car's trailing cable, Richardson discovered two defects in the outer jacket of the trailing cable that required repair. The first defect was repaired with the application of electrical tape and rubber to the end of a splice boot where moisture could enter. The second defect, which exposed the inner copper wire of the black power conductor, was repaired by cutting away part of the cable's insulation and adding rubber and tape to seal off the repair.

[4] A cathead is the "connecting plug" permitting an electrical cable to be attached to a receptacle on a power station. Tr. 15, 17.

Richardson continued inspecting the trailing cable until he reached the power station. At that time, the inspector discovered that the key had not been removed from the lock on the cathead. Accordingly, the inspector issued Citation No. 8110086 for a violation of 30 C.F.R. § 75.511. Richardson alleged that the failure to properly lock out the shuttle car's cathead while performing electrical work was significant and substantial ("S&S")[5] and constituted an unwarrantable failure[6] to comply on the part of Newtown. Sec'y Ex. 3.

The Judge determined that Herndon's failure to properly lock out the trailing cable cathead while performing electrical repair work on the cable constituted a violation of section 75.511. 35 FMSHRC at 2500. He then found five mitigating factors that warranted a finding of low negligence. In particular, the Judge found that (1) the citation was a direct result of the inspection process, not the normal mining cycle, and that if the inspector had not ordered the lockout of the power on the cable cathead to facilitate the inspector's investigation of the trailing cable, no violation would have occurred; (2) the inspector failed to recognize the interplay between his direction to Herndon and the resulting violation; (3) although Herndon should not have used a faulty lock, his actions were a good faith attempt to comply with the inspector's request; (4) section 75.511 allows for the use of a tag when locking out is not possible and the faulty lock "did act as a signal to anyone seeing it that something out of the ordinary was going on"; and (5) the faulty lock was only on the cathead for a short period of time—10 to 30 minutes. 35 FMSHRC at 2501–02.

The Judge vacated the citation's S&S designation. The Judge found that the chain of events required for the hazard to result in an injury was so remote as to make the likelihood of injury "almost speculative." *Id.* at 2506. He recognized that, if the events did occur, the result would be potentially fatal. However, the Judge reasoned that because the miners on the section were aware of the ongoing MSHA inspection, had been trained to only remove locks that they had themselves placed on electrical components, and were not under pressure to maintain production, a miner who is "reasonably aware of his surroundings" would not likely re-energize the trailing cable. *Id.* at 2503, 2506. Additionally, the Judge found that, for the short period of time the lock was on the cathead, the inspection party maintained some level of control over access to the trailing cable due to its close proximity to the power station. *Id.* at 2505.

In his unwarrantable failure analysis, the Judge found that the violation was a product of ordinary negligence, not aggravated or intentional misconduct. The Judge stated that the traditional factors set forth in *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), did not lend themselves to violations that occur in the course of an inspection and only exist for a short period of time. Based upon his negligence and gravity analysis, the Judge concluded that "this was an isolated, ad hoc event, noteworthy primarily because of the potential severity of consequences

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

[6] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

from an unlikely event" and thus did not warrant the unwarrantable failure designation. 35 FMSHRC at 2508. The Judge reduced the $7,578 penalty proposed by the Secretary to $207.

II.

Disposition

On review, the Secretary argues that the Judge erred in vacating the citation's S&S and unwarrantable failure designations and by reducing the proposed civil penalty from $7,578 to $207. As to the assessed penalty, the Secretary contests the Judge's findings concerning the gravity of the violation and the negligence of the operator.

Below, we address the Commission's S&S test as articulated in *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984), in light of recent appellate decisions, and apply the test to the facts of the case. Next, we review the Judge's unwarrantable failure findings. Finally, we examine the Judge's findings as to the section 110(i) penalty criteria, negligence, and gravity.

A. S&S

1. The *Mathies* Test[7]

Section 104(d)(1) of the Mine Act provides that inspectors must note if a "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Under longstanding Commission precedent, a violation is significant and substantial 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. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *National Gypsum*, we also stated that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." *Id.* at 827.

In *Mathies*, 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;

[7] Commissioners Young, Nakamura, and Althen join in this interpretation of the *Mathies* test.

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

6 FMSHRC at 3–4 (footnote omitted). *Accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

In conducting the *Mathies* analysis, the focus now generally centers on the interplay between the second and third steps. A correct understanding of that interplay is crucial to the appropriate evaluation of S&S.[8]

The second step addresses the extent to which the violation contributes to a particular hazard. This step is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016).

The third step is primarily concerned with gravity. *Id.* at 162. At this stage, the analytical focus shifts from the violation to the hazard, which has been established in stage two, and whether it would be reasonably likely to result in injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Knox Creek*, 811 F.3d at 162 ("Requiring a showing at [step] three that the violation itself is likely to result in harm would make [step] two superfluous."). "Every federal appellate court to have applied *Mathies* has also assumed the existence of the relevant hazard when analyzing the test's third [step]." *Knox Creek*, 811 F.3d at 161–162 (citing *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Review Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135; *Austin Power*, 861 F.2d at 103–04; *cf. Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1025–27 (D.C. Cir. 2013)).

Therefore, the relevant concept tying together the second step "likelihood" analysis and third step "gravity" analysis of *Mathies* is the "hazard" at issue. In light of the analytical

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[8] As discussed *infra*, we now consider the proper focus of the second step of the *Mathies* test to be the likelihood of the occurrence of the hazard the cited standard is designed to prevent. In the past, the Commission considered in the third step of Mathies *both* whether there was a reasonable likelihood that the hazard contributed to by the violation would occur *and* whether there was a reasonable likelihood that that occurrence would result in injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (the third step "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in *an event* in which there is an injury.") (emphasis added). As a result, for many years the second step was often a given in the S&S analysis. Indeed, the second step was not contested in this case or in *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 154, 161-62 (4th Cir. 2016). Following the Commission's decisions in *Musser* and *Cumberland*, *infra*, that combined analysis was split between the second and third steps. Consideration of whether the hazard was reasonably likely to occur is now moved to the second step. Consideration of whether an injury was reasonably likely in the event of that occurrence remained in the third step. However, the ultimate inquiry has not changed.

importance placed on "hazards" under the *Mathies* test, it is essential for the Judge to adequately define the particular hazard to which the violation allegedly contributes. A clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations. That same clearly defined hazard will also frame the potential source of injury for purposes of determining gravity in the third step analysis. The Commission thus defines the "hazard" in terms of the prospective danger the cited safety standard is intended to prevent.

The articulation of the hazard in the instant matter therefore considers the potential danger, and the violation's contribution to a reasonable likelihood that injury to miners may result. As described above, the starting point for determining the hazard is the actual cited section. Section 75.511, the standard violated in this case, requires that electrical equipment be locked out and tagged out while electrical work is performed on the equipment. The requirement of lock out and tag out is to ensure that power will not be restored during electrical work, thus protecting the miners performing the electrical work from electrical shock or electrocution. Hence, the specific hazard in this case is that the cathead for the shuttle car would be re-connected to the power center, thus re-energizing the cable which Richardson was inspecting and Herndon was repairing—that is, the hazard of a miner working on energized equipment. Simply stated, in this case, the tangible hazard for consideration at the second step was the likelihood of the occurrence of miners working on energized equipment.

Having clearly defined the hazard, the next task at step two is for the Judge to determine whether the violation sufficiently contributed to that hazard. The Commission has utilized a "reasonable likelihood" analysis for determining whether a violation significantly and substantially "contributes" to a hazard. That means the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. Here, for example, the question under step two is whether, under these particular circumstances, the violation (the failure to remove the key from the lock) was reasonably likely to result in the restoration of power to the shuttle car cables while the inspection group was working on it.[9]

If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumes such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious.

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[9] This is not a situation like a respirable dust violation, *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (Jun. 1986), or a pre-shift examination violation, *Manalapan Mining Co.*, 18 FMSHRC 1375, 1388–98 (Aug. 1996) (Jordan and Marks, Comm'rs, concurring in part and dissenting in part), where the hazard may be presumed from the fact of the violation. Here, the Secretary must prove that the violation contributes to the hazard.

We recognize that "reasonable likelihood" is not an exact standard. Obviously, a Judge cannot calculate the degree of risk of the occurrence of a hazard or a reasonably serious injury in precise percentage terms. Rather, the "reasonable likelihood" standard is a "matter of a degree" evaluation with particular focus on the facts and circumstances presented regarding these risks. This imprecision and the complexity of the facts in many Mine Act cases do not undercut the importance of the standard; indeed, it serves to emphasize the necessity for careful, thoughtful review of all relevant facts in every S&S proceeding. In this regard, it is not unlike other decisions that require Commission Judges to apply their experience and sound discretion to the resolution of difficult, fact-intensive questions, such as those involved in an unwarrantable failure analysis.[10] And as with the unwarrantable failure analysis, Commission Judges have applied an analytical framework in S&S cases that has developed a generally coherent view of the term "reasonably likely," despite its inherent imprecision.

In a recent Mine Act case involving an S&S determination, the Fourth Circuit used the phrase "at least somewhat likely," in describing the second step of *Mathies*. Specifically, the court stated that the Secretary establishes a contribution when he shows that the violation is "at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 163.

The Fourth Circuit's discussion on the second step of *Mathies* is brief and merely supplements the court's primary discussion regarding other matters. Specifically, the meaning of the second step was not at issue in *Knox Creek*; instead the court was concerned with the application of the third step of *Mathies*. *Id.* at 161. The court only described the second step of *Mathies* in order to contrast its purpose with the purpose of the third step. *Id*. at 162. Thus, nothing in the case turned on the exact degree of "contribution" in the second step of *Mathies,* and the court was not required to analyze the differences between "at least somewhat likely" and "reasonably likely."

All Commissioners agree that the Judge must analyze the likelihood of the occurrence of the hazard at step two of the *Mathies* test. It is simply incorrect to assert that the Fourth Circuit "promulgated" a test for the second step of *Mathies* in *Knox Creek*. Slip op. at 20 (Jordan, Chairman, and Cohen, Comm'r, concurring in part and dissenting in part). As pointed out above, the second step of *Mathies* was not an issue in *Knox Creek*. Neither party briefed step two; the step two test was not before the court. For that reason, the fact that the Fourth Circuit discussed the necessity of a likelihood element in step two simply emphasizes that a review of the likelihood of the occurrence of the hazard is required. Indeed, the words "at least" show the circuit court was writing in terms of a minimum standard in discussing a principle not in issue. Those words provide no basis for an inference that the court was considering changing, let alone intending to change, our long-existing reasonable likelihood standard in a case where the issue was not before it. If the court intended to substitute a new standard, it would have said so.[11]

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[10] An unwarrantable failure refers to more serious conduct by an operator in connection with a violation. It is "more than 'ordinary negligence.'" *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Therefore, the Judge must determine the degree of negligence.

[11] The restraint the court displayed in its discussion of this issue is consistent with its thoughtful and well-reasoned opinion.

We note that the Commission itself has never construed "reasonable likelihood" in a narrow or cramped manner that would hinder achievement of the Mine Act's objective of a safe and healthful mining environment.[12] That leads us to believe that the Fourth Circuit was not trying to announce any particular interpretation of the statutory S&S language or draw any distinctions between degrees of likelihood, but was merely attempting to describe existing Commission jurisprudence. As a result, we continue to apply our established standard rather than embracing a different phrasing of the standard in this case.[13]

We now apply the *Mathies* test to the facts of this case.

2. Application of the *Mathies* Test[14]

With respect to the first step of the *Mathies* test, Herndon's actions constituted a violation of a mandatory safety standard. Specifically, he failed to lock out the shuttle car cathead while electrical work was being performed, in violation of 30 C.F.R. § 75.511. As a result, the first step of *Mathies* is met.

The second step of the *Mathies* analysis asks whether this failure to lock out the shuttle car cathead during electrical work contributed to a discrete safety hazard. As noted above, the specific hazard posed by the violation in this case was that the cathead for the shuttle car would

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[12] For example, the Commission has repeatedly held that "reasonable likelihood" does not mean more probable than not. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996); *Amax Coal Co.*, 19 FMSHRC 846, 848-49 (May 1997). Further, we apply certain assumptions in determining reasonable likelihood, such as the presumption that the violation will continue unabated in the course of continued mining operations. *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). Additionally, we do not take into account the existence of redundant safety measures. *Knox Creek*, 811 F.3d at 162, *aff'g* 36 FMSHRC 1128 (May 2014).

[13] Because *Knox Creek* was issued after briefing in this case was completed, we have not yet heard from the Secretary, the operators, or others in the regulated community on this issue. For example, inspectors now evaluate the likelihood aspect of gravity under the penalty criteria in terms of "reasonably likely." We do not know how or whether adopting an "at least somewhat likely" standard for the second step of *Mathies* would impact the assessment of gravity by MSHA inspectors. Nonetheless, we do not foreclose the possibility of making changes in our application of the *Mathies* test in the future if circumstances warrant such a change.

[14] Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the Judge's S&S findings. Commissioner Nakamura finds that the violation was S&S applying the "reasonably likely" standard for step two of the *Mathies* test. Chairman Jordan and Commissioner Cohen find that the violation is S&S applying either the "reasonably likely" or the "at least somewhat likely" standard which they discuss in a separate opinion, *infra*, for step two of the *Mathies* test.

be re-connected to the power center while miners were working on the power cables. Therefore, under the second step of *Mathies*, the question is whether that hazard was reasonably likely to occur given the particular facts surrounding this violation. After a careful review of those facts, we conclude that such an occurrence was reasonably likely.

The relevant facts surrounding this violation are as follows: The inspector, Herndon, and the shuttle car operator composed the inspection party. At the outset of the electrical inspection, Herndon had placed a lock he borrowed from a roof bolter on the shuttle car cathead so that the cable could be inspected and, if necessary, repaired. He was unable to remove the key from the lock and so he decided to simply leave it in place. Tr. 101–05. Inspector Richardson testified that because the key was left in place, anyone working in the area could have removed the lock from the cathead, put the cathead back in the power center, and energized the cable. Tr. 58. Roughly 10 people were on the section and many of those miners would not have known that cable repair was being made. Tr. 61. Miners were likely to be near the power center because, as Richardson testified, this was a location where miners congregated to access their lunch buckets. Tr. 63.

Richardson believed that a miner could "[w]alk by, see the cathead, the shuttle car, and think that the electrician was working on the shuttle car before he got called to work on the miner and say, 'Well, I'll help him out and I'll finish re-energizing[15] the cathead to the shuttle car.'" Tr. 78–79. In doing so, a miner might simply think that the electrician forgot to remove the key. Tr. 61. Richardson also testified that miners would be expected to work at the power center in the near future. At the same time that Herndon was repairing the shuttle car in the fourth entry, a different electrician, Carpenter, was repairing a continuous miner cable in the fifth entry. Tr. 34, 75. After Carpenter was finished with his repair he would have gone to the power center to energize the continuous miner. Tr. 64. Or, he might have given another miner the key to his lock and asked him to go to the power center to energize the continuous miner cable. Tr. 64. That assistant miner might have seen the key in the shuttle car cable lock and energized that cable because he believed he was assisting the section electrician or because he had mistaken the shuttle car cathead for the miner cathead. Tr. 64.

These facts compel a finding that the violation contributed to the hazard of electrical shock. The failure to remove the key was reasonably likely to result in a miner accidentally or unknowingly plugging the cable back into the power center. The miner working on the cable would then be exposed to electrical shock. Therefore, the second step of *Mathies* is met.

The Judge made several findings regarding the likelihood that the cable would be re-energized. Although he did so in his discussion of the third step of *Mathies*, as shown above, the proper place for this analysis is in the second step of *Mathies*. Therefore, the Judge's findings regarding the likelihood of the occurrence of the event against which the standard is directed will

[15] The transcript quotes the inspector as saying "finish de-energizing the cathead." Tr. 79. However, just before this, the inspector was agreeing that someone could walk by the power center and think that he was helping the electrician by "re-energiz[ing]" the cathead. Tr. 78. In context, it is clear that "de-energizing" was a typographical error by the Court Reporter.

be considered here. In doing so, we conclude that the Judge's findings contain legal errors and are not supported by substantial evidence.[16]

Specifically, the Judge found that the lock, even with the key in place, constituted a "visual cue to any miner seeing it that the cathead should not be plugged back in, perhaps similar to the visual cue a proper tag used to tag out a cable like this would provide." 35 FMSHRC at 2504. In making this finding, the Judge relied on the fact that the standard at issue, section 75.511, contains an alternative to locking out, "i.e., it is acceptable to 'suitably' tag a cathead when an actual lock out is not possible." *Id.* The Judge was "convinced . . . that the tagging effect of finding a lock of any sort on a cathead mitigates against a finding of greater likelihood." *Id.*

It is true that section 75.511 contains an alternative to locking out. However, this alternative is a narrow exception that is not applicable here. That section provides that disconnecting electrical devices should be locked out "except that in cases where locking out is not possible, such devices shall be opened and suitably tagged." 30 C.F.R. § 75.511. Therefore, a predicate to the use of tagging out without locking is the impossibility of locking out. Here, there is no question that locking out was possible. In fact, Herndon was able to place a lock on the cathead; he claimed he simply wasn't able to remove the key. Therefore, the exception to the rule is not applicable.

The Judge also found that the condition had existed "for only a few minutes before Herndon told Richardson about it, during which time no work was done on the power cable." 35 FMSHRC at 2505–06. This finding is based on the Judge's incorrect assumption that Herndon told Richardson he had left the key in the lock when he returned to the inspection party. However, the record shows that this assumption is incorrect. Herndon testified that when he put the lock on the cathead, he was unable to remove the key, even with the help of channel locks. Tr. 104. He then walked back over to the shuttle car. Tr. 104–05. He testified that the time between when he left to place the lock on the cathead and when he returned was approximately three minutes. Tr. 105. He testified that in that three-minute period, no work was done on the cable. Tr. 105. However, Herndon did not tell Richardson about the condition when he returned. In fact, the undisputed evidence is that Richardson did not learn about the key in the lock until after the repairs were made. Tr. 46, 48–50. That means that all of the repairs were conducted while the key, unbeknownst to Richardson, was still in the lock. Herndon testified that the repairs lasted ten minutes. Tr. 108. Although the cuts in the cable may have taken ten minutes to repair, Richardson estimated that the lock and key were on the cathead for about 30 minutes during which time he was handling the cable looking for additional hazardous conditions. Tr. 56–57.

[16] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Therefore, substantial evidence does not support the Judge's finding that no repairs were conducted while the key was in place or that the condition existed for only a "few" minutes.

In addition, the Judge found that from the shuttle car, "a visual observation of the cathead was arguably possible," and that the inspection team could have shouted at any miner working around the cathead, warning that miner not to tamper with the lock. 35 FMSHRC at 2505. The Judge supported this finding by noting that the mining machine was turned off and no coal was being produced, meaning that the section would be much quieter than usual. *Id.* This would allow the voices of the inspection team to travel farther. Furthermore, the Judge stated that the power center was only 55 feet away from the shuttle car. *Id.*

There are several problems with the Judge's finding regarding the inspection party's ability to see the power center. First, the Judge's conclusion is based on disputed and contradictory evidence. In particular, while Herndon testified that the power center was only 55 feet from the shuttle car, Richardson testified that it was 115 feet away. Tr. 36–37, 102. Further, Herndon testified that he could clearly see the power center from the shuttle car with his cap lamp, while Richardson testified that the power center was not visible from the shuttle car because of large blocks of coal between the entries. Tr. 37, 127–28. In analyzing whether the inspection crew would be able to verbally warn a miner against re-energizing the cable, the Judge used the 55-foot distance and also assumed that the inspection crew would be able to see a miner at the power center.

Regardless of distance and visibility, the Judge's conclusions are not supported by substantial evidence. Even if the power center was only 55 feet from the shuttle car and even if there was nothing obstructing the view, the evidence would still not support a finding that the inspection crew could "warn" miners away from the power center. First, of the three members of the inspection team present, only one, Herndon, was aware that the key was left in the lock. Tr. 104–05. Richardson only learned of the condition after the repairs were completed. Tr. 46, 48–50. Perhaps more importantly, Herndon, the only person in the inspection party aware of the condition, was busy repairing the cable at the time and might not have been aware that a miner was approaching the power center. Tr. 105–08. Even if Herndon happened to notice a miner approaching, he testified that he did not believe that the key constituted a hazard and therefore would have felt no need to warn the miner. Tr. 111–12. Thus, substantial evidence does not support the Judge's conclusion that the inspection party could warn miners away from the power center.

The Judge also found that, because the continuous miner machine was being repaired, there was "less than normal pressure to keep a production pace, which as a matter of common sense might reduce a miner's incentive to cut corners." 35 FMSHRC at 2506. The Judge reasoned that without this pressure, there was no known impetus to re-energize a cable with a lock in it. *Id.* This conclusion is speculative and is not based on any evidence in the record. There is no reason to believe that miners would be more cautious simply because the continuous miner was being repaired. Richardson testified that the continuous miner being down can, in fact, sow confusion. Tr. at 61. Substantial evidence does not support the Judge's assumptions.

Additionally, the Judge found that the miners would be less likely to re-energize the cable because they were aware that an MSHA inspector was in the area conducting an inspection. 35 FMSHRC at 2506. The Judge believed that the presence of the inspector was "far enough out of the ordinary to override a miner's being 'on auto-pilot' while doing his job to motivate him to be a bit more perspicacious and cautious than normal." *Id.* Once again, the Judge's conclusion is speculative. While it is true that miners were aware that Inspector Richardson was on the section, there is no evidence to suggest that this would somehow change the way miners would consider a lock with the key inserted. Further, many mines have federal inspectors present daily and there is no evidence to suggest that it was out of the ordinary for an inspector to be at this mine. Even if a mine inspection at this particular mine was relatively rare, there is no evidence to suggest that the presence of an inspector would necessarily make miners more cautious. Once again, substantial evidence does not support the Judge's assumptions.

Moreover, the Judge found that miners were trained to know that only the person who placed a lock on a cathead was permitted to unlock it and re-energize it. *Id.* at 2503, 2506. The Judge held that "[a]ll miners are initially trained and subsequently re-trained never to remove a lock placed by someone else . . . . In order for this element to fail, a miner must forget or ignore the training." *Id.* at 2506.

The Judge's reliance on the operator's training program constitutes legal error. Essentially, the Judge is positing that miners were trained to be particularly cautious when working with locks on electrical equipment. However, in *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), we held that whether miners would exercise caution is not relevant under the *Mathies* test. In fact, the Commission concluded that the consideration of mitigation by caution would essentially add a new element to the *Mathies* test. Instead, we held, "[t]he hazard continues to exist regardless of whether caution is exercised." *Id.* at 1123. The second and third steps of the *Mathies* test should be applied by the Judge accordingly. "While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." *Id.* We have also held that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior.'" *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)).

For those same reasons, we reject the Judge's conclusion here that the likelihood of the hazard was lessened by Newtown's training regime. The common sense justification for this legal conclusion is supported by the Judge's own statement that miners forgetting or ignoring their training is "something that happens all too frequently." 35 FMSHRC at 2506. Similarly, Inspector Richardson testified that miners do not always comply with their training. Tr. 61–62. After all, as Richardson noted, miners were trained not to leave their key in the lock but Herndon did so anyway here. Tr. 62–63. Therefore, the Judge committed legal error in his consideration of the miners' training as a factor militating against a finding of S&S.

In light of these errors, we conclude that the Judge's opinion (and the brief submitted by the operator) does not undermine our ultimate conclusion reached above: The presence of the key in the lock made it reasonably likely that the cable would be re-energized.

Having determined that the Secretary has established the second step of *Mathies*, we can now turn to the third and fourth steps to discuss whether it was reasonably likely that the hazard would result in serious injury. As described above, it is necessary at this point to assume that the hazard is realized. *See Knox Creek,* 811 F. 3d at 161–62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135. In this case, that means assuming that the cable was re-energized while miners were working on it.

It is undisputed that Herndon worked on the cable with a metal knife. Tr. 60. The inspector testified that there were two separate conditions with the cable creating points of exposure. Tr. 40. The Judge credited this conclusion. 35 FMSHRC at 2497. If someone re-energized the cathead while the metal knife or a bare hand was in contact with the power conductor inside, the person would become exposed to ground voltage and would complete the path for electricity to flow. Tr. 60. While Herndon testified that he did not believe he or anyone else was exposed to a hazard, he also testified that he would not have touched the inner wires while energized because he would not be sure they were free from pinholes and they would constitute a shocking hazard. Tr. 132–133. If shocked, the miner would come into contact with 277 volts of electricity. Tr. 58. A 277-volt shock would be sufficient to cause fatal injury. Tr. 43, 58. In fact, the Judge found that the injury would be "potentially fatal." 35 FMSHRC at 2506.

If the cable at issue had been energized, it was reasonably likely that Herndon would have been shocked. That shock would be reasonably likely to result in fatal injury. As a result, the third and fourth steps of *Mathies* are established.

Therefore, we reverse the Judge's finding that the Secretary failed to prove that the violation was significant and substantial.

B. Unwarrantable Failure[17]

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346,

[17] Commissioners Young, Cohen, and Althen vacate and remand the Judge's finding regarding unwarrantable failure.

1350–57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

Noticeably absent from the Judge's unwarrantable failure analysis was any consideration of Herndon's position as mine superintendent.[18] A supervisor is held to a higher standard of care than a rank and file miner, and as such, evidence of a supervisor's involvement in the creation of a violative condition is an aggravating factor that should be considered in conjunction with the traditional unwarrantable failure factors. *See, e.g.*, *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Furthermore, a supervisor's violative conduct which occurs within the scope of his employment may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194–97. Therefore, recognition of Herndon's position should have played a major role in influencing the analysis of the traditional factors, such as the operator's knowledge of the violation.

In addition, the Judge erred by failing to discuss the Commission's established factors for unwarrantable failure, finding that the "traditional factors . . . do not lend themselves well to the facts of this case." 35 FMSHRC at 2508. However, while a Judge may determine that some factors are not relevant or are less important than others under the circumstances, "all of the factors must be taken into consideration and at least noted by the Judge." *IO Coal Co.*, 31 FMSHRC at 1351. Regardless of the weight the Judge lends to a factor, the Judge should at least identify the factors and state the reason for the weight he assigns. Obviously, the opinion need not be repetitive if the reason for the weight is the same for a number of factors. However, the Judge should indicate the weight placed on each factor.

The traditional unwarrantable failure factors do not lose their relevancy simply because the violative conduct occurred in the context of an inspection. The extent of the violation, the length of time the violation existed, whether the violation was obvious, the operator's knowledge of the violation, whether the operator was attempting to abate the violation prior to the issuance of the citation, and whether the operator had in the past been placed on notice of similar failures to properly lock and tag out equipment are all discernible when violative conduct occurs in such a context. Furthermore, each factor poses a separate and distinct question that, when taken together, helps to form a greater understanding of whether the operator's conduct was aggravated.

Given the absence of analysis of the fact that Herndon was the mine superintendent and of meaningful findings on many of the traditional unwarrantable failure factors, we remand the determination of unwarrantable failure. On remand, the Judge shall examine the evidence as to

[18] Consideration of Herndon's supervisory role is of even greater importance given his role at the mine. Herndon was the mine's superintendent. With the exception of the mine manager, every employee at the mine was under his authority. Tr. 31. He is also a certified electrician, and thus would have been in a better position to influence his subordinates' approach to addressing electrical hazards.

each of the unwarrantable failure factors with the recognition that the violation was attributable to the superintendent of the mine.

C. Civil Penalty[19]

Pursuant to section 110(i) of the Mine Act, the Commission, in assessing a civil penalty, considers six factors including the negligence and gravity of the violation. Here, the Secretary challenges the Judge's reduction of the penalty to $207, specifically challenging the findings as to negligence and gravity. We agree that the Judge erred in changing the evaluation of Newtown's negligence from "high" to "low." 35 FMSHRC at 2500–03. With regard to gravity, we agree that the Judge erred in finding that an injury was unlikely to occur, even though it would be potentially fatal. *Id.* at 2503–04.

1. Negligence

In analyzing an operator's degree of negligence, the Commission has 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. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

However, we have long recognized that mine management should be held to an even higher standard of care. *See Midwest Materials Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("a foreman . . . is held to a high standard of care"). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).

Substantial evidence does not support the Judge's finding that the violative condition was the result of a low degree of negligence on the part of Newtown. It is clear from the record that Herndon, a certified electrician, failed to meet the high standard of care befitting his position as the mine's superintendent. Herndon knew that leaving the key in the lock was a violation of federal regulations. Tr. 119. *See Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994) (concluding that actual knowledge of violative conditions and failure to act constituted high negligence). He failed to demonstrate good faith because he did not inform

[19] Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the Judge's findings regarding negligence and gravity.

Richardson that he was unable to procure a functional lock. Furthermore, despite his position and experience as an electrician, Herndon failed even to recognize the danger the faulty lock posed. Tr. 111. Not only did his actions put him in danger of serious bodily harm, they also set a poor example for the miners under his supervision.

The Judge erred in finding that the standard of care expected of Newtown was diminished because the violation occurred in the course of an MSHA inspection of the trailing cable.[20] It is indisputable that the violative condition was the product of Herndon's decisions alone. Richardson did not instruct Herndon to use the defective lock, nor did he improperly pressure Herndon to utilize the most expedient means to facilitate the inspection. Further, the Judge erred in characterizing Herndon as a "deputized" agent of Inspector Richardson. *See* 35 FMSHRC at 2499–500. Rather, Herndon's participation in the inspection was voluntary pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f), and Herndon was not at risk of sanction were he to report to Richardson that he was unable to locate a functional lock. Tr. 144–45. Because the Judge shifted part of the blame for the violation to Richardson, he failed to recognize the implication of his finding that Herndon "cut corners." 35 FMSHRC at 2502.

The Judge also found that leaving the key in the lock should be considered an element of mitigation because it represented something akin to tagging the cathead within the meaning of 30 C.F.R. § 75.511, thus acting "as a signal to anyone seeing it that something out of the ordinary was going on." 35 FMSHRC at 2502–03. However, the key in the lock was not intended as a "signal" like tagging. Herndon left the key in the lock simply because he could not get it out.

Finally, the Judge found, as an element of mitigation, that the faulty lock was on the cathead for only a short period of time. *Id.* at 2503. While the length of time of the violation is relevant to the issue of unwarrantable failure, it has little relevance to negligence, especially where Herndon testified that "there was no danger" in leaving the key in the lock. Tr. 111.

Although Herndon partially complied with section 75.511 by de-energizing the trailing cable and placing a lock, albeit defective, on the cathead, this fact alone does not preclude a finding of high negligence.[21] As we have repeatedly held, the Commission and its Judges are not bound to apply the regulations in 30 C.F.R. Part 100 that MSHA uses to calculate most proposed penalties. *See, e.g.*, *Brody Mining*, 37 FMSHRC at 1701–03. We have explained that an ALJ "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* at 1702; *Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1264 (D.C. Cir. 2016). A finding of high negligence may be made in spite of

[20] Given the highly regulated nature of underground coal mines, MSHA inspections occur with enough frequency to be considered a part of the normal mining cycle. Furthermore, the duty to inspect and repair the trailing cable existed independently of the inspection. As such, we see no need to treat the fact that the violation occurred in the context of an inspection as a mitigating factor.

[21] "Locking out" with a defective lock is analogous to using the wrong size of roof bolts. In both instances, the negligence is not diminished by a miner's clearly ineffective effort to comply with the safety standard.

mitigating circumstances. *Brody Mining*, 37 FMSHRC at 1702–03. Instead, the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

Accordingly, we find that the operator failed to meet its duty of care and that Herndon's actions in his position as mine superintendent require a finding of high negligence.

2. 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 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. Here, the Judge concluded that if an injury occurred it would be potentially fatal and would affect one miner, but that an injury was unlikely to occur. 35 FMSHRC at 2503.

The Judge reached his conclusion by noting that, despite the fact that Herndon's actions placed him at risk of serious electric shock or electrocution, it was unlikely that the power cable would have been re-energized. However, for the reasons set forth in our S&S analysis, we find that substantial evidence does not support the Judge's conclusion that an injury-causing event was unlikely. We vacate this finding and conclude that the gravity of this violation was high: a potentially fatal injury to one miner was reasonably likely to occur.

Accordingly, we reverse the Judge's findings as to negligence and gravity and remand for a reassessment of the civil penalty.

III.

Conclusion

For the foregoing reasons, we: (1) reverse the Judge's findings on S&S, and reinstate the S&S designation for the violation; (2) vacate and remand the unwarrantable failure determination for further proceedings consistent with this decision; and (3) vacate and remand the civil penalty for reassessment consistent with the negligence and gravity findings in this decision and (if unwarrantable failure is found) the statutory minimum penalty for section 104(d)(1) citations and orders. *See* 30 U.S.C. § 820(a)(3)(A).

/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

Chairman Jordan and Commissioner Cohen, concurring in part and dissenting in part:

While we join Commissioner Nakamura in finding that the violation was S&S, we write separately because we disagree with the interpretation of the second step of the S&S test in *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984), set forth by the majority on this issue (Commissioners Young, Nakamura, and Althen). In our view, all that is required to establish the second *Mathies* step is that the violation be shown to be "at least somewhat likely to result in harm," as stated by the Fourth Circuit in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148, 162 (4th Cir. 2016).

As our colleagues state, in the second step of the *Mathies* test, the question is whether the violation contributes to a particular hazard. This step is primarily concerned with likelihood, that is, the extent the violation increases the likelihood a hazardous condition will occur. *Id*. at 162. In the third and fourth steps, the violation is no longer the explicit concern of the analysis; the question instead is whether the previously identified hazard is reasonably likely to result in a reasonably serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365, 2370 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013) (citing *Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)); *Knox Creek*, 811 F.3d at 162 ("Requiring a showing at [step] three that the violation itself is likely to result in harm would make [step] two superfluous."). These steps are primarily concerned with gravity. *Knox Creek*, 811 F.3d at 162.

We also agree with our colleagues that under the *Mathies* test, it is essential for the Judge to adequately define the particular hazard that is allegedly contributed to by the violation. Establishing a clear definition of the hazard at issue provides something tangible that the violation's contribution can be measured against in the second step analysis. In the instant proceeding, the Judge did not articulate the hazard at issue. On that point, he simply asserted, "[i]t is a discrete safety hazard to perform electrical work on equipment without locking or tagging it out." 35 FMSHRC 2494, 2505 (Aug. 2013) (ALJ). The Judge's statement of the hazard is insufficient as it does not specify the danger facing miners.

Additionally, we agree with our colleagues that the starting point for determining the hazard is the regulation cited by MSHA. The "hazard," for purposes of the *Mathies* analysis, is the danger which the cited safety standard is intended to prevent. Section 75.511, the standard violated here, requires, among other things, that electrical equipment be locked out and tagged out while electrical work is performed. The requirement of lock out and tag out is to ensure that power will not be restored during electrical work. Under the plain wording of the standard, it is not sufficient for someone performing electrical work to simply de-energize the equipment. Hence, as the majority correctly acknowledges, the specific hazard in this case is that the cathead for the shuttle car would be re-connected to the power center, thus re-energizing the cable which Richardson was inspecting and Herndon was repairing. As Inspector Richardson testified, "[w]ith the key being left in the lock[,] anyone could have removed the lock from the cathead, put the cathead back in the power center and energized the cable." Tr. 58.

After identifying the specific hazard, the next step is to conduct the likelihood analysis in light of that hazard. To that end, the trier of fact must determine whether the Secretary has

proven that the violation contributed to that hazard. It is at this point in the analysis that we disagree with our colleagues.

In *Knox Creek*, the Fourth Circuit held that the Secretary establishes a "contribution" for the purposes of the second step of *Mathies* when he shows that the violation is "at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162, 163. Similarly, in *Peabody Midwest Mining, LLC v. FMSHRC*, the Seventh Circuit held that "[a] violation is significant and substantial if it could lead to some discrete hazard, the hazard was reasonably likely to result in injury, and the injury was reasonably likely to be reasonably serious." 762 F.3d 611, 616 (7th Cir. 2014) (emphasis added). We find the standard put forth by the Fourth and Seventh Circuits to be similar and would apply this standard of proof for the second step of *Mathies*. In short, a violation "contributes" if it is at least somewhat likely to result in, or could result in, a safety hazard. In adopting this language, we note that this standard is in harmony with the wording of section 104(d) of the Mine Act. 30 U.S.C. § 814(d)(1) ("[S]uch violation is of such nature as could significantly and substantially contribute to the cause and effect of a . . . safety or health hazard . . . .") (emphasis added).[1]

Regarding *Knox Creek*, our colleagues state that the Fourth Circuit's discussion of the second step of *Mathies* cannot be taken as intending to change our "long-existing reasonable likelihood standard," and merely supplements the court's primary analysis. Slip op. at 7–8. We disagree. While the term "reasonable likelihood" is longstanding in our jurisprudence, its traditional use in the third step of the *Mathies* test rather than the second step makes its meaning in the latter context far from clear. The question of what is meant by a hazard "contributed to by the violation" has not heretofore been addressed by the Commission, and has not been specifically equated with "reasonably likely."

Moreover, *Knox Creek* contains a thorough discussion of the Mine Act's S&S provision, and Commission decisions interpreting that provision. The Fourth Circuit stated that the evidentiary test for the second step of *Mathies* is "at least somewhat likely to result in harm" in two separate places within its opinion. 811 F.3d at 162, 163. The Commission should not ignore the test promulgated by the Fourth Circuit in *Knox Creek*.

As explained in the Commission's opinion, the Judge made several erroneous findings regarding the likelihood that the cable would be re-energized. Although he did so in his discussion of the third step of *Mathies*, as shown above, the proper place for this analysis is in the second *Mathies* step. Therefore, we would have considered the Judge's findings regarding

[1] We recognize that, in the past, the Commission has been reluctant to hold that a violation was S&S based on a finding that it "could" result in an injury-causing event. *See, e.g.*, *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993) ("A reasonable likelihood of an ignition is [a] necessary precondition to the reasonable likelihood of an injury."). However, as the court in *Knox Creek* pointed out, that holding is inconsistent with our holding in *Musser*. 811 F.3d at 164.

likelihood in the context of the second step analysis. In doing so, we conclude that the Judge's findings contain legal errors and are not supported by substantial evidence. We conclude that the violation was S&S under the majority's "reasonably likely" test for the second step of *Mathies* as well as under the "at least somewhat likely" test which we would prefer to have the Commission adopt.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioners Young and Althen concurring in part and dissenting in part:

We concur with Parts A.1 and B of the opinion. For the reasons set forth below, we dissent with regard to Parts A.2 and C.

A. Substantial Evidence Supports the Judge's Decision that the Violation Was Not Significant and Substantial

This is a substantial evidence case. We agree with the majority that defining the hazard is the first step in determining whether a violation is reasonably likely to result in the occurrence of the hazard against which a standard is directed. We further agree that the hazard in this case was the danger that Herndon or the shuttle car operator would work on energized equipment.

Therefore, under the Commission's articulation of the significant and substantial test, the evidence must preponderate that, upon the particular facts and circumstances of the case, it was reasonably likely that Herndon would work on energized equipment. Here, the Judge focused on the likelihood of the occurrence of the hazard. He analyzed the facts, made findings, and rendered his decision based upon the particular facts surrounding the violation. Substantial evidence supports his finding that the violation was not reasonably likely to result in Herndon or the shuttle car operator working on the shuttle car while it was energized.

Because this is a substantial evidence case, our analysis must be whether, in light of the evidence placed before the Judge, a reasonable mind might accept such evidence as "adequate to support [the Judge's] conclusion" that there was not a reasonable likelihood of the occurrence of the hazard under the facts related to the violation. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Without doubt, a reasonable person could, indeed would, arrive at the same conclusion as the Judge that the facts do not demonstrate any measurable likelihood that Herndon or the shuttle car operator faced a danger of working on energized equipment during the inspector's brief inspection.

Based upon evidence in the record cited and relied upon the Judge, he found:

1. No mining was occurring. Other than the two miners with the inspector, all miners were a substantial distance from the power center as they were located with the mining machine shut down for maintenance. Tr. 90, 99. Further, the Judge found, "[t]here was no known impetus to re-energize a cable with a lock on it." 35 FMSHRC 2494, 2506 (Aug. 2013) (ALJ). Thus, based on the evidence, the Judge determined there was no miner near the power center and no reasonable likelihood a miner would go near the power center during the brief inspection. The majority conveniently ignores the time it took to perform the inspection. A reader of the majority opinion might assume that it was expected to go on for hours. In fact, it lasted a brief period, and, even then, took only minutes, at most, to do a brief repair. Of course, an accident only takes an instant. Here, however, the facts are that miners were far removed from the power center and had no reason to return to it during the period of the inspection or to make the gross mistake of energizing the shuttle car if by some remote chance a miner returned.

2. Because the power center was only 55 feet from the shuttle car, in the very unlikely event a miner did approach the power center, the Judge found the supervisor and shuttle car operator could see them and notify them of the inspection of the shuttle car. *Id*. at 2505. In fact, the Judge further found that the miners were aware that an inspector was on the section, so such an alert may not even have been necessary.

3. The operator had labelled all catheads and receptacles at the power center. Tr. 89. The catheads and the receptacles at the power center clearly designated both the cathead that went to the shuttle car and the receptacle for the shuttle car cathead. Similarly, specific labels displayed all other equipment receptacles.

4. Herndon had removed the cathead for the shuttle car, labelled as described above, from the power center and laid it on the floor of the mine. Tr. 103, 111.

5. In fact, Herndon locked out the cathead. Herndon had placed and locked a lock on the cable. The labelled shuttle car receptacle was empty and the labelled and locked cathead was lying on the floor. Tr. 103–04. Therefore, any approaching miner would have confronted a locked out cable labelled for the shuttle car. Such a lock actually does far more than "alert" miners to the out of service status of the cathead. Because the key was in the lock, the lock could be removed. However, such action would require a miner to physically turn the key and remove the lock from the labelled cathead lying on the floor. He would then have to have inserted the labelled cable into a labelled receptacle for a piece of equipment upon which he was not working, the shuttle car.

Therefore, for the violation to result in Herndon working on energized equipment during the inspection, several events, none of which was individually reasonably likely to occur, would *all* have to have occurred. During a brief period, a miner, however unlikely and without reason, would have to have travelled to the power center. The inspector and the two miners would have to have not seen him. That miner, who would have had no work to do with the shuttle car, would have had to pick up the cathead clearly labelled for the shuttle car from the floor of the mine. Then, the miner would have to take the lock off the labelled cathead by turning the key and removing the lock. Then, he would have to have plugged the cathead into a receptacle labeled for the shuttle car and turned on power to the shuttle car.

Not only is the foregoing sequence of events not reasonably likely but also such an action would violate the most basic training given miners. In this respect, the Commission previously has discounted the possibility of gross neglect as a basis for an S&S finding:

> Substantial evidence supports the Judge's implicit finding that the only possibility through which miners could have been exposed to a hazard from the cut in the cable was if a mine repairman were willfully grossly neglectful in completing repairs under an action plan that was underway. The possibility of such willful gross neglect in ongoing repairs does not provide grounds to overturn the

> Judge's finding that that the Secretary did not carry his burden of proof.

Knox Creek Coal Corp., 36 FMSHRC 1128, 1139 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016). Without doubt, taking a labelled and locked cathead from the floor of the mine, removing the lock, and inserting the cathead into a plug for equipment a miner is not using, and has no reason to use, would be grossly neglectful.[1]

Thus, the Judge correctly followed Commission case law and applied the applicable reasonably likely standard to the likelihood of the occurrence of the hazard. He considered all the evidence and evaluated whether, "under the particular facts surrounding the violation," there was a reasonable likelihood of an event causing an injury—that is, the occurrence of a hazard of working on energized equipment. He noted correctly that it is the Secretary's job to prove through the particular facts that the violation was reasonably likely to cause such an occurrence rather than the operator's job to prove injury was unlikely. It is not sustainable for the majority to find that a reasonable person reviewing the evidence could not reach such a conclusion.

The Commission majority chooses to defy logic and disregard the substantial evidence rule in order to reverse the Judge's eminently reasonable decision. We dissent.

B. Civil Penalty

1. The Issue of Negligence Should be Remanded

While we would not hold the violation to be S&S, we would vacate and remand the Judge's finding of low negligence for reconsideration. There may be some argument about the precise level of negligence implicated by Herndon's conduct here, but the Judge had a duty to assess independently the operator's negligence in light of all of the relevant facts and circumstances.

Herndon was superintendent. He had responsibility for ensuring compliance with the Act and yet failed to comply fully with the requirement to lock and tag out electrical equipment while

[1] *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), cited by the majority, is not remotely relevant. Slip op. at 12. That case involved a presumption by the Judge that a miner would walk cautiously once he entered water that presented a substantial hazard of slipping. The issue was the likelihood of an injury where the occurrence of the hazard was conceded, and, therefore, involved caution by a miner already in a hazardous situation. *Id.* at 1123. This case is not remotely similar to a miner's action when caught in a hazardous situation. Creation of a hazard in this case could occur only if a miner: (1) without reason to do so returned to the power center, (2) was not spotted by Herndon who had a clear view, (3) picked up a labelled and locked cathead with which he was not working from the mine floor, (4) contrary to all training and commonsense unlocked it (5) inserted it into the receptacle, (6) re-energized equipment with which the miner would not have had any concern, and (7) within 10 minutes. Certainly, a reasonable person viewing those facts could conclude that such a sequence of events was not reasonably likely. That is the substantial evidence standard of review.

working on the equipment. This failure might have been mitigated by telling the inspector about the status of the lock or taking other measures to foreclose the possibility that the keyed lock might be removed and the cathead connected to the power. It is possible that Herndon did put a tag on the lock—as we have noted, the record is inconclusive—but he allowed the inspector to work on the cable without fully assuring that the lock could not be removed.

In light of this failure by the superintendent, we could not find the negligence to be low. It may be either moderate or high negligence. We believe a remand is necessary for the Judge to consider the violation and Herndon's actions in the context of his position and responsibilities as a supervisor and to determine independently the operator's level of culpability.

2. Gravity

For the reasons set forth above, we conclude that substantial evidence supports the Judge's finding that the violation was not S&S. At the same time, we agree that the gravity requires consideration of a number of factors. For that reason, we join in a remand for re-evaluation of gravity in considering the appropriate civil penalty.

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

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

Chairman Jordan and Commissioner Nakamura, concurring in part and dissenting in part:

We join Commissioner Cohen in vacating the Judge's finding that the violative condition was the result of low negligence on the part of Newtown, and we agree that a finding of high negligence is required and that the violation was significant and substantial. We write separately because we find that the violation was due to the operator's unwarrantable failure.

As our colleagues correctly state, slip op. at 14, unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMHRC 1997, 2001 (Dec. 1987). It is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350 (Dec. 2009).

In this case, Robert Herndon, a mine superintendent (who was a trained electrician), in attempting to lock out a shuttle car cathead at a power station, intentionally left the key in the lock. Tr. 30–31, 104–05, 110–11. As the Judge noted, Herndon conceded that leaving the key in the lock on the cathead would violate federal law if electrical work was being performed because someone could remove the lock and re-energize the line. 35 FMSHRC 2494, 2498 n.3 (Aug. 2013) (ALJ) (citing Tr. 119–20).[1] Adding insult to injury, he had been asked to lock out the cathead by an MSHA inspector who needed to inspect a trailing cable, and he told the inspector that he had locked and tagged out the cathead. Tr. 38, 49–50. However, by leaving the key in the lock, he created a hazardous condition, because another miner could have come to the power station, removed the key, and energized the cable.[2] Tr. 58–60.

We find it deeply troubling that a mine superintendent could demonstrate such a disregard for the safety of the inspector and of the other miners. Even the Judge, who determined that the violation was not the result of unwarrantable failure, concluded nonetheless that:

> Herndon's choice of means to comply with [the inspector's] directive was wrong under the circumstances. Based on his experience and training, he could have done something different that would have facilitated the inspection without creating a potential hazard. He chose a method that increased the likelihood of an injury-causing event. He cut corners in an attempt to facilitate [the] inspection.

35 FMSHRC at 2502 (citations and footnotes omitted).

[1] Newtown argued that electrical work was not being performed, but the Judge rejected this claim. 35 FMSHRC at 2496-98.

[2] Along with Commissioner Cohen, we rely on many of these findings to support a determination of high negligence. Slip op. at 15-17.

The Commission's admonition in *Wilmot Mining Co.*, 9 FMSHRC 684 (Apr. 1987), bears repeating:

> We emphasize that managers, such as Schrock, who was superintendent and overall supervisor of the pit operation, must be held to a demanding standard of care in safety matters. Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.

Id. at 688; *see also Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) ("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.") (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, dissenting)).

Accordingly, when the mine superintendent in this case did not properly lock out and tag out the cathead, and then failed to inform the inspector that the cathead was not locked and tagged out, we determine that, pursuant to longstanding Commission precedent regarding the involvement of high level managers in violations, the record compels the conclusion that this constituted an unwarrantable failure.[3]

For our purposes, the analysis need go no further. However, we wish to address the decision of our colleagues to remand this case rather than reversing the Judge and finding unwarrantable failure. They remand and instruct the Judge to examine the evidence as to each of the unwarrantable failure factors, while recognizing that the violation was caused by the mine's superintendent. Slip op. at 14–15.

The factors to which they refer are used by the Commission and its Judges to determine whether conduct is aggravated in the context of unwarrantable failure. They include: (1) the extent of the violative condition; (2) the length of time that it has existed; (3) whether the violation posed a high risk of danger; (4) whether the violation was obvious; (5) the operator's knowledge of the existence of the violation; (6) the operator's efforts in abating the violative condition; and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal*, 31 FMSHRC at 1351–60; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

[3] Our colleagues in the majority recognize the importance that Herndon's position as the mine's superintendent should play in the unwarrantable failure analysis, emphasizing that "[w]ith the exception of the mine manager, every employee at the mine was under his authority." Slip op. at 14 n.18.

Although these factors are usually helpful in analyzing whether a violation is due to an unwarrantable failure, they should not operate as a rigid checklist, especially in a case such as this, where the mine superintendent deliberately violated the standard.

Even applying the usual factors, however, we believe it unnecessary to remand to the Judge to make further findings. Nobody disputes that the potential hazard posed a high risk of danger—indeed, of electric shock. The Commission has often relied upon the high degree of danger posed by a violation to support a finding of unwarrantable failure. *See, e.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 34–37 (Jan. 1997) (finding that the record compelled the conclusion that a foreman's conduct reflected reckless indifference and a serious lack of reasonable care when it resulted in a miner working directly underneath unsecured heavy equipment to dismantle it); *BethEnergy Mines, Inc., et al.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992) (finding unwarrantable failure where the unsaddled beams presented a danger to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon common knowledge that power lines are hazardous and precautions are required when working near them with heavy equipment); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708–09 (June 1988) (finding unwarrantable failure where highly dangerous roof conditions were present).

Moreover, the operator's knowledge of the existence of the violation is uncontroverted, as it was caused by the mine superintendent.[4] In addition, the violation (caused by leaving the key in the lock) was obvious, as the lock was clearly being used to ensure electrical equipment was de-energized. Tr. 46, 110–11.

Even assuming that the unwarrantable factors must be taken into account in this case, the evidence regarding these three factors alone would require a determination that the violation was unwarrantable. The Commission reached a similar conclusion in *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *aff'd*, 229 F.3d 1141 (4th Cir. 2000) (unpublished). In that case, a foreman failed to de-energize equipment before doing mechanical work. *Id.* at 892. We noted that as a supervisor, the foreman had been entrusted with augmented safety responsibility and was obligated to act as a role model for a subordinate who was watching him. *Id.* at 893.

In upholding the Judge's finding of unwarrantable failure, the Commission concluded that the supervisor's failure to de-energize the rail in the face of obvious and dangerous hazards

[4] We reject the implication of the Judge's decision that the inspector shared some fault for this violation. 35 FMSHRC at 2500. The majority cogently refutes this contention in its discussion vacating the Judge's finding of low negligence and finding high negligence. Slip op. at 15–17. Moreover, the fact that the violation occurred during an MSHA inspection is irrelevant. Enforcement of safety standards are not checked at the door simply because an inspection is in progress.

supported the Judge's determination.[5] *Id.* at 893–95. We emphasized that, consistent with Commission precedent on unwarrantable failure, we needed to apply only those factors relevant to the facts of the case. *Id.* at 893, n.13 (*citing Lafarge Constr. Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998) (holding that for violations involving high danger of which a foreman should have been aware, other factors may be less relevant)).

In summary, we see no need to remand this case and require the Judge to examine evidence regarding each of the unwarrantable failure factors. The Commission has not hesitated to reverse a Judge's finding of no unwarrantable failure when faced with compelling evidence to the contrary. *See, e.g.*, *Consolidation Coal Co.*, 22 FMSHRC 328, 334 (Mar. 2000) (reversing Judge's finding that a violation of a standard requiring the operator to maintain a supply of supplementary roof support material was not due to unwarrantable failure); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 487–89 (Mar. 1997) (reversing Judge's conclusion that coal accumulation violations were not the result of unwarrantable failure); *Midwest Material*, 19 FMSHRC at 34–37 (reversing Judge's determination that a violation of a standard requiring that in certain circumstances, mechanical equipment be blocked or mechanically secured to prevent it from rolling or falling, was not the result of the operator's unwarrantable failure). Similarly, remand is not necessary here, where the superintendent's actions demonstrated a reckless disregard for safety constituting an unwarrantable failure. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when the record supports no other conclusion).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

[5] In *Midwest Material*, we held that reliance on the brief duration of the violation was misplaced in view of the high degree of danger posed by the hazardous condition and its obvious nature. 19 FMSHRC at 36. We noted that:

> [g]iven the extreme hazard created by [the foreman's] negligent conduct, that misconduct is readily distinguishable from other types of violations – such as those involving the accumulation of coal dust – where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time.

The same holds true in this case.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 2016

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

v.

THE AMERICAN COAL COMPANY

Docket No. LAKE 2009-35

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

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Under review are rulings the Administrative Law Judge made in affirming two orders alleging flagrant violations of 30 C.F.R. § 75.400.[1] 35 FMSHRC 2208 (July 2013) (ALJ).

The Commission granted cross-petitions for discretionary review from American Coal Company ("AmCoal") and the Secretary of Labor. AmCoal, on multiple grounds, challenges the Judge's determinations that the violations constituted "flagrant" violations, as that term is used in the Mine Act's penalty provisions. The Secretary petitioned for review of the Judge's determination that, in connection with the second violation, there was a lesser degree of negligence on the part of AmCoal, which provided a basis for the Judge's reduction in the amount of the penalty he assessed for the violation relative to that proposed by the Secretary.

For the reasons that follow, we affirm the Judge's "flagrant" determination with respect to the first violation. We vacate and remand certain of the Judge's determinations with respect to the second violation for further proceedings consistent with this decision.[2]

[1] Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

[2] A majority of the Commissioners join in each section of the unsigned opinion, and therefore it constitutes the Commission's decision in this case. Those sections in which not all Commissioners join in either result or rationale, and thus one or more Commissioners write separately, include footnotes identifying a Commissioner's departure.

I.

General Factual and Procedural Background

The two violations occurred five days apart in September 2007 at AmCoal's Galatia Mine, a large underground coal mine in Saline County, Illinois. There, a complex system of conveyor belts transports coal for many miles from mine face to portal. The mine was subject to five-day spot inspections by MSHA due to the amount of methane it liberated daily.[3]

The orders in this case were issued due to accumulations of loose coal and float coal dust at two separate belt transfer points. Specifically, on September 18, Steven Miller, the lead inspector at the mine from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Order No. 7490584 for accumulations of those materials occurring approximately four miles outby the working section, near the location where the Flannigan #1 belt transferred coal to the Northwest #3 belt. Am. Ex. 5, at 3-4 (maps). The order alleged that the violation was both significant and substantial ("S&S") and attributable to AmCoal's unwarrantable failure to comply with section 75.400.[4]

On September 23, Inspector Miller issued Order No. 7490599 for accumulations of loose coal and float coal dust near the transfer point between a "pony" belt — a shorter, temporary belt at the working section in the northwest area of the mine — and the larger Flannigan Tailgate belt. Am Ex. 4, at 5 (map). This order also alleged that the violation was both S&S and attributable to AmCoal's unwarrantable failure.

MSHA subsequently proposed penalties for the two alleged violations. Significantly, both violations were assessed as "flagrant" under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), which at that time permitted penalties of up to $220,000 per violation to be imposed for flagrant violations.[5] For the first order, MSHA proposed a penalty of $179,300, while for the second it proposed $164,700.

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[3] Section 103(i) of the Act provides in pertinent part that a mine liberating in excess of one million cubic feet of methane or other explosive gases during a 24-hour period is subject to a minimum of one spot inspection every five working days. 30 U.S.C. § 813(i).

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[5] Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act amended section 110 of the Mine Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty. Pub. L. No. 109-236, 120 Stat. 498, 500 (2006).

A. Introduction - Flagrant Violations

The MINER Act's "flagrant" provision provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).[6]

In this case, the Secretary of Labor alleges that the operator's "failure" was of the "repeated" variety, not the "reckless" variety. As described in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), a "repeated" failure to make reasonable efforts to eliminate certain violations may be proven in two different ways.

When we first considered proof of flagrant violations, on interlocutory review in *Wolf Run*, we held that the graduated enforcement scheme of the Mine Act and other reasons allowed an operator's violation history to be taken into account in determining whether its "failure to take reasonable steps to eliminate a" serious "known violation" was a "repeated" one. *Id*. at 541-43.[7] This is best described as a recurrent-type violation, and was referred to by the Judge in his decision as the "broad" interpretation of the flagrant provision for repeated violations.[8]

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[6] Congress divided section 110(b) into two subsections, with the new language set forth above included within section 110(b)(2). Pub. L. No. 109-280, 120 Stat 1108 (2006). MSHA subsequently added identical language to its penalty regulations. *See* 30 C.F.R. § 100.5(e). The language of section 110(b) that existed prior to the MINER Act was placed in section 110(b)(1) of the Mine Act. Section 110(b)(1) now provides that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues." 30 U.S.C. § 820(b)(1). These are essentially the penalties for failure to abate orders issued under section 104(b), 30 U.S.C. § 814.

[7] Commissioner Althen, who was not on the Commission at the time *Wolf Run* was issued, disagrees with this holding, for the reasons discussed in his separate opinion. Slip op. at 50-55. His four colleagues have considered his arguments, and affirm the holding in *Wolf Run*.

[8] Because of the interlocutory nature of the proceedings in *Wolf Run*, we found that it was inappropriate to address which prior violations were relevant in that instance. As a result, we offered no view on the reasonableness of the specific interpretation proffered by the Secretary's appellate counsel in that case. *Id*. at 543 & n.15. On remand, the parties settled the case. The flagrant designation was removed and a penalty of $70,000 was assessed, which was a little less than half of the $142,900 penalty that the Secretary proposed. Order, Docket No. WEVA 2008-1265 (Apr. 14, 2014) (ALJ).

We also made passing reference to a second approach to establishing a repeated failure in *Wolf Run* (35 FMSHRC at 543 n.14), which was referred to as the "narrow" interpretation of the flagrant provision by the Judge, who applied it to both orders in this case. The Judge held that to establish a "repeated failure to make reasonable efforts to eliminate" a serious, known violation under this approach, the Secretary would be required to show that the cited and assessed violation, discreetly and without reference to the operator's past violation history, met the requirements for a flagrant violation. In other words, there was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e., known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities (repeated failure to take reasonable steps to eliminate).[9]

B. The Proceeding Below

This case was tried below in August 2011under the first approach, with the Secretary focusing on AmCoal's past history of section 75.400 violations. In the two years leading up to September 2007, MSHA had issued the Galatia Mine a large number of citations and orders for accumulations violations. At the hearing, the Secretary introduced evidence in particular of citations and orders issued in the 12 months preceding September 2007 for accumulations of coal, lump coal, coal dust, float coal dust, and coal fines on or around conveyor belts.

In his decision,[10] the Judge rejected the interpretation of the flagrant provision proffered by the Secretary which relied upon AmCoal's history of past violations (the "broad" approach). After an extensive analysis, he concluded that he could defer to the Secretary's interpretation only to the extent that it had the power to persuade, and that here he was "not persuaded by the Secretary's shifting and inconsistent reasoning, including the addition of requirements not present in the statutory language." *Id*. at 2242-49, 2253-58.

The Judge nevertheless held that both accumulations violations were flagrant under the second approach — the "narrow" interpretation — as the evidence established that the violations fell within the express terms of the statutory language. *Id*. at 2258-67. He assessed penalties of $101,475 and $77,737, respectively, for the orders. Thus, the penalty amounts exceeded the maximum penalties for non-flagrant violations, but were less than the Secretary's requested amounts. *Id*. at 2266-69.

[9] In *Wolf Run*, the Commission intimated that such conduct may be considered as both "reckless" and "repeated" under the terms of the statute. 35 FMSHRC at 543 n.14.

[10] By order dated February 28, 2012, the Judge stayed this proceeding while the Commission considered the issue of the interpretation of the flagrant penalty provision. Upon issuance of the Commission's decision in *Wolf Run*, the Judge lifted the stay and took further briefing regarding the Commission's decision. *See* Order dated April 1, 2013.

II.

Order No. 7490584

AmCoal is appealing the Judge's determination that the violation in Order No. 7490584 was established as "flagrant." It argues that the Judge's "narrow" interpretation of the term "repeated" is incorrect, that substantial evidence does not support the Judge's findings under a number of the elements of the definition,[11] and that AmCoal was deprived of due process because it had no notice of the interpretation.

In response, the Secretary urges that the Judge's flagrant determination under the narrow interpretation of the statute be affirmed, or that if it is not, the Commission reverse the Judge on the question of the reasonableness of the broader interpretation and find that the violation was established as flagrant under that alternative interpretation of the statutory definition.

Order No. 7490584, also referred to herein as "the first violation," states:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Northwest Number 3 conveyor belt. The accumulations measured approximately 6 inches to 29 inches in depth. Accumulations of coal that had been removed from under this tail roller in the past had been stock pile[d] behind the tail roller guard and measured approximately 6 feet in width, 2 feet in depth, and 8 feet in length. Loose coal and coal float dust also extended outby the tail roller approximately 150 feet as well as 40 feet inby the tail roller. This area was black and the turning tail roller was suspending float coal dust into the atmosphere. This condition has been on the books for the last four shifts.

Gov't Ex. 2. 35 FMSHRC at 2211-12.

According to the terms of section 110(b)(2), to establish a "flagrant" violation, the Secretary must demonstrate on the operator's part "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Thus, for a flagrant violation, it must be established that: (1) there was a condition that constituted a violation of a mandatory health or safety standard, (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious

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

bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated." In this instance AmCoal challenges the Judge's determinations with respect to a number of the elements of the flagrant standard.

A. A Known Violation of Section 75.400

The Judge found that AmCoal conceded both violations. He concluded that a violation is considered to be "known" if the operator has actual or constructive knowledge of the violative condition. 35 FMSHRC at 2259-60.

With regard to the first violation, the Judge found actual knowledge of the accumulations, in that there were references made in the examination books for the three previous shifts to the belt area at issue being "dirty" and "black." *Id*. at 2212-14, 2238 (unwarrantable failure analysis), 2264-65.

AmCoal does not challenge the Judge's application of "known" in this instance, nor does it challenge his reliance on the preshift reports with respect to the first violation. Those reports document the accumulations over the course of four shifts. Am. Ex. 22, 23. Consequently, substantial evidence supports the Judge's conclusion that there was a known violation of section 75.400.[12]

B. Reasonable Expectation of Death or Serious Bodily Injury

A violation can be found to be flagrant if it is established that there was a reasonable expectation of death or serious bodily injury from the violation and the operator's failure to eliminate it. Here, the Judge determined that the grinding of the tail roller in the loose coal was a potential ignition source, 35 FMSHRC at 2227, and that the known accumulation violation contributed to the hazard of a mine fire, which could have been expected to cause severe and serious injuries due to smoke inhalation. *Id*. at 2265. Substantial evidence supports his determination.

In finding that there was a reasonable expectation of serious bodily injury from the violation, the Judge relied upon his determination that the violation was S&S. On review, AmCoal does not challenge the Judge's finding with respect to the violation being S&S.

As AmCoal recognizes, the fourth and final finding necessary for concluding that a violation is S&S under the Commission's S&S test is similar, though not exactly identical to, the

[12] While, as he discusses in his separate opinion, Commissioner Althen would apply a more stringent standard to the "knowledge" element of the flagrant provision than the Judge did in this case, he notes that applying that standard results in the same conclusion with respect to this violation. Slip op. at 40.

language describing the degree of injury necessary for a flagrant violation to be established.[13] While there is no legislative history addressing the flagrant violation provision (*see Wolf Run*, 35 FMSHRC at 541 n.8), it nevertheless appears that Congress, when it enacted the MINER Act and the flagrant provision, may have been looking to established Mine Act principles, such as the Commission's interpretation and application of S&S in *Mathies* and subsequent cases.[14]

On appeal, AmCoal argues that, with regard to whether the violation here qualifies as "flagrant," the Judge erred, on both legal and substantial evidence grounds, in finding that the violation had the potential for "death or serious injury." It first contends that the statutory flagrant language establishes a more stringent standard than does the fourth *Mathies* element, in that the statute requires that a reasonable expectation of death or serious bodily injury be established, and not just the reasonable likelihood of an injury "of a *reasonably* serious nature" that satisfies *Mathies*. Relying on the terms MSHA uses in its penalty proposal regulations in expressing degrees of gravity, AmCoal would have flagrant violations limited to those that are reasonably likely to result in "fatal" or "permanently disabling" injuries, and not include the next

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

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

Id. at 3-4 (footnote omitted) (emphasis added); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[14] As he notes in his separate opinion, Commissioner Althen finds that it is more likely that the phrase "reasonable expectation of serious bodily injury from the violation" was drawn from Commission cases interpreting the Mine Act's imminent danger provision, 30 U.S.C. § 817, and thus does not join his colleagues in interpreting and applying that language with reference to the Commission's S&S precedent. *See* slip op. at 42; 30 U.S.C. § 802(j) (defining "imminent danger" as "the existence of any condition or practice in a . . . mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated").

lower level of injuries under those regulations, those resulting in "lost work days or restricted duty." *See* 30 C.F.R. § 100.3(e).[15]

However, those regulations are only applicable at the start of the penalty process, and then are only employed by MSHA when it proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). Section 110(i) of the Mine Act ultimately authorizes the assessment of penalties for violations of the Act, and it assigns that responsibility to the Commission. *See* 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). Included as one of the criteria the Commission is required to consider in assessing a penalty is "the gravity of the violation." *Id*.

We thus reject AmCoal's reliance on the Part 100 penalty regulations — with their division of the severity of injuries into the three categories of "lost work days or restricted duty," "permanently disabling," and "fatal," 30 C.F.R. § 100.3(e) — to circumscribe the definition of "serious bodily injury." *See Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016); *Brody Mining LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). Consequently, we decline to look to the Part 100 regulations in interpreting elements of the flagrant penalty provision.

AmCoal also argues that the higher penalties for flagrant violations indicate that, under the Mine Act's graduated enforcement scheme, something more is required than under the scheme as it existed prior to the MINER Act amendments, and that therefore something more than an S&S finding is necessary before a violation can be found to be flagrant. It submits that the omission in the flagrant provision of the term "reasonably" from the *Mathies* fourth element of "injuries of a reasonably serious nature" further supports this argument.

We agree with AmCoal in part with respect to its first argument. Clearly, the maximum penalty that can be imposed under the MINER Act for the new classification of a "flagrant" violation far exceeds the penalty that can be imposed for a non-flagrant violation under the other provisions of the Mine Act.[16] Accordingly, it is reasonable to expect that flagrant violations be of

[15] AmCoal points out that MSHA issued two Procedural Instructional Letters in the first two years after the enactment of the flagrant provision. *See Procedures for Evaluating Flagrant Violations* (PIL Nos. I06-III-04 and I08-III-02); Am. Ex. 27. In both, MSHA indicated that "serious bodily injury" meant an injury evaluated to be at least permanently disabling. However, the last of the effective PILs expired in 2010, and the Secretary has since disavowed them as his definitive interpretation of the flagrant provision.

[16] Section 110(a)(1) of the Mine Act provides for a penalty of up to $50,000 for each violation of the Act. 30 U.S.C. § 820(a)(1). In 2008, the maximum was adjusted to $70,000 through rulemaking to account for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, Nov. 10, 1998, 112 Stat. 3280). *See* 30 C.F.R. § 100.3(a); 73 Fed. Reg. 7206, 7207-08 (Feb. 7, 2008).

a type that was not addressed in the original Mine Act. Otherwise, Congress could have simply increased the maximum amount at which a penalty can be assessed and avoided creating a new statutory classification of violation.

However, it does not necessarily follow that a flagrant violation must have a potential for a greater degree of gravity than that of an S&S non-flagrant violation. Rather, the distinguishing characteristic of a flagrant violation is most evident in those terms of the provision that previously were not part of the Mine Act. Foremost, in light of the Act's framework of escalating sanctions, is the language targeting a "repeated or reckless failure to make reasonable efforts to eliminate a known violation."

Under the Mine Act, section 104(d)(1) already provided for the inclusion of a special finding in citations and orders regarding an operator's "unwarrantable failure" to comply with the mandatory health or safety standard violated. The Commission has determined that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence, such that it encompasses "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). Under well-established Commission case law, facts regarding the extent of an operator's knowledge of the conditions that constitute a violation, and the operator's behavior in light of that knowledge — particularly what it did to address the conditions — are key components in determining whether a violation is attributable to an operator's unwarrantable failure. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2331-32 (Aug. 2013); *Manalapan Mining Co.,* 35 FMSHRC 289, 295-97 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1353-55 (Dec. 2009).

Nevertheless, with the addition of the flagrant provision, Congress in the MINER Act chose, in the statute itself, to expressly and more forcefully focus upon violations known by operators and behavior indicative of a failure to address such violations. These factors, and not the degree of danger posed by a violation, are what distinguish the flagrant provision from the previous enforcement mechanisms available to MSHA.

As for the potential injuries from a mine fire, smoke inhalation clearly is a "serious bodily injury" under the terms of the flagrant provision. In *Wal-Mart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731 (D.C. Cir. 2004), a case arising out of an alleged safety violation in a retail store stockroom, the court quoted approvingly from an Occupational Safety and Health Review Commission decision that "[c]learly, burns, smoke inhalation, and other potential injuries caused by delays in exiting the workplace during an emergency fall within the meaning of 'serious physical harm.'" *Id*. at 735-36 (quoting *Tree of Life, Inc.*, 19 OSH Case (BNA) 1535 (2001); *see also Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1141 (May 2014) (potential for smoke inhalation from mine fire constitutes serious injury and thus compels conclusion that violation was S&S), *aff'd*, 811 F.3d 148 (4th Cir. 2016). Due to the long distances miners may have to travel to escape the underground mine environment in the event of a fire, their potential exposure to smoke is substantial. Moreover, in this case there were extensive accumulations of coal and coal dust to fuel a fire, so a fire at the location in question would present a severe hazard.

AmCoal nevertheless challenges on substantial evidence grounds the Judge's finding of a reasonable expectation that ten or more miners would have suffered from smoke inhalation while exiting the mine to escape a fire fueled by the belt accumulations. AmCoal contends that there is insufficient evidence of the amount of smoke that would leak into the primary escapeway due to the two damaged stoppings that would have permitted smoke from the belt area to enter that escapeway. AmCoal further contends that the secondary escapeway would not have been contaminated by smoke from a belt-area fire, and thus miners could have used it instead of the primary escapeway.

The Judge found that there was sufficient evidence that some smoke would leak into the primary escapeway due to damaged stoppings between the belt area and the primary escapeway. In making his findings, the Judge expressly credited Inspector Miller's testimony over that of AmCoal mine superintendent Steve Willis. 35 FMSHRC at 2230-31. The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

We see no reason to disturb the Judge's credibility determinations here. The Judge relied upon Miller's 31 years of experience in mining and mine safety. 35 FMSHRC at 2211 n.5, 2230. Miller had described the potential for "contaminat[ion of] the other air courses pretty quickly," because of the damaged stoppings, before miners could get outby the source of the fire. He rejected the idea that the direction of the air flow would mitigate the hazard posed by the smoke. Tr. I 93-94.[17]

In contrast, Superintendent Willis downplayed the likelihood of smoke contaminating the primary escapeway, due to the air flow and air pressure in the primary escapeway being much greater than the air flow and pressure in the belt entry in question. He also described how, if miners were to encounter such smoke, they could use a secondary escapeway and utilize a regulator to divert any smoke in that escapeway. Tr. I 415-19, 421-23, 426; Am. Ex. 5, at 4 (map).

We disagree with AmCoal that to satisfy the flagrant provision the Judge was required to be more specific regarding the amount of smoke that would have reached the primary escapeway. The amount of smoke the miners would have been required to travel through in the event of a fire started in the belt accumulations is dependent upon a number of factors. Those factors include not only the intensity of the fire, but also the amount of time miners would have spent traveling through the compromised portion of the escapeway, a variable which itself is dependent upon other variable conditions. *See Buck Creek*, 52 F.3d at 135 (characterizing as "common sense" the "conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present."). In summary, the record evidence supports the Judge's finding that an accumulations fire "reasonably could have been

[17] References to "Tr. I" are to the transcript for the first day of the hearing below, held on August 23, 2011, while references to "Tr. II" are to the transcript for the second day of the hearing, held the following day.

expected to cause . . . serious bodily injury" in the form of smoke inhalation by escaping miners.[18]

C. Repeated Failure to Make Reasonable Efforts to Eliminate the Known Violation

With respect to this violation, the Judge correctly concluded that AmCoal had made no efforts to eliminate the accumulations. The Judge found that the only effort that had been made was to remove some loose coal that had accumulated earlier around the tail roller and stockpile it behind the tail roller guard; this did nothing to eliminate the accumulations violation. He noted that not only were AmCoal's actions contrary to the mine's section 75.400-2 cleanup plan, but also that the stockpile of loose coal simply provided additional fuel in the event of an ignition caused by the tail roller grinding in the accumulations. 35 FMSHRC at 2240, 2264; Am. Ex. 15, at 1 ("[l]oose accumulations of coal along the belt lines will be shoveled onto the belt."). These conclusions by the Judge have essentially gone unchallenged by AmCoal, which is instead challenging whether its failure to address the accumulations can be considered to have been a "repeated" one.

Relying on a number of dictionary definitions, the Judge held that the term "repeated" means "more than one occasion." 35 FMSHRC at 2258. Applying that definition to the facts of the violation, the Judge held that the evidence established that the failure to make reasonable efforts to eliminate the accumulations was repeated in nature. For the first violation, the Judge found that AmCoal failed to take steps to address the violation before and during each of the three shifts the accumulations existed. *Id*. at 2264.

AmCoal challenges the Judge's interpretation and application of the term "repeated." It takes the position that defining "repeated" to simply mean "more than once" is overbroad, is contrary to the term's plain meaning, ignores the context of the flagrant provision and its legislative history, and is inconsistent with the graduated enforcement scheme of the Mine Act. AmCoal would instead have the Commission hold that the term "repeated" means "several, many, or again and again," and can only be applied after taking the following into account: the extent of the cited conditions, or changes in the extent; the level of the operator's knowledge and any changes to that knowledge between the repeated instances; the level of danger posed by the conditions; and the abatement efforts of the operator.

In considering the meaning of the Mine Act, we must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr.

[18] In light of the dangers posed by a potential underground mine fire in this instance, we need not decide whether the slight difference between the pertinent language of the flagrant provision and the fourth element of *Mathies* mandates that flagrant violations cover only "a narrower, more severe subset of hazards" than violations designated S&S. Am. Coal Br. at 35. We need not decide this issue here because even if the standard for flagrant violations is more rigorous, it is met in this case.

1996). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue." *Coal Employment Project v. Dole*, 889 F. 2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

We find that the term "repeated" as it is used in the flagrant violation provision of the Mine Act does not have a plain meaning with respect to the failure to eliminate a singular, continuing violation. The Judge relied on several dictionary definitions, but they were not consistent. *See* 35 FMSHRC at 2258.[19] "A dictionary definition of a term cannot provide plain meaning when reliance on a different dictionary would provide 'different or uncertain outcomes.'" *Am. Coal Co.*, 35 FMSHRC 380, 383 (Feb. 2013) (finding different dictionaries contain different definitions of "fire") (citing *Alarm Indus. Communication Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997)), *aff'd*, 796 F.3d 18 (D.C. Cir. 2015); *see also Sec'y of Labor v. National Cement Co. of Cal.*, 494 F.3d 1066, 1074 (D.C. Cir. 2007) (different dictionary definitions of the term "private" establish that meaning of term was ambiguous as used in Mine Act).

Other traditional tools of statutory interpretation are of little aid in ascertaining a plain meaning of the statute's use of the term "repeated." Unfortunately, there is no legislative history on what Congress meant by any of the terms it employed to define what constitutes a flagrant violation, just the general intent of the flagrant penalty provision. *See Wolf Run*, 35 FMSHRC at 541 n.8. In short, we find the statutory language ambiguous.

With regard to the second step of *Chevron*, we do not read the Secretary's submissions in this case as having articulated a definite interpretation of "repeated" that he would always apply in the context of cases involving a single, continuing violation. Before the Judge, the Secretary tried the case on a different approach to the flagrant provision, relying on AmCoal's history of accumulations violations, so he likely saw no need to provide such an interpretation.

On appeal, the Secretary still does not provide a concrete interpretation of the "narrow" approach to "repeated" violations applicable in all cases. Instead, he simply states that he "agrees with [AmCoal] that two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." S. Resp. Br. at 17. We agree with the parties that, as far as it goes, this is a reasonable, albeit very general, interpretation.

Interpreting "repeated" in the context of the circumstances of the "failure" at issue is consistent with the term "flagrant." While Congress provided a definition of the term "flagrant,"

[19] Some of the dictionaries he cited indicate that "repeated" means more than once, so that twice is sufficient to qualify as "repeated," while other dictionary definitions use language that twice is insufficient to qualify as "repeated," such as those that state it means "again and again." Indeed, one dictionary contains both iterations of the term. *See Webster's Third New Int'l Dictionary of the English Language (Unabridged)* 1924 (1993) ("1: renewed or recurring again and again : CONSTANT, FREQUENT (~ absences) (~mistakes) (~changes of plan) 2 : said, done or presented again (an often ~ repeated excuse) (an eloquently ~ repeated speech) (an easily ~ pattern)").

the word bears an inherent approbation related to intolerable and obvious failure. "Flagrant" means "extremely . . . conspicuous; glaringly evident; notorious." *Websters Third Int'l* at 862-63. Another dictionary definition is "shockingly noticeable or evident; obvious; glaring." *Dictionary.com Unabridged* (Random House, Inc.), http://www.dictionary.com/browse/flagrant (last visited Aug. 29, 2016). We presume that Congress intended this word in its full significance, because it has chosen not to employ "flagrant" in an analogous context involving willful or repeated violations. *See* 29 U.S.C. § 666(a) ("Willful or repeated violation" provision of Occupational Safety and Health Act). Because the terms "flagrant" and "repeated" are used to characterize the operator's "failure to make reasonable efforts to eliminate" a known, serious hazard, our determination centers on the operator's dereliction where immediate remedial action was required.

In this instance, a review of the record with respect to the violation indicates that we need not decide the minimum number of failures to address a violation before those failures can be considered to have been "repeated."[20] The Judge's findings readily establish that, over several shifts, AmCoal knew of and had multiple opportunities to eliminate the cited accumulations but did not take corrective action.

The Judge examined in detail the operator's examination records not only for indications of the extent of the accumulations during each of the shifts leading up to Inspector Miller's discovery of the accumulations, but also for what AmCoal's reports documented that the operator did in response to those indications. When the first preshift/onshift report on September 17 indicated accumulations around the Northwest No. 3 belt, the next such report indicated that the area had been cleaned. 35 FMSHRC at 2213; Am. Ex. 22, at 2-3. Thus, AmCoal clearly had the capability to take steps to immediately address an accumulation from the belt in question.

After that, however, AmCoal's reports indicate worsening accumulations, with no corresponding indication of subsequent corrective action by AmCoal. From the examiner's report entered for the shift starting at 8:00 pm on September 17 until Miller issued his order at 5:15 pm on September 18, four successive reports indicated accumulations around the belt. 35 FMSHRC at 2213-14; Am. Ex. 22, at 4& 6; Am. Ex. 23, at 2 & 4. This includes notations that

[20] The Secretary focuses on the number of shift examinations of the belt in question that AmCoal conducted that should have alerted it to the accumulations. However, simply counting the number of shift examinations over which a violation existed is not necessarily the most accurate indicator of whether an operator's failure to eliminate it can be characterized as "repeated." Once the existence of an accumulation becomes known to the operator, it has an immediate and continuing obligation to act to correct the condition. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262-63 (Aug. 1992); *Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979). The number of shifts over which accumulations were left unaddressed can provide a useful measurement of the duration of an accumulations violation, and the number of operator reports noting the violative condition may help establish the degree to which the operator was aware of the violation. However, counting each shift or shift examination as a single opportunity for the operator to clean up the accumulations tends to obscure the extent to which the operator failed to act once it became aware of the existence of the condition. Not acting to clean up accumulations over the course of a shift should not necessarily be considered a single "failure."

the tail scraper and rollers were "black," which the Judge reasonably interpreted to mean that they were in contact with the accumulations. 35 FMSHRC at 2234-35.

Evidence that AmCoal's failure was a repeated one in this instance was also provided by Miller's testimony, credited by the Judge, that the amount and extent of accumulations indicated that they had begun some time before, that the reddish-brown color of some of the coal dust indicated that it had been in contact with the belt's rollers over a number of shifts, and that the black dust in the area was an indication that it had accumulated since the time the area had last been rock dusted. Miller also viewed the presence of float coal dust in the air to be the result of the turning tail roller suspending it. *Id*. at 2212, 2215; Tr. I 71-72, 63-65, 83-84, 206-07. The coal stockpiled behind the tail also demonstrates that AmCoal was aware of the accumulations, and acted at least at one point to move them away from the rollers (though that did nothing to eliminate them as "accumulations"). 35 FMSHRC at 2214; Tr. I 151.

Lastly, there is no record evidence of anything that was preventing AmCoal from cleaning up the accumulations much sooner. Indeed, in a rather damning concession in its opening brief, AmCoal states that if it had realized the flagrant provision applied to its conduct in this instance, it might have responded differently, such as "dedicat[ing] more personnel to quickly clean-up the accumulations noted in the exam records instead of allowing them to be on the books for three (3) shifts without fully correcting them." Am. Br. at 29-30 & n.11. Such an attitude towards accumulations by the operator clearly runs counter to the duty the Mine Act imposes on it to immediately act to clean up accumulations once their existence becomes known, and may, in part at least, explain why Congress found it necessary to include the flagrant violation provision in the MINER Act.

D. Notice

AmCoal contends that, with regard to the narrow interpretation of the flagrant provision, it did not have adequate notice of the meaning of the term "repeated failure." It maintains "that its management could not and did not 'know what [was] required of them so they [could have] act[ed] accordingly' to avoid" the flagrant orders. Am. Br. at 23 (quoting *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012)). The operator requests that the Commission therefore hold that the flagrant provisions are unconstitutionally vague as applied to AmCoal. According to the Supreme Court in *Fox*, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . It requires the invalidation of laws that are impermissibly vague." 132 S. Ct. at 2317 (citations omitted).

We reject the argument that the term "repeated failure" did not give AmCoal sufficient notice of what the flagrant provision required of it. The operator's notice argument relies on cases involving a defense in which a party claims a lack of notice of prohibited conduct. The conduct at issue here is compliance with the safety standard regarding accumulations. The operator makes no claim that it did not understand how to comply with this provision. Any ambiguity in the statutory language regarding "flagrant violations" affects the amount of penalty assessed. It does not affect the clarity of the standard of conduct to which AmCoal must adhere, as expressed in the underlying safety standard.

The term "repeated" depends on the context in which it is to be applied. In this case, given the above-described facts, all of which are supported by substantial evidence, it is clear that the operator permitted a known, dangerous accumulation to persist over several shifts. Under the facts of this violation, it is also abundantly clear that the operator "repeatedly" failed to address a known violation of a mandatory safety standard.

An operator's history is probative of the conditions in which the alleged flagrant failure occurred. For example, an operator's history of past similar violations may be used to demonstrate failure to address the root cause on previous occasions; to show the operator had notice of a general problem which included the subject violation; or to establish the operator's general practices and the failure to adopt improved practices, where relevant.

The record in this case refutes the assertion that AmCoal could not have expected the violations here to fall within the scope of the "repeated failure" provision. The Secretary submitted at the hearing 27 citations or orders, issued at the mine within the 12 months preceding the subject orders, for violations of section 75.400 involving accumulations in belt areas of the same materials at issue here — coal, float coal dust, coal fines, and other combustibles. Gov't Exs. 6 to 32. In addition, the Secretary submitted a history of previous violations for the mine showing 361 final and nonfinal orders for accumulations violations at the mine during the two years prior to the issuance of the orders, including five alleging violations attributable to AmCoal's unwarrantable failure issued within the two months prior to the subject violations. Gov't. Ex. 1.

This history places AmCoal's failure to address the subject accumulations in context. The Judge found that MSHA had "warned [AmCoal] repeatedly through meetings, training sessions, and prior citations/orders, about belt accumulation[s]." 35 FMSHRC at 2237; Tr. 86-90. AmCoal thus already knew that MSHA viewed its accumulations to be a serious general problem that the operator was not adequately addressing. With that as background, any reasonably prudent operator would have understood, by reading the "repeated failure" language of the flagrant provision, that its conduct with respect to accumulations — which were allowed to persist over several shifts, despite the agency's specific and escalating admonishments concerning substantially similar violations — was subject to the flagrant penalties.

In summary, we affirm the Judge's determination that the violation in Order No. 7490584 was established to be a flagrant violation of the Mine Act in and of itself. Consequently, in this instance we do not need to address the Secretary's alternative request that we determine whether, contrary to the Judge's decision, the Secretary also established the violation as flagrant based on the evidence of AmCoal's history of accumulations violations.

III.
Order No. 7490599

This order, also referred to herein as "the second violation," states that:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of

> the Flannigan Tailgate conveyor belt. The accumulations measured approximately 6 inches to 14 inches in depth. Loose coal and coal float dust also extended outby the tail roller approximately 450 feet as well. The area was black and the turning tail roller was suspending float coal dust into the atmosphere. The bottom belt and bottom rollers were in contact with these accumulations.

Gov't Ex. 3.

A. The Violation of Section 75.400

As with the first violation, there is no dispute in this instance that the cited accumulations constituted a violation of section 75.400. The Judge's finding of a violation is well supported by the record evidence. *See* 35 FMSHRC at 2217-19, 2224 & n.8. He credited Miller's testimony, which was supported by his notes, that there was "a lot" of black float coal dust, such that he immediately noticed it upon entering the area. *Id*. at 2218-19; Tr. I 108-09; Tr. II 143; Gov't Ex. 4.

B. Reasonable Expectation of Death or Serious Bodily Injury

As with the first violation, the Judge relied on his S&S analysis to find that it was reasonable to expect that the second violation, if left unabated, would cause death or serious bodily injury. 35 FMSHRC at 2265. He found the second violation to be even more serious than the earlier accumulations. He found that a fire was reasonably likely to occur as a result of frictional heat generated between the loose coal and the energized tail roller of the belt at issue, and that serious and possibly fatal injuries would result in the event of a fire to the six miners on the working section inby the belt, as a result of smoke inhalation, carbon monoxide poisoning, burns, and entrapment. *Id*. at 2231.

AmCoal's legal challenges to the Judge's reliance on his S&S analysis were addressed, *supra*, with respect to the first violation, and the grounds for rejecting them are even stronger here. With regard to whether the violation was S&S, the Judge credited Inspector Miller's testimony that in this instance there were *two* separate ignition sources in contact with mostly dry accumulations — the bottom belt and bottom rollers, and the energized tail roller that was turning in the accumulations. *Id*. at 2219, 2230-31; Tr. 107, 119. Moreover, the six miners on the section were just six crosscuts away from the accumulations, and thus would have had little time in which to react to the effects of a fire precipitated by the accumulations at the belt. 35 FMSHRC at 2231; Tr. 121.

Lastly, the Judge relied upon Miller's testimony to conclude that, due to the miners' proximity, a mine fire would expose them not only to smoke inhalation, but also to carbon monoxide poisoning, burns, and entrapment. 35 FMSHRC at 2231; Tr. 121. Again, it appears to us that in finding the violation to be S&S, the Judge supported his determination with a quantum of evidence exceeding that necessary to uphold an accumulations violation as S&S under *Mathies*. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2328-29 (Aug. 2013).

While again not contesting the Judge's determination that the second violation was S&S, with respect to whether the violation was also flagrant AmCoal challenges on substantial evidence grounds the Judge's findings of the danger posed by a fire resulting from the cited accumulations. In analyzing the potential effects of a fire at the belt transfer point, the Judge referred to an AmCoal exhibit, a map used to illustrate witness testimony, that he interpreted as showing no stoppings present to isolate escaping miners from the effects of such a fire. *See* 35 FMSHRC at 2231 (citing Am. Ex. 4, at 5). As a result, he considered the smoke hazard to be "unmitigated." *Id*.

AmCoal contends that the exhibit was not prepared to be used as evidence for such matters as the existence and location of stoppings isolating the escapeway, so the Judge should not have used it in the manner he did. Tr. II 38. At the hearing, to the extent he addressed the issue, Inspector Miller testified to there being no evidence of the leakage of air coming off the belt area into the escapeways in this instance, and no evidence of damage to stoppings. Tr. I 347-48.

AmCoal contends that the map was not prepared for the purposes of documenting either the existence or location of stoppings and the Judge erred in interpreting it for that purpose. The Secretary concedes that the Judge misconstrued the evidence and that there were in fact stoppings between the primary and secondary escapeways on the Flannigan Tailgate belt. S. Br. at 21; Tr. II 37-46; Am. Ex. 4, at 5.

However, the evidence demonstrates that the pony belt entry, which ran from its intersection with the Flannigan Tailgate to the set-up area for the long wall panel lacked stoppings. Tr. II 42; Am. Ex. 4 at 5.[21] The Secretary notes that AmCoal's approved ventilation plan only required stoppings separating intake and return air course "up to and including the fourth connecting crosscut outby the working faces." Am. Ex. 18, at 7. Because the miners were inby the area of required stoppings, the area of entry in which they were working was not isolated by stoppings from the pony belt entry. Tr. II 42; Am. Ex. 4, at 5.

Miners evacuating the working face would have to travel outby over 400 feet before there were any stoppings to isolate them from fire and smoke in the pony belt entry, and another 200 or so feet in which the stoppings were not permanent and not designed to withstand fire, but were merely brattice and curtains. Tr. II 42, 101. It was only at that point that the miners would reach the belt intersection where the accumulations had ignited, and upon turning the 90-degree corner where the belts intersected could access any escapeway isolated by stoppings from the Flannigan Tailgate belt.

Accordingly, we conclude that substantial evidence supports the Judge's conclusion that the smoke hazard was serious enough to reasonably be expected to cause death or serious bodily

[21] Foreman Raney's testimony regarding the presence of stoppings isolating the escapeways was specifically limited to the escapeways in the Flannigan Tailgate. Tr. II 101-02.

injury.[22] Whether the Judge's misuse of the mine map affected his further finding that, under the circumstances, this violation posed an even greater danger than the earlier violation, is not material to the disposition of the flagrant determination on appeal.[23]

C. Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

With regard to whether the violation was "known" by AmCoal, the Judge credited Miller's estimate that the coal and dust had accumulated over more than two shifts, because in only a "train wreck" scenario would such extensive, black accumulations result in less than that amount of time. 35 FMSHRC at 2265 (citing Tr. I 108). The Judge held that while AmCoal did not have actual knowledge of the accumulations, in that they had not been reported in the operator's examination books in this instance, it had constructive knowledge of the accumulations from its Production Delay ("P&D") reports. *Id*. at 2239 (citing Am Ex. 21), 2259, 2265.

The Judge read those reports as having documented problems with the pony belt stopping and starting due to electrical problems over the course of several shifts, and drew upon testimony from AmCoal section foreman Rocky Raney that such stops and starts could cause spillage from the belt and quickly lead to accumulations. *Id*. at 2219, 2239, 2265; Tr. II 66-68. Accordingly, the Judge found that AmCoal had the opportunity during the two shifts preceding the discovery of the accumulations by Inspector Miller to address the accumulations, but did not do so. 35 FMSHRC at 2265.[24]

AmCoal challenges the Judge's findings with regard to its knowledge of the accumulations, and thus his findings that it failed to make reasonable efforts to eliminate the

[22] For the reasons stated in his partial dissent, Commissioner Young would remand this issue to the Judge for him to make the necessary findings of fact in the first instance. Commissioner Althen joins in this view. Slip op. at 32, 41 n.3.

[23] Despite finding a greater degree of gravity for the second violation as compared to the first, the Judge assessed a penalty that was $23,000 less than the penalty he assessed for the first violation, and in so doing reduced the Secretary's proposed penalty for the second violation approximately $9,000 more than he reduced the Secretary's proposed penalty for the first violation. 35 FMSHRC at 2266-67. Consequently, we see no need to include in a remand of the case to the Judge the issue of the gravity of the second violation.

[24] In a related holding, the Judge found that the failure of AmCoal's examiners to report the violations in the two shifts preceding the discovery of the accumulations by Miller mitigated AmCoal's negligence with respect to the second violation. Consequently, the Judge, relying on the Secretary's penalty regulations addressing the negligence factor, reduced the level of AmCoal's negligence from "high" to "moderate." *Id*. at 2241. The Commission granted the Secretary's petition for review on the reduction, and we address his arguments below in Part III.E.

violations. We conclude that the Judge's analysis of the evidence of AmCoal's knowledge of the accumulations was insufficient in this instance.[25]

At the mine, each AmCoal shift foreman would fill out P&D forms by hand each shift, including for the working section in question. Tr. II 31-32; *see* Am. Ex. 20, at 37-42 (three Sept. 23 shifts the Judge focused upon). These reports were then summarized in the daily printout to which the Judge cited, which according to Raney were likely produced by "Mine Control." 35 FMSHRC at 2219, 2239, 2265; Tr. II 30-31, 60-61; Am. Ex. 21, at 10 (Sept. 23). The Judge's reliance on the daily printout of the P&D reports is problematic, however, because the September 23 report was not printed until the morning of September 24, the day after AmCoal was cited for the accumulations. Tr. II 60; s*ee* Am. Ex. 21, at 10 (notation of date of printing).

Rather than exclusively relying on the daily printout of the P&D reports, the Judge should have looked to the handwritten forms prepared by those foremen, as they included contemporaneous information. They also included a greater amount of more specific information, such as the exact times that the pony belt was experiencing the problems summarized on the printed P&D report for that day. For instance, with regard to the first shift on September 23, the shift starting at midnight, the notation that "pony belt would not run for more than [two to three minutes]"(Am. Ex. 20, at 38), was for the 7:00 a.m. to 9:00 a.m. time period at the end of that shift. This is the problem to which Raney, in reviewing the daily summary, linked the potential for spillage at the belt transfer point. Tr. II 65-68.

The pony belt was then not used until the next shift, when there is a notation that it was discovered at the arrival of that next shift, at 9:15 am, that the pony belt's ground monitor card was bad, and it was repaired or replaced between 9:15 and 9:45 a.m., and again between 12:50 and 1:20 p.m. Am. Ex. 20, at 37-38. Raney explained that a bad ground monitor card would shut down the electrical current to the pony belt, resulting in the belt's stopping and starting. Tr. II 66-67.

The time at which the belt was stopping and starting is important, because the Judge inferred from the interruptions in the running of the belt that shift examiners had to have seen the resulting accumulations, and imputed that knowledge to AmCoal. *See* 35 FMSHRC at 2239 ("it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition").[26]

However, the evidence is that the belt examinations took place and no reports of accumulations were made. Despite alleging that the violation was flagrant, in this instance MSHA did not issue a citation or order to AmCoal for having failed to conduct a proper examination of the belts during the preceding shifts, unlike what it did with respect to the first

[25] For the reasons set forth in their partial dissent, Chairman Jordan and Commissioner Nakamura would affirm the Judge with regard to these elements of the flagrant provision as to the second violation. *See* slip op. at 33-36.

[26] The belt area at issue was required to be examined once per shift pursuant to MSHA regulations. *See* 30 C.F.R. § 75.362(b).

violation. While the Secretary now alleges that the AmCoal examiners should have recorded the accumulations, and argues that their negligence in failing to do so is attributable to AmCoal, he provides no explanation why "Inspector Miller did not cite American Coal for it." *See* S. Resp. Br. at 15.

Inferences drawn by a Judge are only permissible to the extent that "they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Here, the Judge erred when he gave no consideration to the other conclusions that could have been drawn in this instance.

It may have been that there was the lack of a record of accumulations on a shift report due to the lack of accumulations at the time. Another possibility is that Inspector Miller, exercising his discretion, decided not to cite AmCoal for failure to conduct a proper belt examination. Because the Judge did not address these alternative explanations, we cannot find the inference he drew to be a reasonable one.

On remand, the Judge should review all of the record evidence, and determine at what point, prior to Miller's discovery of the accumulations, AmCoal should have become aware of the accumulations.[27] This includes not only the evidence with respect to September 23, but

[27] While he agrees that the case should be remanded so that the Judge can consider this evidence, Commissioner Althen states that the question of whether a violation is "known" under the flagrant standard is "not [one of] what AmCoal 'should have known,'" but rather "whether AmCoal knew of the violation, or whether it knew of sufficient facts from which it is reasonable to infer knowledge." Slip op. at 49. While not addressing the need for actual knowledge, Chairman Jordan and Commissioner Nakamura conclude that actual knowledge on the part of AmCoal was established. Slip op. at 35.

Commissioners Cohen and Young conclude that, in the context of this case, they do not need to reach the issue of whether there is a difference between implied actual knowledge and constructive knowledge. However, they note that supervisors cannot "'close their eyes to violations and then assert a lack of responsibility for those violations because of self-induced ignorance.'" *Matney, emp. by Knox Creek Coal Corp.,* 34 FMSHRC 777, 786 (Apr. 2012) (quoting *Glenn, emp. by Climax Molybdenum Co.*, 6 FMSHRC 1583, 1587 (July 1984)). The question of the operator's knowledge and whether it meets the standard required to show a flagrant violation is one for the judge to resolve in the first instance.

Commissioners Cohen and Young further note that Commissioner Althen claims that the Commission has repeatedly held that constructive knowledge, i.e., a "should have known" standard, is indicative of only ordinary negligence. Slip op. at 43-44 n.5 (citing *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1987)). That is a misreading of Commission case law. In *Emery*, the Commission cited the Act's legislative history and explicitly stated that aggravated conduct more than ordinary negligence can be demonstrated through a "knew or should have known standard." *See* 9 FMSHRC at 2002-04. In *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), the Commission again held that "[a] lack of actual knowledge by [] management . . . does not necessarily bar an unwarrantable failure finding." This principle has been recently reaffirmed by the Commission in our decision in *Brody Mining*, 37 FMSHRC at 1699.

September 22 as well, as there also is record evidence of belt interruptions on that day as well. Am. Ex. 20, 21. In doing so, the Judge should consider what knowledge the foremen on any of the shifts, including Raney's, would have had regarding the accumulations, given the evidence that they and their crews would have had to pass by the location where the accumulations were later discovered by Inspector Miller.[28] Additionally, the Judge could consider that the day shift crew on September 23 made repairs to the pony belt so that it would run without interruption, and so, presumably, the crew was working near the accumulations. The Judge should also reexamine the evidence supporting his inference that multiple shift examiners had to have noticed the accumulations.

Only after having considered all of the evidence, and found the time at which AmCoal should have become aware of the violation, can the Judge determine whether AmCoal then "repeatedly" failed to make reasonable efforts to address the accumulations.

D. The Alternative of Establishing a Flagrant Violation Under the Broad Interpretation of "Repeated"

In the event on remand that the Judge does not find that Order No. 7490599 was a flagrant violation under the narrow approach, he will need to address whether a flagrant violation was nevertheless established by the Secretary under the broad approach, as mandated by the terms of the flagrant provision. Should he reach the issue of the broad interpretation, having previously rejected the Secretary's proffered interpretation, the Judge will have to fashion an interpretation of the flagrant violation provision which permits the Secretary to establish a violation as flagrant by taking the operator's history of previous accumulations violations into account. *See Wolf Run*, 35 FMSHRC at 541.[29]

Commissioners in their individually-signed opinions set forth below further address this issue.

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[28] Below, the Secretary argued that Raney must have seen the accumulations at the start of the shift immediately prior to their being cited by Miller, but otherwise made no attempt to establish that AmCoal knew of the violations earlier. *See* S. Post-Hr'g Br. at 39-41 (citing Tr. I 114-15). Indeed, the Secretary never explored with Raney during his testimony whether he had noticed the accumulations. The Judge did not make a finding from other evidence that Raney must have observed the accumulations. The intersection between the Flannigan Tailgate and pony belts where the accumulations were discovered was in an area only six crosscuts (and thus a little more than 600 feet) outby the working section. Tr. I 365; Tr. II 42. Inspector Miller testified that Joe Myers, the AmCoal safety escort accompanying him on his inspection at that time, reacted to the accumulations by getting upset with foreman Raney and his crew, because they, upon arriving for their shift at the section, had to have passed through the area to get to the working section, and thus should have noticed the accumulations. Tr. I 114-15.

[29] All Commissioners agree, except for Commissioner Althen who dissents on the ground that the flagrant provision does not permit consideration of the operator's history of previous violations.

E. The Judge's Reduction in the Level of AmCoal's Negligence

The Judge modified the order as to the second violation to find it was the result of only moderate negligence on the part of AmCoal. He did so because he found that the failure of AmCoal's shift examiners to report the accumulations to mine management was a mitigating factor with respect to AmCoal's negligence, and that under MSHA's regulations, if there is even a single mitigating factor, a violation will not be alleged to be due to high negligence. 35 FMSHRC at 2241 (citing 30 C.F.R. § 100.3(d)).

In his cross-appeal, the Secretary contends that the negligence of AmCoal's mine examiners in not reporting the accumulations to management is attributable to the operator for negligence purposes under Commission case law. According to the Secretary, the Judge's erroneous discounting of the level of AmCoal's negligence led him to reduce the Secretary's proposed penalty by 53 percent, which was an abuse of discretion on the Judge's part. He requests that the case be remanded for a reassessment of the penalty. AmCoal counters that the Judge's lowering of the negligence found means that his finding of unwarrantable failure with respect to the violation must be reversed as a matter of law.

While the Secretary is correct that the Judge should have imputed the actions of the shift examiners to AmCoal for negligence determination purposes, as discussed previously, our remand requires that he reconsider his findings on the culpability of AmCoal's shift examiners with regard to the cited accumulations. Thus, we remand the Judge's negligence determination and penalty assessment as well.[30]

As we discussed earlier with respect to the gravity of the first violation, the Commission and its Judges are not in any way bound by the Secretary's penalty regulations in analyzing negligence issues, such as the existence and importance of any mitigating factors. *Mach Mining*, 809 F.3d at 1263-64. Thus, on remand, the Judge should conduct an independent analysis of AmCoal's negligence with respect to this violation, evaluating negligence from the starting point of a traditional negligence analysis rather than based upon the 30 C.F.R. Part 100 definitions, "consider[ing] the totality of the circumstances holistically." *Brody Mining*, 37 FMSHRC at 1702.

Under such a traditional analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act. "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

[30] As they explain in their separate opinion, Chairman Jordan and Commissioner Nakamura would reverse the Judge and reinstate a finding of high negligence with respect to the second violation. *See* slip op. at 36-38.

> 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).

JWR, 36 FMSHRC at 1975(citation and footnote omitted); *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (considering negligence inquiry to be circumscribed by scope of duties imposed by regulation violated). Thus, in making a negligence determination, the Judge is not limited to an evaluation of allegedly "mitigating" circumstances. Instead, the Judge may consider the totality of the circumstances.

Because Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to an evaluation of potential mitigating circumstances.[31] Therefore, a Commission Judge may find "high negligence" in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances. In this respect, the Commission has recognized that the gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).[32]

On remand, the Judge will need to examine the violation and determine the degree of negligence on the part of the operator that led to it. The Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented

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[31] As stated in his concurring opinion in *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3105-08 (Dec. 2014), Commissioner Cohen urges the Commission to hold not merely that the definitions of the degrees of negligence contained in 30 C.F.R. § 100.3(d) and Table X contained therein are not binding on the Commission, but that these definitions are too restrictive, and should not be used by Commission Judges. In these definitions, the distinctions between "low" negligence, "moderate" negligence and "high" negligence are made by counting the number of mitigating circumstances. Thus, in this case the Judge ruled out the possibility of high negligence in Order No. 7490599 because Table X provides that a finding of high negligence can be made only if there are no mitigating circumstances. 35 FMSHRC at 2241. Counting the number of mitigating circumstances is an appropriate approach for MSHA inspectors at mine sites who must make determinations regarding negligence efficiently and quickly. However, it is too mechanical and restrictive an approach for Commission Judges who have the opportunity to "evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence." *Hidden Splendor*, 36 FMSHRC at 3108 (Cohen, Comm'r, concurring).

[32] When a Judge finds an operator to be negligent, the Judge should take into account the degree of operator negligence, which would be on a scale between low negligence and reckless disregard, in assessing an appropriate penalty. Of course, because Judges are required to explain substantial divergences from the penalty proposed by the Secretary, if the Judge makes a substantial penalty adjustment based upon a negligence finding, the Judge must explain his/her determination. *Brody*, 37 FMSHRC at 1703 n.17.

that are relevant to an operator's obligation to comply with section 75.400. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3095-96(Dec. 2014) (examining operator's claim of mitigating circumstances in reviewing Judge's high negligence finding), *aff'd*, 632 F.App'x 622 (D.C. Cir. 2015); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator's conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (concluding that repeated violations of regulation merited increase in level of negligence ascribed to operator). It is within this context that the Judge can consider the Secretary's arguments regarding the extent of AmCoal's knowledge and how that impacts the operator's level of negligence and the penalty that it should be assessed for the violation.

Remand of the negligence issue nullifies AmCoal's argument that the Judge's unwarrantable failure determination must be reversed because it contradicts his finding of moderate negligence. In any event, that determination was arrived at after taking into account all of the unwarrantable failure factors. *See* 35 FMSHRC at 2233-41.

AmCoal did not challenge the Judge's findings on such factors as the extent of the accumulations (*id*. at 2233); that, as detailed with respect to the first violation, the operator had been placed on notice that greater efforts to comply with section 75.400 were necessary on its part (*id*. at 2237); and that the violative conditions were obvious when discovered by the inspector. *Id*. at 2239. In addition, we have already affirmed the Judge in large part as to the danger of the violation, another factor the Judge took into account in determining that the violation was attributable to AmCoal's unwarrantable failure. *See id*. at 2238. Given the limited remand in this instance, we do not foresee the Judge's findings on the scope of the operator's knowledge of the violation undercutting our conclusion that substantial evidence otherwise supports the Judge's unwarrantable failure determination. Consequently, we affirm that determination.

V.

Conclusion

For the foregoing reasons, we (1) affirm the violation in Order No. 7490584 as properly assessed as a flagrant violation; and (2) vacate in part the Judge's determinations with respect to the violation in Order No. 7490599 and remand to him the questions of whether the Secretary established it as flagrant violation, the level of the operator's negligence in connection with the violation, and, if necessary, a reassessment of the penalty in accord with his findings on remand.

Commissioner Cohen, concurring:

I agree with all parts of the foregoing majority opinion in this case. I write separately, together with Commissioner Young, to state our views on the issue of the broad interpretation of the flagrant provision as it has been advanced by the Secretary of Labor in this case, and, should he reach the issue on remand, how the Judge should consider the interpretation with respect to Order No. 7490599. There is no question that the Secretary has the right to argue this issue before the Commission in response to the appeal by American Coal Company ("AmCoal") of the Judge's decision.[1]

At the hearing, the Secretary submitted a history of 359 citations and orders for accumulations violations at the mine from October 1, 2005 to October 1, 2007, the two years roughly prior to the two orders being tried below. Gov't Ex. 1. As of August 4, 2011, aside from the two violations being tried, all but 11 had been paid and become final. *Id*. at 9.[2]

[1] As the prevailing party below, the Secretary may urge in support of the decision under review even those arguments that the Judge considered and rejected, so long as the position which the Secretary seeks the Commission to adopt would not attack the judgment below or enlarge the Secretary's rights thereunder. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990). Amcoal argues that taking into account the operator's history of previous violations, or permitting remand for the Judge to further consider the issue with respect to either violation would enlarge the Secretary's rights. The Secretary, however, is merely arguing alternative grounds for finding one or both of the violations to be flagrant. This is an argument we have at least acknowledged. *See Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013) (concluding that plain meaning of the flagrant provision permits proof of flagrant violation by use of prior violations, although "[o]ne might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a 'repeated failure' under 110(b)(2)").

This case is merely one in which those arguments are being addressed, the Secretary having tried the case under that approach. That the case may provide a more important precedent if decided by taking into account AmCoal's history of previous history of violations was thus evident from the case's outset. The Judge's rejection of the Secretary's broader approach and adoption of a narrower approach to the case, also contemplated by *Wolf Run*, does not limit the Secretary's right to vindicate his approach now, while AmCoal is challenging the Judge's decision.

[2] Seventy-five of those 359 citation or orders were alleged or found to be significant and substantial ("S&S"). Tr. I 125-26; Gov't Ex. 1, at 9. According to Miller, the issuing inspectors had also designated 11 of those as attributable to the operator's unwarrantable failure, including three issued within the two months prior to the violations here. Tr. I 126; Gov't Ex. 1, at 8-9.

The Secretary also submitted copies of 27 citations or orders, issued to AmCoal within the 12 months preceding the issuance of the subject order for violations of 30 C.F.R.§ 75.400.[3] These involved accumulations in belt areas of the same materials at issue here – coal, float coal dust, coal fines, and other combustibles. Nineteen of the orders had been issued alleging that the violations were S&S, and five of them resulted from AmCoal's high negligence. Gov't Exs. 6 to 32.

The Secretary also presented evidence that the Department of Labor's Mine Safety and Health Administration ("MSHA") had worked with AmCoal on training and mine examinations that would focus the operator's attention on its accumulations problems. Tr. I 86-90, 143-45.

In his post-hearing brief, the Secretary drew upon court and Occupational Safety and Health Review Commission precedent that he argued was decided under an analogous provision, section 17(a) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 666(a). He maintained that the foregoing evidence established that both orders at issue were flagrant violations and that AmCoal had not acted reasonably to address the two violations of section 75.400 after an extensive history of substantially similar violations.

In the hearing below, the Secretary argued that his interpretation of "repeated failure" was entitled to deference. The Judge declined to give the Secretary's interpretation full deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 35 FMSHRC at 2253-58. On appeal before the Commission, the Secretary has again asserted an entitlement to *Chevron* deference, a position AmCoal has countered. S. Resp. Br. at 25-26; Am. Reply Br. at 12-14.

We do not perceive any coherent interpretation of the "repeated failure" language by the Secretary to consider in terms of granting deference. As AmCoal pointed out, the Secretary did not state an interpretation of the language in his brief to the Commission but merely referred to his "position taken in the Secretary's post-hearing brief." S. Resp. Br. at 25; Am. Reply Br. at 13 n.7. In his post-hearing brief to the Judge, the Secretary did nothing more than (1) analogize to section 17(a) of the OSH Act, which provides for enhanced penalties against employers who "repeatedly" violate Occupational Safety and Health Administration standards, and (2) cite to several cases under the OSH Act which, according to the Secretary, indicate that a violation following one prior violation of the same standard, or of a different standard involving similar hazards, establishes a "repeated" violation for OSH Act purposes. S. Post-Hr'g Br. at 36-37.

We would decline to afford deference to the Secretary's formulation, which lacks practical utility for Commission judges in that it does not provide a manageable standard or limits. Under the Secretary's suggested approach, a single prior accumulations violation in an

[3] The Judge found that the 27 citations and orders for belt area accumulations entered into evidence were not proven to be final orders of the Commission. 35 FMSHRC at 2247-48 & n.19. However, the Secretary points out that the finality of all 27 of those citations and orders was established by the printout he submitted detailing the broader array of accumulations violations over a greater length of time. *See* S. Resp. Br. at 29; Gov't. Ex. 1.

underground coal mine might be a sufficient basis for finding a subsequent violation to be flagrant — or not. There is no principled basis for making the determination.[4]

The Secretary's analogy to section 17(a) of the OSH Act as a purported "interpretation" is thus not an application of reasoned judgment or expertise to which we must, or even logically could, defer. The Secretary has simply plucked the word "repeated" out of another statute which protects occupational safety and health, and made a specious argument that there's a parallel in the statutory language or Congressional intent. Adopting the Secretary's methodology would ignore the specific provisions Congress created for section 110(b)(2). Unlike section 17(a) of the OSH Act, the Mine Act's flagrant provision (1) requires "reasonable efforts to eliminate a *known* violation," and (2) requires that the violation "proximately caused, or reasonably could have been expected to cause, *death or serious bodily injury*." 30 U.S.C. § 820(b)(2) (emphases added). Most fundamentally, as we noted *supra*, slip op. at 13, section 17(a) of the OSH Act, does not contain the word "flagrant," a word of approbation related to intolerable failure.

We therefore would hold that the Judge did not err in declining to afford *Chevron* deference to the Secretary's interpretation. However, we do believe that the Judge should have nonetheless considered, and made an independent determination on, the question of the broader interpretation of "repeated failure," and the evidence of the operator's history of violations which the Secretary proffered in support of a more expansive view.

The Judge's determinations regarding the relevance, use, and weight of the operator's history of violations in this context were complicated by a number of factors. The only Commission precedent did not resolve the issue, and only alluded to it in passing. The Secretary has not promulgated regulations delineating his interpretation of a "repeated failure," nor did he provide a coherent interpretation in the context of this litigation. And the guidance materials the Secretary has provided to his inspectors reflect the agency's grappling with the application of the statute.

In considering this matter, we would conclude that the operator's history may be more generally relevant to the determination of flagrancy than the Judge decided. The Judge rejected the Secretary's attempt to use AmCoal's history of violations to establish either violation as flagrant largely without examining the evidence submitted on the previous violations. The Judge said, "in the absence of further guidance from the Commission, long overdue rulemaking from MSHA, or a consistent interpretation or litigating position by the Secretary that has not been advanced by appellate counsel in another case, I decline to address a broader interpretation here or the significance of past violation history." 35 FMSHRC at 2263. While the Judge's frustration

[4] Earlier in this decision, the Commission considered the formulation by the parties that "two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." Slip op. at 13 (quoting S. Resp. Br. at 17). We stated that this formulation "as far as it goes . . . is a reasonable, albeit very general, interpretation." *Id*. The Commission's earlier statement was solely in the context of the narrow approach to "repeated failure," where there is a single, continuing violation rather than a history of past violations. It did not apply to consideration of allegedly flagrant violations under the broad approach to "repeated failure."

with the absence of clear principles governing the use of violation history is understandable, the language of the statute and our decision in *Wolf Run* nevertheless support the reasoned consideration of an operator's history of substantially similar violations, where they may be shown to be relevant to the issues arising in the repeated failure context.[5]

The Secretary introduced the aforementioned evidence on AmCoal's recent history of accumulations violations at the hearing. Inspector Miller, the Secretary's only witness in the case, testified extensively regarding that evidence. Tr. I 124-34, 142-46, 162-71. This evidence could be probative of a finding of a flagrant violation under the broad approach to "repeated failure" flagrant violations.[6]

We disagree with the Judge's conclusion that "the Secretary must establish *all* the statutory elements for *each* 'repeated failure' relied upon to establish a flagrant violation." 35 FMSHRC at 2255 (emphases added). The Judge would have thus required the Secretary's evidence to establish that each prior violation in the operator's history was both a "known"

[5] Contrary to Commissioner Althen's characterization of the liberal construction we and the courts of appeals afford the Act (*see s*lip op. at 51 (the "last redoubt of losing causes")), our reading in favor of the safety purposes of the statute is an entrenched canon of mine safety jurisprudence. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 823 F.2d 608, 617 (D.C. Cir.1987) ("In reviewing the Mine Act to determine congressional intent, we begin with the recognition that '[t]he primary purpose of the . . . Act was to protect mining's most valuable resource — the miner,'" and in order to meet the "'urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm . . . Congress intended the Act to be liberally construed.'") (quoting *Int'l Union, United Mine Workers of Am. v. Kleppe*, 532 F.2d 1403, 1405–06 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976)); *accord Freeman Coal Min. Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974).

[6] While Commissioner Althen argues that a repeated violation would require a prior occurrence of the same violation, that is not what the statute says. As we have said, "repeated failure" modifies "to make reasonable efforts to eliminate." If the subsequent violations have a common cause or origin known to the operator — including bad management, where better practices would have eliminated recurrent violative conditions — a Judge may find a repeated failure to take reasonable steps to eliminate those conditions.

violation and involved a reasonable expectation of death or serious bodily injury to one or more miners. *Id*.[7]

Reading "repeated" as narrowly as the Judge did in this case is contrary to the intent and language of the statute. The essence of a repeated flagrant violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility. Because repetition requires a demonstration of prior occasions, the operator's history of substantially similar violations is patently relevant.

As noted previously, *supra* slip op. at 15-16, the operator's history may reveal a common cause or origin known to the operator, which was not addressed on previous occasions. Similarly, the operator's violation history may be used to show a known pattern of neglect which included the subject violation. *Id.* Finally, while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria. Thus, in our opinion, it is unnecessary on remand for evidence adduced by the Secretary to conclusively establish that the previously-established violations of section 75.400 each met the statutory definition of a "repeated or reckless failure," as the Judge suggested.[8] Rather, Judges

[7] It appears that the Judge's analysis of the statutory language may have relied upon our decision in *Wolf Run*. 35 FMSHRC at 2247-49. In *Wolf Run*, however, an operator's prior history of violations was considered only with respect to the "repeated" clause of the flagrant provision. *See* 35 FMSHRC at 541 ("it is difficult to conceive how one determines whether certain conduct represents 'repeated' behavior of any sort without considering whether there have been prior instances of similar behavior. One might reasonably argue about the number of prior violations that should be necessary before conduct is appropriately considered a 'repeated failure' under section 110(b)(2) . . ."). Our decision in that case did not address whether the violations in the operator's prior history also need to satisfy the other elements of the flagrant provision.

[8] The Judge's conclusion on this point appears to flow from his opinion that final determinations on S&S and unwarrantable failure findings may be sufficient to establish the requisite findings of "known violation" and risk of serious bodily injury to miners in the earlier violations. It does not necessarily follow, however, that evidence on the two special findings is a necessary condition precedent before such violations can serve as predicate violations for a "flagrant" violation. There is nothing definitive in the language of the flagrant provision on that point, and the Judge may be imbuing S&S and unwarrantable failure findings with more significance than the record in those previous cases actually permits, particularly with respect to cases that are settled short of a Commission decision on the issues. In essence, the Judge's approach would require the Secretary to establish through litigation the requisite findings in those previous cases before he could even later bring a flagrant case. We cannot discern in the flagrant provision any congressional intent to place such a burden on the Secretary or to increase litigation before the Commission under the Mine Act.

should consider allegations of repeated failure case-by-case, and should consider the operator's history of violations where it may be probative of the issue.[9]

In this context, we would have the Judge especially consider the evidence of the Secretary's efforts prior to the violations at issue in this case to get AmCoal to improve training and examinations related to accumulations violations. The alleged failure of AmCoal to take meaningful action toward that end would be reviewed to determine whether it supports a showing of a repeated failure to make reasonable efforts to eliminate the problem, as the Act requires.

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

[9] On remand, the Secretary of course bears the burden of demonstrating a link between the violation in Order No. 7490599 and previously-cited dangerous conditions that are substantially similar. *See Wolf Run*, 35 FMSHRC at 541. Such a demonstration should include an explanation of how the failure here was a repeated failure to make reasonable efforts to eliminate a known and serious violation.

Commissioner Young, concurring in part and dissenting in part:

I join in my colleague Commissioner Cohen's opinion in all parts except Part III.B, the issue of whether the accumulations cited in the second violation could be reasonably expected to lead to serious bodily injury to miners. I would vacate the Judge's findings on this issue and include the issue in the remand.

The Judge found that the accumulations cited in the second violation could be reasonably expected to lead to serious bodily injury to miners, but only reached that conclusion after relying on a map which he read to demonstrate a lack of stoppings that would protect escaping miners from the effects of a fire resulting from the accumulations. 35 FMSHRC 2208, 2231 (citing Am. Ex. 4, at 5), 2265 (July 2013) (ALJ).

The Secretary of Labor concedes the argument of the American Coal Company that it was error for the Judge to do so. S. Resp. Br. at 21. Rather than remand to the Judge, however, the Secretary would have the Commission examine the evidence regarding the actual location at issue in the mine and find here that escaping miners would be exposed to smoke from a fire resulting from the cited accumulations. *Id*. at 21-23.

While Commissioner Cohen, joined by Chairman Jordan and Commissioner Nakamura in their separate opinion, make such a finding in support of their conclusion that death or serious injury to miners could be reasonably expected to result from the accumulations here, I cannot agree with this procedure. Where a Judge errs in failing to understand the evidence presented, as the Judge did here, our standard practice is to remand the case to him for him to make the necessary findings of fact in the first instance, using a correct understanding of the evidence. *See, e.g., Wolf Run Mining Co.*, 32 FMSHRC 1669, 1676–77 (Dec. 2010) (vacating Judge's affirmance of citation and remanding for factual determination and to address operator's arguments erroneously unaddressed).

Remand is especially appropriate in this instance, because the Judge's misunderstanding of the evidence led him to conclude that the degree of gravity of the second violation was even greater than the first violation. The Judge found that the lack of stoppings was reasonably likely to lead not only to smoke inhalation but to carbon monoxide poisoning, burns, and entrapment of the six miners on the working section. *See* 35 FMSHRC at 2231. As this finding rests on clear error, remand on the issue of the gravity of the second violation is clearly necessary.

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

Chairman Jordan and Commissioner Nakamura, concurring and dissenting:

We join the opinion of our colleagues affirming the Judge's flagrant determination with respect to the first violation at issue in this case. However, we write separately because we would also affirm the Judge's flagrant determination regarding the second violation (Order No. 7490599).

The statutory criteria for a flagrant violation require "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). For the reasons stated below, we find that all of these factors have been satisfied.

The salient facts regarding this violation are:

- Float coal dust and loose coal accumulated under and around the energized tail roller of the belt.
- The accumulations measured approximately 6 inches to 14 inches in depth.
- Loose coal and coal float dust also extended outby the tail roller approximately 450 feet
- The area was black.
- The turning tail roller was suspending float coal dust into the atmosphere.
- The bottom belt and bottom rollers were in contact with these accumulations.
- The inspector testified that absent a "train wreck," it would take more than two shifts for accumulations of this type and color to develop.
- There was no reference to these conditions in the examination books.
- Based on the red-brown color of the float dust, the inspector concluded that the roller and belt had been grinding in coal for a significant period of time.
- The Judge credited the inspector's testimony that the float coal dust and loose coal that was accumulating under and around the tail roller was not wet.
- The inspector designated the violation S&S based on the fact that the bottom belt and bottom rollers were in contact with the accumulations and the energized tail roller was turning in the accumulations, thus providing two separate potential ignition sources.

35 FMSHRC 2208, 2218-19 (July 2013) (ALJ); Gov't Ex. 3.

A. Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

Regarding AmCoal's knowledge, substantial evidence supports the Judge's decision regarding the extent to which AmCoal was or should have been aware of the accumulations. Indeed, the evidence is such that it establishes actual knowledge of the accumulations on the part of AmCoal, and not just constructive knowledge.

Raney testified that that the starting and stopping of a belt can lead to spillage of coal from the belt. Tr. II 66-68. In this instance there were electrical problems with the pony belt during the shifts preceding the discovery of the accumulations by Inspector Miller, which resulted in the belt's shutdown a number of times during those shifts.

The September 23 handwritten reports of the foremen (the production and delay, or "P&D" reports) on the previous two shifts amply demonstrate that the foremen were aware of the problems with the pony belt.[1] They clearly noted that during the first shift the pony belt was down four different times and, during the last time, interrupted production for 120 minutes (until the end of the shift). 35 FMSHRC at 2219. The handwritten reports reflect that the first shift crew waited to leave the section until the second shift crew had arrived. The report from the second shift on September 23 shows that that crew was making repairs to the belt from the very beginning of the shift, and they therefore were aware that the first shift had been having problems with the pony belt. Later in that shift, there was another delay of 30 minutes while maintenance was performed on the pony belt. Hence, they knew that there could have been violative accumulations. Am Ex. 20.[2]

Evidence of those shutdowns is also supplied by the daily printed production delay report. 35 FMSHRC at 2239, 2265. Raney explained that the daily report was likely produced by "Mine Control" from the handwritten shift P&D reports that foremen supplied. Tr. II 30-31, 60-61; Am. Ex. 20 (shift P&D reports). The daily reports indicate electrical and breaker problems with the belt during all three shifts on September 22, which grew worse during the first two shifts on September 23 before repairs were made on the second shift. Tr. II 61-66; Am. Ex. 21, at 8-10.

Further evidence that the accumulations occurred over several shifts was supplied by Inspector Miller, whose testimony on the nature of the accumulations the Judge credited. 35 FMSHRC at 2265. Consistent with his contemporaneous notes, Miller attributed the presence of float coal dust that was red-brown in color to the grinding of coal dust by the tail roller of the belt over an extended period of time. Tr. I 116, 203, 206-08; Gov't. Ex. 4, at 6.

The Judge inferred from the foregoing that the accumulations had resulted from the stopping and starting of the pony belt, and that AmCoal had constructive knowledge of the accumulations over the course of the preceding shifts. Inferences drawn by a Judge are permissible to the extent that "they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

Here the record establishes that the inferences the Judge drew were reasonable. Not only was there evidence of the belt stopping and starting multiple times and that coal spillage can result from each stop and start of the belt, but there was also evidence that the stopping and starting had been reported during each shift and a daily report produced for AmCoal management documenting the stops and starts during the three shifts the day prior to the discovery of the accumulations. Moreover, it was the working section foremen for the shifts who were reporting the stops and starts of the belt. Am. Ex. 20, 21.

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[1] These handwritten reports are prepared contemporaneously on or immediately after the shift. Tr. II 91.

[2] The handwritten P&D reports also reflect that the section crew on the second September 23 shift did not leave until the third shift crew arrived on the section (5:15 pm). Am. Ex. 20.

We conclude that AmCoal had actual knowledge of the resulting accumulations. Five total shift P&D reports were submitted regarding the electrical problems, a daily P&D report was produced documenting the problems the previous day, and the inspector's credited description of the accumulations was consistent with the accumulations occurring over the course of several shifts. 35 FMSHRC at 2265.

This is entirely consistent with the Commission's interpretation of the term "knowingly" under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). We have held that "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (quoting *Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)).

Here, where the belt was continually stopping and starting over the course of not only multiple shifts but also multiple days, a reasonable operator would have investigated whether accumulations were resulting. Yet there is nothing in the record indicating that AmCoal did so.

Furthermore, given the length of time during which the problems were occurring, it was reasonable for the Judge to infer that AmCoal had multiple opportunities to address the accumulations, and thus its failure to do so constitutes a "repeated" one. As with the first violation, the evidence that the accumulations may have existed over the course of several shifts means that it is not necessary to decide in this instance what minimum number constitutes a "repeated failure."

It is even less essential to our decision to provide, as our colleagues Commissioners Cohen and Young attempt to do, a definitive interpretation of the "broad" meaning of "repeated," in the context of an operator's history of violations. Slip op. at 26-31. The majority in this case have vacated the Judge's decision applying the "narrow" approach to repeated, and remanded the case to him. If he finds no liability under the narrow analysis, then the Judge should proceed to consider the Secretary's alternate theory.

Our colleagues' instructions to the Judge on how the case should be litigated under the broader theory (if that becomes necessary), are, however, premature. The Judge, in the first instance, can interpret the statutory provision "repeated" under the historical approach, applying his legal definition to the facts in the record before him. If the case is appealed, we will then have ample opportunity to review the matter. The case would then be in a posture where our view on the correct interpretation of the broad application of "repeated" is squarely and properly before us, and we would also have the benefit of the parties' views on the issue.

Having argued that our colleagues' determination to weigh in on this issue now is precipitous, we are nonetheless constrained to comment on the substance of their suggested approach.

Commenting in the abstract, as they must, their opinion serves to illustrate why adjudicatory bodies generally refrain from issuing advisory opinions, preferring instead to rule

within the context of the facts of a specific case. Our colleagues state that "while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria."[3] Slip op. at 30. They also indicate that an operator's history of violations may be used to show "a known pattern of neglect" which includes the violation at issue. *Id*.

Our colleagues' opinion raises as many questions as it strives to answer. For instance, must the Secretary, to prove his case, put on evidence regarding each of the prior violations he posits as supporting a "repeated" violation? How must the Secretary prove the existence of "a known pattern of neglect?" How feasible would such a requirement be if the violations occurred many months or even years prior to the violations deemed flagrant? What does "substantially similar" mean and if violations of the same standard are not "substantially similar" enough, what more is required? What constitutes a "link" between the prior violations and the current ones, slip op. at 30, and how would that be demonstrated?

In short, in their desire to provide guidance on a statutory interpretation question that is neither currently before them nor necessarily headed to the Judge on remand, our colleagues, without benefit of briefing by the parties, announce a test that may confuse rather than clarify. We believe the more prudent approach is to wait until this issue is properly before us before weighing in on such an important matter.

B. Reasonable Expectation of Death or Serious Bodily Injury

The majority has adroitly summarized the evidence supporting the Secretary's claim that it was reasonable to expect that this violation would cause death or serious bodily injury. Slip op. at 17-18. We agree with its conclusion that substantial evidence supports the Judge's determination that the smoke hazard was serious enough to meet this test. We also agree that the Judge's possible misuse of the mine map is not material to the disposition of this issue (and believe that it constituted harmless error).

C. The Judge's Reduction of the Level of AmCoal's Negligence

We would reverse the Judge's determination that the second violation was the result of only moderate negligence on the part of AmCoal. The Judge found that the failure of AmCoal's shift examiners to report the accumulations to mine management was a mitigating factor with respect to AmCoal's negligence. 35 FMSHRC at 2241 (citing 30 C.F.R. § 100.3(d)). We disagree.

As a threshold matter, it is important to place this negligence determination in the proper perspective. The Judge held that the violation was flagrant (a holding we would affirm), finding that AmCoal repeatedly failed to make reasonable efforts to eliminate the violation for two shifts

[3] We note that the operator's history in this case includes 359 violations of section 75.400's prohibition against accumulations in the 24 months preceding the issuance of the flagrant violations at issue here. Slip op. at 26.

even though the operator was alerted to the fact that potential accumulations would need additional attention. 35 FMSHRC at 2265. In addition, the Judge found the violation to be the result of AmCoal's unwarrantable failure to comply with the safety standard, 35 FMSHRC at 2240, thus concluding that the operator's conduct was aggravated. He noted that unwarrantable failure is characterized by conduct such as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2231 (citing *Emery Mining Corp.*, 9 FMSHRC 1907, 2003-04 (Dec. 1987)).[4] Given these findings**,** we require no great analytical leap to reinstate MSHA's high negligence determination.

Turning now to the Judge's analysis of the negligence level, we start with the view — shared by our colleagues in the majority — that an operator is negligent if it fails to meet the requisite standard of care — a standard of care that is high under the Mine Act. We must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with section 75.400. *See, e.g., Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator's conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (repeated violations of regulation merited increase in level of negligence ascribed to operator).[5] Thus we must examine whether the operator met the standard of care that a reasonably prudent mine operator would have applied.

As we stated during our discussion affirming the Judge's flagrant determination for this violation, AmCoal had actual knowledge of the violation via its own P&D reports. Slip op. at 34-35. Management created these reports and in fact a section foreman writes such a report for each production shift on each section. Tr. I at 461-62. Supervisors at the mine were thus aware that there were electrical problems with the belts, and were aware that the stopping and starting of the belts was a known cause of spillage. Hence a reasonably prudent foreman at a mine with an extensive history of coal accumulations (such as AmCoal's) should have investigated this problem. The failure to do so indicates a lack of reasonable care.

The absence of information about the belt problems in the MSHA-mandated examination reports in no way reduces the level of negligence here. An operator cannot rely on a negligent

[4] The operator argued to the Commission that, given the Judge's finding of only moderate negligence, the violation could not be unwarrantable because unwarrantable failure requires a higher level of negligence. Given our determination that the negligence level should be reinstated as high, we need not address this assertion.

[5] Although the Judge recognized that negligence is conduct that falls below the requisite standard of care, 35 FMSHRC at 2241, he also utilized the Secretary's Part 100 penalty regulations, which state that MSHA may allege a moderate level of negligence if there are "mitigating circumstances." *Id*. (citing 30 C.F.R. § 100.3(d)).

examination[6] (which could have conceivably been a violation of the MSHA examination standards) to mitigate the negligence for the violation of another standard. We agree with the Secretary that an operator may not put blinders on regarding information about a potential hazard simply because that information is not contained in an MSHA-mandated examination report. S. Reply Br. at 3 n.3 (citing *Ernest Matney, emp. by Knox Creek Coal Corp*., 34 FMSHRC 777, 786 (Apr. 2012) (on-site supervisors may not close their eyes to violations and then assert lack of responsibility based on self-induced ignorance)). As the Secretary persuasively argues, permitting a defective mine examination to shield an operator from a negligence charge would reduce incentives for operators to ensure the effectiveness of their examination procedures.[7]

The Secretary proposed a penalty of $164,700, but the Judge reduced it to $77,737, based, we believe, on his reduction of the negligence level. Because we would reinstate the finding of high negligence, we would vacate and remand the penalty for reassessment in light of this determination.[8]

In conclusion, we would affirm the Judge's finding that this violation was flagrant and unwarrantable, reinstate the inspector's negligence level to "high," and vacate and remand the civil penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commission

[6] The Judge found it "difficult to believe that reasonably attentive on-shift examiners would not have reported th[e] condition," 35 FMSHRC at 2239, and that if [AmCoal] had conducted thorough examinations, the conditions should have been documented." *Id*. He emphasized that "even a casual observation would have revealed that there was an energized tail roller grinding through coal at the Flannigan Tailgate." *Id*.

[7] Our reinstatement of the inspector's high negligence finding nullifies AmCoal's argument that the Judge's unwarrantable failure determination must be reversed because it contradicts his finding of moderate negligence.

[8] Regarding the unwarrantable failure determination, we join our colleagues in affirming that determination.

Commissioner Althen, concurring in part and dissenting in part:[1]

A. Order No. 7490854

I join in the sustaining Order No. 7490854 as a flagrant violation. I do not join with certain opinions expressed in the majority decision and, therefore, do not join in the decision. Although the issue of whether the violation created a "reasonable expectation" of death or serious injury is not free from doubt, I find the Judge's decision meets the substantial evidence test, thereby requiring affirmance. The number of shifts the violation existed and its obviousness and extensiveness support the conclusion that management repeatedly ignored a known, extensive, and sufficiently dangerous accumulation to meet the definition of a flagrant violation. However, as explained in more detail below, I disagree that the Secretary may use a history of non-flagrant violations to support a finding that a later violation is flagrant. Therefore, I would disagree with any use of AmCoal's history of violations to support upholding a flagrant designation for Order No. 7490854. *See infra* slip op. at 53-55.

B. Order No. 7490599

I agree to a remand of Order No. 7490599 for a reconsideration of what the operator "actually knew" with respect to the underlying violation and the level of the operator's negligence. *See infra* slip op. at 56. However, I respectfully disagree with my colleagues with respect to several aspects of their various opinions.

An essential element of a flagrant violation is that the violation must be "known" by the operator. In the context of a flagrant violation, a violation is "known" only if the operator has actual knowledge, express or implied, of the violation. Constructive knowledge, as used by the Judge below, does not comport with the wording of section 110(b)(2), the purposes of the statutory provision, or integration of the section with other sections of the Mine Act. Therefore, as explained below, I would find that the Secretary must prove actual knowledge of the violation under the Commission's so-called "narrow" standard of review.

Chairman Jordan and Commissioner Nakamura conclude that the facts demonstrate actual knowledge. Slip op. at 34-35. However, I take no position on whether the facts demonstrate sufficient knowledge to sustain a flagrant finding under an actual knowledge standard.[2]

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[1] I appreciate the footnotes added to the majority decision indicating areas in which individual Commissioners disagree. However, given the number of issues involved, their complexity, and the number of different opinions, I prefer to limit my agreement to areas in which I expressly state agreement in this opinion.

[2] I think the Judge must make the determination of knowledge in the first instance. In my opinion, the necessary determination is whether the operator had actual knowledge of the violation within a time frame that a failure to eliminate the violation justly may be found to be "repeated."

I do opine that Congress meant section 110(b)(2) to apply only where an operator has actual knowledge of the violation. Because the Judge used a constructive knowledge construct that I find inappropriate, I would remand for a finding with respect to actual knowledge.[3]

Separately, I disagree with my colleagues' decision in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), that a history of non-flagrant violations not shown to have created a reasonable expectation of death or serious bodily injury may demonstrate the "repeated" element of a flagrant violation. I, therefore, disagree with use of previous violations to demonstrate a failure by an operator to eliminate a violation that is "known" to it. The flagrant violation section responds to pre-MINER Act circumstances in which an operator could know of an extremely dangerous violation, bordering upon if not constituting an imminent danger, but not face any repercussions beyond the normal penalty amounts by allowing the danger to continue unless and until an inspector noticed the condition. In my opinion, the plain language of section 110(b)(2) demonstrates it applies only to repeated failures to remedy "a known violation," that is, the violation that is the subject of the flagrant designation.[4]

DISCUSSION

I. Background

Section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

[3] I also would remand the Judge's finding of moderate negligence. *See* slip op. at 23-25. I am not certain the Judge felt bound by the Part 100 regulations in a manner that he had no choice other than to reduce negligence or he found the mitigating circumstance a sufficient reason. I would accept a finding by the Judge that the failure of the pre-shift examiner to note any accumulation coupled with the inspector's failure to cite a pre-shift violation is sufficient to reduce negligence to a moderate level. Separately, I agree with Commissioner Young's opinion that we should remand the case for a redetermination of whether the violation was "reasonably expected" to cause death or serious bodily injury. *Id*. at 32. The seriousness of an injury if it should occur does not deal with the "expectation" of the occurrence.

[4] I am bound to respect the settled law of the Commission. However, as the Commission decision demonstrates, the contours of the so-called broad interpretation do not appear settled. Therefore, I find it remains appropriate to express the view that the broad interpretation, standing alone and certainly without any definition or context, does not comport with the purpose and effect of section 110(b)(2).

Congress has established a scheme of "increasingly severe sanctions for increasingly serious violations or operator behavior." *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (April 1981)). At the far end, those progressive sanctions apply to violations resulting from highest levels of negligence — that is, gross negligence or reckless disregard (unwarrantable failures) and violations that could contribute significantly and substantially to the likelihood of serious injuries (S&S violations). For unwarrantable failure violations, the progressive discipline culminates in a difficult to break chain of withdrawal orders under section 104(d), 30 U.S.C. § 814(d). For S&S violations, the progressive discipline culminates in a perhaps more difficult to break chain of withdrawal orders under section 104(e). Such violations carry a maximum civil penalty of slightly less than $70,000. *See supra*, slip op. at 9 n.16. Certainly, Congress was aware of the existing sanctions under the Mine Act in passing the MINER Act.

Congress enacted the MINER Act in response to three tragic and highly publicized mine disasters at the Sago, Aracoma Alma, and Darby mines, respectively. S. Rep. No. 109-365, at 2 (Dec. 6, 2006). Each of those events spotlighted the occurrence of particularly serious dangers and the inability of the miners to escape those dangers.

After the Alma mine disaster, for example, four foremen pled guilty to criminal charges of not conducting escapeway drills. *Massey bosses get probation on Aracoma charges*, Charleston Gazette-Mail (Dec. 9, 2010), http://www.wvgazettemail.com/News/201012091056. The foremen knew that mandatory safety standards required the drills and knew that awareness of how to react to an emergency could spell the difference between life and death. Yet, they repeatedly did not conduct the drills. In enacting section 110(b)(2), Congress demonstrated that it would not tolerate an operator that knows of a violation reasonably expected to cause death or serious injury to repeatedly or recklessly ignore rather than eliminate the violation.

The majority decision notes the lack of legislative history of the flagrant provision but suggests that Congress may have been looking at the fourth step of the *Mathies* test for S&S violations in defining flagrant violations. Slip op. at 7. Perhaps Congress is intimately familiar with Commission case law. However, given that the gravity standard in the definition of a flagrant violation is virtually identical to the definition of an imminent danger in the Mine Act itself, it seems strange to stretch for a comparison to Commission case law when a statutory provision is far closer in wording. The gravity portion of the definition of an imminent danger is "reasonably could be expected to cause death or serious physical harm." 30 U.S.C. § 802(j). Section 110(b)(2) covers known violations that "reasonably could have been expected to cause, death or serious bodily injury."

The gravity aspect of an S&S violation does not meet the definition of a flagrant violation unless the gravity goes beyond the Mathies standard of ***reasonably likely*** to result ***in a reasonably serious injury*** and reaches the level of "***reasonably expected*** to result in death or ***serious bodily injury***." In other words, every flagrant violation meets the gravity requirement for an S&S violation but not every S&S violation meets the gravity requirement for a flagrant violation. To intimate otherwise is error. There is a clear and distinct difference between S&S violations and flagrant violations regarding the necessary level of gravity.

Further, ironically, if the supposition that Congress used the fourth step of the *Mathies* test were correct, the dropping of the word "reasonably" from the definition of a flagrant violation before "serious bodily injury" could well be taken as demonstrating that the injury itself must be more severe than those qualifying for S&S. If one supposes use of a model, then deletion of a substantive word from the model would seem to be meaningful. In sum, I do not think it useful to misconceive the fourth step of *Mathies* as a model for the gravity element of a flagrant violation.

In establishing a nearly four-fold higher maximum penalty, Congress dealt with two essential elements to the violation: gravity and culpability. As seen, with respect to gravity, the violation must be one that "substantially and proximately caused, or that could reasonably be expected to cause, death or serious bodily injury."

The section is more complex regarding culpability. The circumstances must violate "a mandatory safety standard." The violation must be "known" to the operator. Finally, the operator must fail recklessly or repeatedly to make reasonable efforts to eliminate the known violation. I deal first with the requirement that the violation is "known" and then with circumstances constituting a "repeated" failure to eliminate a known violation.

II. For Purposes of Section 110(b)(2), a Violation Is "Known" Only if the Operator Has Actual Knowledge of the Violation.

To be flagrant, a violation must be "known" by the operator. The law recognizes actual knowledge and constructive knowledge. In reaching his decision below, the Judge found the term "known" embraced both actual and constructive knowledge. *American Coal Co.*, 35 FMSHRC 2208, 2259-60 (July 2013) (ALJ). There are, of course, distinct differences between actual knowledge and constructive knowledge. Black's Law Dictionary notes the distinction in defining actual knowledge as "direct and clear knowledge as distinguished from constructive knowledge." *Knowledge*, *Black's Law Dictionary* 1004 (10th ed. 2014)

Constructive knowledge or notice is a principle applied in negligence cases[5] to permit a court to make a legal inference that an actor did not meet a legal standard of care.[6] Actual knowledge, on the other hand, is a factual inquiry to determine whether an actor knew of the

[5] The Commission has repeatedly held that constructive knowledge, or a "knew or should have known" standard, is equal to a negligence standard. In *Emery Mining*, 9 FMSHRC at 1999, 2005, for example, the Commission reversed a Judge's finding of unwarrantable failure based on the Judge's conclusion only that the operator's safety personnel "should have known of the condition." Similarly, Chairman Backley, writing for the Commission in *Wyoming Fuel Co.*, 16 FMSHRC 1618 (Aug. 1994), stated that "[u]se of a 'knew or should have known' test by itself would make unwarrantable failure indistinguishable from ordinary negligence." *Id.* at 1628 (quoting *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (Oct. 1993)). Consequently, while the Commission properly applies constructive knowledge in unwarrantable failure cases, the Commission has stated clearly that because constructive knowledge is indicative of only ordinary negligence, constructive knowledge, standing alone, is insufficient to meet unwarrantable failure's extreme negligence standard. Commissioners Young and Cohen misapprehend the point of the preceding sentences. *See* slip op. at 21 n.27. The sentence immediately preceding the former sentence, for example, merely states the obviously correct proposition that the factor of constructive negligence by itself — that is, "standing alone" — is insufficient to meet the standards for an unwarrantable failure because the Commission has repeatedly required Judges to explicitly consider seven separate factors in determining the existence of an unwarrantable failure. Indeed, as stated earlier in this footnote, in the *Emery* case, the operator clearly was constructively negligent but the Commission reversed the Judge's finding of an unwarrantable failure because the totality of conduct did not constitute an unwarrantable failure.

The source of Commissioners Young and Cohen's disagreement is further unclear given that the Secretary has *twice* argued that by showing only that an operator "knew or should have known" of a violation, based on *Emery*, a violation can constitute an unwarrantable failure, and the Commission has *twice*, clearly and forcefully, rejected that interpretation of *Emery*. Thus, when confronted in *Virginia Crews* and *Wyoming Fuel* with the argument that a violation was unwarrantable solely because the operator knew or should have known of the violation, "we reject[ed] such an interpretation of *Emery*" because that would "make unwarrantable failure indistinguishable from ordinary negligence." *Wyoming Fuel*, 16 FMSHRC at 1628 (quoting and citing *Virginia. Crews*, 15 FMSHRC at 2107)).

Of course, the important point — a point with respect to which Commissioners Cohen and Young do not express any disagreement — is that constructive knowledge is directed toward negligence. It is not directed to the "known" violation requirement focused upon by section 110(b)(2).

[6] For example, in the context of negligence actions against possessors of land, "[p]ossessors of land owe a duty to protect invitees from foreseeable harm." *Carrender v. Fitterer*, 503 Pa. 178, 185, 469 A.2d 120, 123 (1983). A duty is only owed, however, when the possessor "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee." Restatement (Second) of Torts § 343(a). Where a possessor should discover a condition through the exercise of reasonable

(continued…)

required fact or knew of facts making it reasonable to infer knowledge of the facts. Thus, actual knowledge may be "express" in which the evidence definitively shows the actor knew the facts in issue or "implied" in which an adjudicator may draw an inference the actor knew of the disputed facts from facts of which the actor had express knowledge. Simply stated, one cannot avoid an obligation by closing his eyes to facts he sees.[7] *Sapp v. Warner*, 105 Fla. 245, 255, 141 So. 124, 127 (1932).

I conclude that the knowledge requirement for a flagrant violation is actual knowledge. This conclusion necessarily follows from the background of the enactment of the provision, the ordinary meaning of the terms "flagrant" and "known," and the section's relationship to other sanctions in the Mine Act's scheme of progressively severe sanctions.

Congress passed the Act in direct response to Sago, Aracoma, and Darby. We also know that those disasters involved circumstances in which operators had actual knowledge of very dangerous circumstances arising from violations but, despite that knowledge, the operators took no timely action to eliminate the violations. To qualify for the extraordinary penalty, the violation must be "flagrant."

Webster's Third New International Dictionary defines flagrant as "extremely, flauntingly, or purposefully conspicuous usu[ally] because of uncommon evil, unworthiness, unpleasantness, or truculence: glaringly evident." *Webster's Third New Int'l Dictionary* (Unabridged) 862-63 (1993 ed.). The American Heritage Dictionary of the English Language defines flagrant as

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[6] (…continued)
care, it has constructive notice of the condition and breached its standard of care. *See Rojas v. Wal-Mart Stores, Inc.*, 857 F. Supp. 533, 538 (N.D. Tex. 1994) ("[E]ven without actual knowledge, Defendant Wal-Mart would be considered to have constructive knowledge of any premises defects or other dangerous conditions that a reasonably careful inspection would reveal."); *Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 481-82 (7th Cir. 2008) ("Where constructive knowledge is alleged, '[o]f critical importance is whether the substance that caused the accident was there a length of time so that in the exercise of ordinary care its presence should have been discovered.'") (quoting *Torrez v. TGI Friday's, Inc.,* 509 F.3d 808, 811 (7th Cir. 2007).

[7] The difference between implied actual knowledge and constructive knowledge may be subtle. The notion of constructive knowledge comprehends the notion of a "legal" duty to make an inquiry. If an actor has a duty to undertake an inspection, for example, but fails to do so, the actor may have constructive knowledge of an event that he should have discovered by performing his duty. In such instance, the actor "should have known" certain facts but did not know those facts because of his failure to meet a legal duty of care. He was negligent, perhaps grossly or unwarrantably so. The notion of implied actual knowledge, on the other hand, is a factual construct based upon information of which the actor actually was aware. Thus, if an actor performing an inspection actually detects facts (former facts) that would have led a reasonable actor to learn of a specific problem (latter facts), a court may infer actual knowledge of the latter facts due to the actor's express knowledge of the former facts. Constructive knowledge springs from a legal duty to discover certain information whereas implied (or inferred) actual knowledge is a factual inference drawn from facts of which a person actually was aware.

"conspicuously bad, offensive, or reprehensible: *a flagrant miscarriage of justice*." *American Heritage Dictionary of the English Language* 667 (4th ed. 2009). Webster's Collegiate Dictionary defines flagrant as "conspicuously offensive esp[ecially] so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality." *Webster's Collegiate Dictionary* 441 (10th ed. 1999). Black's Law Dictionary uses the term "flagrant" to define "egregious"—that is, "egregious" means "extremely or remarkably bad; flagrant." *Egregious*, *Black's Law Dictionary* at 629. Indeed, in Black's, "flagrant" is a sixth meaning of "gross"—that is, "gross" means "[b]eyond all reasonable measure; flagrant." *Gross*, *Black's Law Dictionary* at 818. Administrative Law Judge Paez correctly noted the importance of Congress' use of the term "flagrant" in *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ), finding "[t]he only thing that is apparent from the [limited] legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety." *Id*. at 801.

Congress' institution of a new "flagrant" violation to identify especially egregious conduct and its nearly quadrupling the maximum penalty for flagrant violations connotes an intention by Congress to penalize severely any violations where operator conduct goes substantially beyond violations previously established in the Mine Act. A "flagrant" violation, therefore, goes beyond the level of extreme negligence or reckless disregard already dealt with as unwarrantable failures and the requirement for a reasonable expectation of death or serious bodily injury essentially reaches the gravity level necessary for an imminent danger. For example, in upholding an administrative decision finding a "flagrant' violation of another federal statute, the Ninth Circuit emphasized, "the ruling was based on the [Judicial Officer]'s finding that Potato Sales's conduct was intentional, knowing, and deliberate." *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996).

Recognizing Congress' targeted aim at especially egregious conduct, we turn to the requirement that the violation must be "known." The dictionary definitions of "know" is "1. to apprehend immediately with the mind or with the senses: perceive directly: have direct unambiguous cognition of . . . (2) to have perception, cognition, or understanding of esp[ecially] to an extensive or complete extent." *Webster's Third Int'l* at 1252. In turn, "known" is the past participle of the word "know." Something is known when it is "familiar or recognized." *Id*. at 1253.

Mindful of the meaning of flagrant and known, it is then necessary to consider the terms in the context of their function within the structure of the Mine Act. Prior to the MINER Act, the Mine Act recognized and penalized the most serious forms of violations or negligence (excepting criminal acts) as an S&S and/or "unwarrantable failure" violation. Under Commission cases, unwarrantable failures are characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). In *Buck Creek*

Coal, Inc., 52 F.3d 133 (7th Cir. 1995), the Seventh Circuit endorsed the standard established in *Emery Mining*:

> An unwarrantable failure may be established "by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of 'indifference, willful intent or serious lack of reasonable care.'" [*Emery Mining*, 9 FMSHRC] at 2003. It has also been defined as an "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." *Secretary of Labor v. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991). *See also Secretary of Labor v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (1993).

52 F.3d at 136.

Thus, the Commission emphasizes that an unwarrantable failure exists when a violative condition results from a reckless disregard for safety. Because the basis of an unwarrantable violation is gross neglect or reckless disregard, MSHA issues unwarrantable failure citations on the legal ground of extreme negligence.

Had Congress wished, therefore, to base a flagrant violation upon reckless disregard or gross neglect — that is, a negligence standard to which constructive knowledge is applicable, the Mine Act provided ready terminology. Congress could have defined a flagrant violation as a reckless or repeated failure to make reasonable efforts to eliminate an unwarrantable failure that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. It did not do so. Instead, by using a "known" violation, Congress focused upon fact-based knowledge rather than upon negligence-based imputed knowledge.

I am unaware of any case in which the Commission has addressed expressly the distinction between actual knowledge and constructive knowledge. Of course, the Commission has reached decisions in which a section of the Mine Act deals with actions taken "knowingly." Those cases sometimes use the terminology "knew or should have known." However, I do not find those cases controlling as they apply to a different subsection using different terminology, enacted at a different time for a different purpose. The term "knowingly" in section 110 applies to violations of orders issued under the Mine Act, a false statement made in documents required under the Mine Act, or sales of non-compliant equipment as if it were compliant. 30 U.S.C. § 820(c), (f), (h). Obviously, these are all very different circumstances from violating a mandatory safety standard during the course of mining operations.

Even *identical* words within the same statute may have different meanings when they serve different purposes. *Verizon California, Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

In *Verizon California*, the District of Columbia Circuit stated:

> [b]ecause of that possibility — different contexts dictating different interpretations — courts addressing the meaning of a term in one context commonly refrain from any declaration as to its meaning elsewhere in the same statute.

Id. at 276; *see also Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) ("Identical words may have different meanings where 'the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another'") (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)); *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992).

Here, as noted above, different Congresses enacted different provisions thirty years apart using different words in different contexts to address different problems. Therefore, the word "knowingly" used in different contexts does not guide interpretation of "known" in section 110(b)(2).

Moreover, even were we to look at "knowingly" cases, many of those cases apply an actual knowledge standard. The Commission, in fact, has written of the "knowingly" standard as requiring that the operator "had reason to know" of the violation. Whether an actor "has reason to know" is a factual and legally distinct (if easily misunderstood) concept from whether an actor "should have known." "Had reason to know" involves knowledge of facts not a negligence duty to take specific actions. Instead, it asks whether the actor knew of sufficient facts from which a reasonable actor would then determine the actual facts, not whether an actor would take action in the first instance without knowing facts leading to a possible inference that other facts existed.

In *Richardson*, 3 FMSHRC 8 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)), the Commission defined the term "knowingly" as follows:

> "[k]nowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (D.S.C. 1950)).

The Commission, therefore, stated that the meaning of "knowingly" is "that used in contract law." *Id*. Contract law recognizes that "reason to know" and "should know" are distinct legal concepts. The Second Restatement of Contracts states: "Reason to know is to be distinguished from knowledge and from 'should know.'" Restatement (Second) of Contracts §

19 cmt. b (Am. Law Inst. 1981). The Second Restatement of Contracts cites favorably to the Second Restatements of Torts and Agency, which also recognize the distinction between "should know" and "reason to know." *Id.* The Second Restatement of Torts makes clear that the two concepts should not be conflated:

> "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Restatement (Second) of Torts § 12, cmt. a (Am. Law Inst. 1965).

Thus, the question in this case is not what AmCoal "should have known." The question is whether AmCoal knew of the violation, or whether it knew of sufficient facts from which it is reasonable to infer knowledge to AmCoal.

In this case, the Judge found the violation was known on the basis that AmCoal "should have known about" the accumulations. 35 FMSHRC 2265; Am. Ex. 21, at 10. This is a lesser negligence standard. *See, e.g.*, *United States v. Kalu*, 791 F.3d 1194, 1208 (10th Cir. 2015) (stating that "should have known" is "equivalent to a negligence standard" rather than knowledge or reckless disregard); *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) ("No case of which we are aware treats what a person 'should have known' as knowledge or wilfulness. Unless knowledge, recklessness, criminal negligence, and civil negligence are to merge into a single mental state, it is essential to preserve the difference."); 30 C.F.R. § 100.3, tbl.X (using "should have known" standard in defining low, moderate, and high negligence). When a statute requires actual knowledge, a finding based on constructive knowledge must be set aside. *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d. 1216, 1222-23 (7th Cir. 1990).

III. A Flagrant Designation Requires Proof of the Reckless or Repeated Failure to Eliminate the Specific Violation Charged — Prior Violations Are Not Relevant.

A. Section 110(b)(2) Has a Plain and Unique Meaning.

Section 110(b)(2) plainly refers to a single, specific violation—"***a*** known violation." This is a reference is to the discrete violation that is allegedly flagrant rather than a group of violations leading up to making a discrete violation being denominated as flagrant due to prior non-flagrant violations. To commit a "flagrant" violation, the operator, recklessly or repeatedly, must fail

make reasonable efforts to eliminate that cited and known violation. Moreover, the definition of "flagrant" and the uniqueness of a flagrant violation support its application based only on a repeated failure to eliminate a reasonable expectation of death or serious injury resulting from the specifically charged violation.

As described above, prior to the MINER Act, the Mine Act provided a remedy and severe sanction for repeated significant and substantial ("S&S") violations. Congress enacted section 104(e) to "provide an effective enforcement tool" against repeat violators who are undeterred by MSHA's standard enforcement scheme, which consists of citations and orders. S. Conf. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978). There is no mention in the legislative history of the MINER Act of supplementing the pattern of violations section 104(e) or dissatisfaction with its usage or non-usage. There is no basis to believe Congress was enacting a severe penalty aimed at the very same purpose as section 104(e).

Under the Commission's reasoning in *Wolf Run*, a violator not only would face withdrawal orders for unwarrantable failures or a pattern of S&S violations but also could face a future of quadruple-fold maximum penalty for every subsequent violation reaching the requisite level of gravity. It is simply impossible to reconcile such a result with the absence of any mention of sections 104(d) and 104(e) from the legislative history of the flagrant penalty provisions, any mention of such an ongoing sanction, and, in fact, Congress' statement elsewhere that safety penalties should not put operators and miners out of work.

Clearly, a uniquely violative circumstance is at the heart of a "flagrant" violation and an unprecedented civil penalty. That circumstance is failing repeatedly to correct a specific violation of which the operator has knowledge and is so serious that it creates a reasonable expectation of death or serious injury.

Administrative Law Judge Feldman persuasively explained in *Conshor Mining, LLC*, 33 FMSHRC 2917, 2927-28 (Nov. 2011) (ALJ), that "the plain statutory language in section 110(b)(2) with respect to 'repeated conduct' refers to a single known violation, rather than a series of recurring violations." Administrative Law Judge Barbour agreed with Judge Feldman's interpretation stating "the Secretary must show that Wolf Run repeatedly failed to make reasonable efforts to eliminate the violation of section 75.400 charged in the order." *Wolf Run Mining Co.*, 34 FMSHRC 337, 346 (Jan. 2012) (ALJ), *rev'd*, 35 FMSHRC 536 (Mar. 2013).

I would accept and apply their well-reasoned decisions.

B. The Commission's *Wolf Run* Decision Misinterprets Section 110(b)(2).

In *Wolf Run*, the Commission found it would allow use of prior non-flagrant violations to prove a flagrant violation even though knowledge of the violation and reasonable expectation of death were not necessary to prove such prior non-flagrant violations. Such an interpretation does comport with the words or purpose of section 110(b)(2) and is not reasonable.

1. The Commission's Reasons for Its Reading Are Insubstantial.

The arguments offered by the Commission in support of its interpretation in *Wolf Run* accentuate its erroneousness. The Commission first asserted in *Wolf Run* that unless prior non-flagrant violations may prove a repeated failure to remedy a known violation, section 110(b)(2) "would be effectively indistinguishable from the failure to abate provisions of section 104(b) of the Mine Act." 35 FMSHRC at 542. That is obviously incorrect. Section 104(b) deals exclusively with the failure to abate a condition identified in a citation. Section 110(b)(2) is not aimed at enforcing abatement orders. Instead, section 110(b)(2) authorizes imposition of a severe penalty upon an operator that fails to remedy a known violation that is reasonably expected to cause death or serious injury notwithstanding the absence of a citation. The sections apply to completely different situations.

The clear purpose of section 110(b)(2) is to incentivize operators strongly to eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition. Far from being duplicative of section 104(b), section 110(b)(2) plugs a perceived hole in mine safety by imposing a very stiff penalty upon an operator that repeatedly fails to remedy a known and very seriously dangerous violation despite the absence of a citation setting an abatement period.[8] Operators now run a very significant financial risk if they wait for an inspector to catch a very dangerous known violation before eliminating it.

The Commission also erroneously asserted that section 110(b)(2) would be duplicative of section 110(b)(1). *Id*. at 542. The Commission again failed to recognize that section 110(b)(1) deals with failures to correct violations for which citations have been issued. Thus, the Commission missed a central point of section 110(b)(2) — requiring operators to correct known very serious violations without the prior presence of an inspector. It is not acceptable for operators to allow known violations that are reasonably expected to cause death or serious injury to persist. Section 110(b)(2) addresses that problem — a problem not addressed by section 104(b) or section 110(b)(1).[9]

The Commission's last argument in *Wolf Run* is that the term "repeated" must extend to a history of prior violations because, if the term "repeated" does not include a history of prior violations then, "this might result in the elimination of any meaningful distinction between a 'reckless' and a 'repeated' flagrant violation." 35 FMSHRC at 543. Surely, the Commission does not mean that it cannot see a distinction between repeated failures to remedy and reckless failures to remedy. Once it does so, the makeweight argument collapses. Instead, "reckless" and "repeated" have distinctly different meanings and create different bases upon which the

[8] Additionally, section 104(b) provides for withdrawal orders whereas section 110(b)(2) provides for monetary penalties.

[9] In the preamble to the final flagrant violation rule, MSHA distinguished subsection 110(b)(1) from subsection 110(b)(2) stating, "[S]ection 110(b)(1) specifically applies to failure to correct a 'violation for which a citation has been issued.' In contrast, section 110(b)(2) applies to failure to eliminate a 'known violation,' and does not specify that a 'known violation' must be a violation which has been cited." 72 Fed. Reg. 13,592, 13,623 (Mar. 22, 2007).

Secretary can establish a flagrant violation. Thus, the repeated failure is not rendered "mere surplusage," as the Commission states, simply because it is restricted to the cited violation. *Id.*

Finally, the *Wolf Run* Commission stated that Judges Barbour and Feldman's reading of the statute ran "counter to the rest of the Act's graduated enforcement scheme." *Id.* at 541. In doing so, the Commission "retreat[ed] to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Workers' Comp. Progs., Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (citation omitted).[10] The Commission reasoned that, because the Secretary could consider past violations with respect to unwarrantable failure violations, he must be able to do so under the flagrant provision. 35 FMSHRC at 542. Invocation of an Act's purpose "may be invoked, in case of ambiguity, to find present elements that are *essential* to the operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." 514 U.S. at 135-36 (emphasis added). This is because "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means." *Id.* at 136.

Imposition of an especially severe flagrant violation penalty for a repeated or reckless failure to correct a known violation reasonably expected to cause death or serious bodily injury is the essence of the Mine Act's scheme of increasingly enhanced enforcement. A Commission desire to provide the Secretary another avenue to impose flagrant penalties is not a reason to find two meanings where there is only one. The plain wording of section 110(b)(2), its purpose, its essential elements, and the failings in the Commission's analysis wholly undercut the Commission's interpretation in *Wolf Run*.

2. *Wolf Run* Presents Due Process Concerns.

Apart from the Commission's misconstruction of section 110(b)(2), there is another perplexing problem with the *Wolf Run* decision and with the decision in this case. The Commission acknowledged that, under its interpretation, operators could not know the number,

[10] Commissioner Cohen responds with vigor to this expression by the United States Supreme Court. *See* slip op. at 29 n.5 (Cohen, Comm'r, concurring). It is, of course, simply a colorful way of saying that Judges and Commissioners must apply the law as written rather than indulge their own predilections toward the law. Of course, we interpret the Mine Act mindful of its fundamental purpose. However, our duty is a judicial one to apply the law as written. We are not empowered to make policy that we might desire under the guise of interpretation. My colleague casts the Mine Act so liberally as to make meetings with MSHA a factor in determining whether an operator has failed repeatedly to eliminate "a known violation." *See* slip op. at 16. Indeed, he concludes his concurrence by asserting that the issue is whether the evidence "supports a showing of a repeated failure to make reasonable efforts to eliminate the ***problem***." Slip op. at 31 (emphasis added). At the end, therefore, he seems to think section 110(b)(2) is aimed at curing a repeated "problem" rather than at very severely penalizing the repetition of "***a*** known violation."

type, or similarity of prior violations that would be necessary for prior violations to sustain a flagrant penalty. The Commission made this acknowledgement, saying,

> One might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a "repeated failure" under 110(b)(2), but an interpretation that precludes consideration of *any* prior violations runs counter to the natural meaning of the language.

35 FMSHRC at 541.

Having acknowledged the patent ambiguity in its construction of statutory language providing for hundreds of thousands of dollars of penalties, the Commission wholly ignores the obvious issue of whether such an incomprehensible reading of the Mine Act meets basic principles of fair notice and due process. It is elementary that due process requires that a party must receive fair notice before being deprived of property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Civil penalties are "quasi-criminal" in nature. Consequently, parties subject to administrative penalties and especially penalties running into the hundreds of thousands of dollars are entitled to clear notice of the conduct for which such penalties may be assessed. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997); *First Am. Bank of Virginia v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985). As the Fifth Circuit stated in its oft-quoted decision in *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976),

> [S]tatutes and regulations which allow monetary penalties against those who violate them . . . must give . . . fair warning of the conduct [they] prohibit[] or require[], and [they] must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

The Fifth Circuit's reference to a "reasonably clear standard' is often encapsulated in another phrase used by the courts — namely, that the regulation must provide notice of the basis for liability with "ascertainable certainty." *Id.*; *see also, e.g.*, *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *Geo. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1232-33 (3rd Cir. 1980).

3. The Current Decisions

Having read the separate Chairman Jordan/Commissioner Nakamura and Commissioners Cohen/Young opinions, I have no idea how previous violations can or should be used to determine that a current known violation reasonably expected to cause death or serious bodily injury "repeats" a prior violation. This ambiguity is troubling in light of the obvious errors in *Wolf Run*.

Chairman Jordan and Commissioner Nakamura do not address the problem because they find that the violation is flagrant under the narrow interpretation of the statute.[11] If the Judge disagrees, he is on his own with respect to application of the broad standard, even though he already provided his opinion of how to apply the misguided *Wolf Run* decision.

Commissioners Cohen and Young deal with the issue of use of previous violations. However, I cannot find any meaningful suggested guidance for Administrative Law Judges in their minority opinion.

Commissioners Cohen and Young say "the language of the statute and our decision in *Wolf Run* support the reasoned consideration of an operator's history of substantially similar violations, where they may be shown to be relevant to the issues arising in the repeated failure context." Slip op. at 29. Of course, as we have seen, the *Wolf Run* decision was based upon a number of remarkable misinterpretations of the Mine Act. For present purposes, however, the important point is that the foregoing phrases are clichés typically used by lawyers when they have nothing concrete to offer such as "substantially similar" violations, and "where they may be shown to be relevant," and "to the issues arising in the repeated failure context." I do not see how that sentence offers any meaningful guidance to Administrative Law Judges.

Moreover, I do not see how such suggestions comply with fundamental due process standards of notice to operators of the standard for a flagrant violation. Section 110(b)(2) establishes a standard for civil penalties into the hundreds of thousands of dollars. We have the same duty as any federal agency to provide fair notice of scope of the violation that may result in such penalties.

Even were we to allow previous violations to be used as my colleagues wish, I simply do not see how the Commission could find that a violation "***repeats***" a failure to eliminate "a known violation that . . . could have been expected to cause, death or serious bodily injury" unless that prior violation was "a known violation . . . that could have been expected to cause, death or

[11] Because we are all human, such uncertainty unintentionally creates an insidious danger that I hesitate to identify but, in this real world, must acknowledge. A Judge faced with a difficult decision on knowledge of the charged violation under the "narrow" interpretation but complete uncertainty how to deal with the nonexistent or impossible to fathom standard for the "broad" interpretation might be pushed imperceptibly and even unknowingly toward a flagrant finding under the narrow interpretation thereby avoiding grappling with the broad interpretation.

serious bodily injury."[12] A new violation could only "repeat" a prior violation if such prior violation and the new violation share the same fundamental elements. Here, that means that in the prior violation the operator (1) failed to eliminate a known violation that (2) could be reasonably expected to cause death or serious injury.[13] The difficulty for my colleagues seems to be that they strongly desire to allow use of prior violations, but they realize the vast majority of prior violations do not demonstrate either that the operator had knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury.[14]

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[12] Commissioner Cohen, joined by Commissioner Young, claims that "repeated failure" modifies "to make reasonable efforts to eliminate." *See* slip op. at 29 n.6. This limited parsing of the statutory definition of "flagrant" ignores the critical terminology of the statute by disregarding that the entirety of the key phrasing is "repeated failure to make reasonable efforts to eliminate ***a*** known violation of ***a*** mandatory health or safety standard." (emphases added). A key issue of section 110(b)(2) is this: What must the operator fail to make reasonable efforts to eliminate? There is one, and only one, answer to that question. The statute demands the failure to make reasonable efforts to eliminate "a known violation." "A known violation" is the direct object of the infinitive phrase "to eliminate," which itself modifies "efforts." The Act does not require efforts to eliminate bad management or to encourage "better practices" (whatever that means). Identifying actions such as "bad management" and an absence of "better practices" as demonstrating a preceding and repeated failure to make reasonable efforts to eliminate a known violation demonstrates compellingly the absence of any knowable or reasonable standard, let alone a standard for imposing hundreds of thousands of dollars in civil penalties, under the Commission's *Wolf Run* decision or Commissioner Cohen's opinion. Indeed, it appears use of the actual statutory language is so foreign that even in the last sentence of the footnote, they use the term "violative conditions" instead of "a known violation."

[13] The term "a known violation" must mean that the operator had knowledge of the specific cited condition, not that it generally knows various kinds of activities constitute violations. For example, operators "know" an accumulation of loose coal and coal dust constitutes a violation. It would be foolish to assert that an operator who commits a number of violations of 30 C.F.R. § 75.400 could then be on the hook for every subsequent violation as a "flagrant" violation because it "knows" accumulations of coal dust violate a mandatory safety standard.

[14] My colleagues correctly point out that the operator had a very high number of violations of section 75.400 during the two years preceding the flagrant citations. No one can defend or excuse such violations, especially in a high methane mine. At the same time, it is notable that, according to MSHA's website, in the calendar years 2006 and 2007 MSHA issued 15,301 citations to underground coal mines for violations of section 75.400. MSHA, Most Frequently Cited Standards by Mine Type, http://arlweb.msha.gov/stats/top20viols/top20home.asp (last visited Aug. 30, 2016). Further, the operator's mine is on a frequent inspection schedule with inspectors present virtually every day. Finally, my colleagues state that the mine has "a complex system of conveyor belts transports coal for many miles from mine face to portal." Slip op. at 2. Of course, miles of belt lines with multiple exchange points create a particular danger of coal accumulations. None of this excuses any one violation, a large number of violations, or any inattention to safety, and I do not draw any such conclusion. The point is

(continued…)

Inspectors may be, and often are, the first persons to find a violation. The occurrence of a prior violation, standing alone, does not demonstrate that the prior violation was "known" by the operator. Indeed, even with respect to unwarrantable failures, Judges must evaluate and weigh seven distinct attributes, only one of which is knowledge. Therefore, although knowledge of the violation is a necessary element of proof of a flagrant violation, knowledge is rarely, if ever, an essential element of non-flagrant citations.[15]

Further, without rules for, or any understanding of, the kinds of prior violations that may be considered or what number are necessary, the Commission's decisions create an unknowable, unworkable, abusive, and purely subjective standard for the issuance of penalties in the hundreds of thousands of dollars. We see that problem at work in this case.

It seems to me the inability to explain how an interpretation should be applied should be a hint that the interpretation is incorrect. In any event, I conclude that *Wolf Run* was decided incorrectly and that the repeated element of a flagrant violation means situations in which an operator repeatedly allows a known violation to sit unabated despite "repeated" awareness of the violation.

Conclusion

The Commission has stated that "a judge's factual findings are often colored by the legal standard applied," and in such a case, remand for reconsideration of factual findings under the correct standard is appropriate. *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 180 (Feb. 2000). I agree. Accordingly, I would vacate the Judge's decision and remand the case for a determination of whether AmCoal knew or had a fact-based reason to know of the violation, not whether it should have known.

In remanding, I find that the Judge failed to address much of the record evidence that would detract from his erroneous finding of knowledge and that the Judge misunderstood the record evidence regarding the stoppings. The Judge should consider all of the evidence, even that which conflicts with his original conclusion. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *American Wrecking Corp. v. Sec'y of Labor,* 351 F.3d 1254, 1261 (D.C. Cir. 2003) ("The substantial evidence rule requires that the [Occupational Safety and

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[14] (…continued)
that the recitation of one raw number does not constitute a judicious review of performance. Such review would require a detailed analysis of all factors bearing upon the number of violations in a particular setting.

[15] Similarly, as noted, the culpability language of section 110(b)(2) does not track the language of the Commission's S&S decisions but instead tracks the definition of an imminent danger — that is, a violation that is "reasonably expected" to cause death or serious physical harm. An S&S violation may exist without a finding of a "reasonable expectation" of death or serious physical harm. Therefore, standing alone, a prior S&S violation does not prove any element of a flagrant violation.

Health Review] Commission reasonably consider material evidence on both sides, as evidence that is substantial when viewed in isolation may become insubstantial when contradictory evidence is taken into account.").

Although I disagree with the Commission's decision in *Wolf Run*, I concur with the majority that the judge properly found that Order No. 7490584 was flagrant. Regarding Order No. 7490599, I would vacate and remand the flagrant and gravity determinations for the Judge to reconsider (1) whether the violation was "known" under the correct legal standard, (2) whether the accumulations could be reasonably expected to result in serious bodily injury, and (3) the operator's level of negligence in consideration of all of the facts. I would not permit the Judge to take a history of prior violations into account.

/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

August 30, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. WEST 2012-760-M WEST 2012-986-M
v.	
HECLA LIMITED	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2014-591-M
v.	
DOUG BAYER, employed by HECLA LIMITED	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). They concern an order that was issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Hecla Limited, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). In that order, MSHA alleged that Hecla had failed to examine and test for loose ground[1] as required by the safety standard at 30 C.F.R. § 57.3401.[2]

[1] The term "loose ground" is defined as "fragmented or weak rock in which underground openings cannot be held open unless artificially supported, as with timber sets." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 320 (1997). In this case, it generally means material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling. *See Amax Chem. Co.*, 8 FMSHRC 1146, 1148 (Aug. 1986).

[2] Section 57.3401 states that "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift." 30 C.F.R. § 57.3401.

MSHA designated the violation of the standard as "flagrant" pursuant to section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), and proposed that Hecla pay a civil penalty of $159,100. MSHA also proposed that Doug Bayer, the mine superintendent, personally pay a civil penalty of $4,500 pursuant to section 110(c) of the Mine Act.[3]

Hecla and Bayer contested the order and the proposed civil penalties before a Commission Administrative Law Judge. After a hearing on the merits, the Judge vacated the order; he concluded that Hecla had performed an examination as required by section 57.3401. 37 FMSHRC 877, 889-90 (April 2015) (ALJ). The Secretary of Labor filed a petition for review of the Judge's decision, which we granted.[4]

For the reasons that follow, we hold that the order must be vacated. Although we hold that the Secretary can reasonably construe the examination and testing requirement in section 57.3401 to require more extensive testing in certain situations, we conclude Hecla did not have fair notice of this interpretation.

I.

Factual and Procedural Background

Hecla operates the Lucky Friday Mine, a silver, lead, and zinc mine located in northern Idaho. On April 15, 2011, a large fall of ground occurred in an active mining area known as the 15 Stope. A "stope" is where the mining of ore takes place. Larry Marek, a miner, was fatally injured by the ground fall.

Hecla mined in the 15 Stope using an unusual method known as underhand cut-and-fill mining. Under this method, the ultimate trajectory of mining proceeds downward. Mining begins at the "slot," which is the access point of the stope. Cuts are taken simultaneously to the east and to the west of the slot.[5] After a cut is complete and before the next cut is mined, the cut is

[3] Section 110(c) provides that "any director, officer, or agent of [a] corporation who knowingly authorized, ordered, or carried out [a] violation" shall be subject to a civil penalty fine. 30 U.S.C. § 820(c).

[4] As noted *infra*, the Judge's decision also concerned a citation issued to Hecla for a violation, arising out of the same fatal accident, of 30 C.F.R. § 57.3360, which requires ground support to be designed, installed, and maintained to control the ground in places where miners work or travel. The Judge concluded that Hecla violated the standard, the violation was S&S, and the violation was the result of an unwarrantable failure to comply with the standard. 37 FMSHRC at 887-88. The Judge assessed a $180,000 penalty under the flagrant violation provision in section 110(b) of the Mine Act after concluding that Hecla was reckless in its failure to make reasonable efforts to eliminate a known violation. *Id.* at 894-95. Hecla did not appeal any of the Judge's findings with respect to this separate citation and, accordingly, it is not before the Commission.

[5] One "slot" is used to access a "sublevel," which consists of five cuts totaling 50 vertical feet. Jt. Stips. nos. 27-28.

backfilled. This is accomplished by installing bolts vertically in the mined out area and filling that area with a backfill paste.[6] The bolts provide structure for and reinforce the paste fill. After the backfill cures, the miners begin the next cut. That cut occurs 10 feet below the last cut; the floor of the previous cut becomes the roof or "back" of the subsequent cut.

The ground fall that is the subject of this proceeding occurred on the western side of the third cut of the sublevel. On the first cut of the sublevel on the western side of the stope, Hecla advanced a 20-foot wide cut for about 50 feet. Then, Hecla created two parallel entries, following the two diverging ore veins that were located in the stope. The rock between the veins was not removed. The miners only backfilled the area where the ore veins had been located. The unmined rock, known as "waste rock," remained as a pillar in between the two entries. The second cut of the sublevel was mined in a similar manner. Solid waste rock was again left as a pillar between the two advancing faces. *Id.* at 880. On the third cut, the two ore veins merged into the area directly below the waste rock/pillar left above in the first and second cuts. Hecla directed the miners to cut all of the rock in the stope including the rock directly under the waste rock pillar that was left in cuts one and two. *See* Attached Appendix (The Cut Three Stope Map), Gov. Ex. 8, at 15. Bolts were installed in the bottom of the pillar.[7] In total, the undercut pillar on the western side of the stope extended an estimated 72 feet and ranged from three to nine feet wide. Gov. Ex. 8, at 7.

Prior to the ground fall, Hecla had undercut previous waste pillars for short distances of 10 to 20 feet. The practice of undercutting a pillar for 72 feet was unprecedented at the mine. 37 FMSHRC at 888.

On April 13, 2011, Hecla managers conducted a weekly geology tour of the mine, which included a visit to the mining faces of the third cut on the 15 Stope. Bayer participated in this tour and observed no ground control problems. Tr. 471-72, 479-80.

On the morning of April 15, 2011, Nicholas John Furlin, a Hecla production geologist, also visited the third cut and observed no indications that the ground was unstable. Tr. 619-21. Later that day, a massive portion of the "back" in the western side of the stope fell and fatally crushed Mr. Marek. MSHA estimated that the ground fall was approximately 90 feet long, 20 feet wide, and 30 feet high. Gov. Ex. 8, at 3.

[6] The backfill paste is pumped underground from the surface. It consists of cement, water, and classified mill tailings. Jt. Stips. no. 33. The intense horizontal pressure, that significantly exceeds the vertical pressure, which is a characteristic of the Coeur D'Alene Mining District where the Lucky Friday Mine is located, holds the backfill in place. The backfill paste is elastic and able to withstand this horizontal pressure.

[7] Before beginning work in the stope, miners examined those bolts. Tr. 474-75.

MSHA issued Hecla an order alleging a violation of 30 C.F.R. § 57.3401 for a failure to examine and test for loose ground.[8] MSHA also issued Hecla a citation for a failure to maintain ground control as required by 30 C.F.R. § 57.3360.[9]

After the hearing on the merits, the Judge vacated the order. He concluded that Hecla had adequately performed the examination required by section 57.3401. 37 FMSHRC at 889. The Judge considered the miners' visual examination of the bolts and the backfill to be a sufficient examination under the safety standard. The Judge noted that the Secretary had not set forth any guidelines for another examination technique. *Id.* (citing *Asarco, Inc.*, 14 FMSHRC 941, 947 (June 1992)).

With respect to the citation issued for a violation of section 57.3360, the Judge found that Hecla had failed to control the ground and, thus, he affirmed the citation.[10] Hecla did not appeal that ruling.

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[8] The order states:

> Management failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken. This was necessary due to constantly changing ground conditions, they were mining a wide stope and removing the support pillar. The operator has engaged in aggravated conduct constituting more than ordinary negligence . . . .

Gov. Ex. 1, at 8.

[9] The citation states:

> Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed, and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground.

Gov. Ex 1, at 1.

[10] The Judge concluded that Hecla had failed to provide any evidence that it was reasonable to believe that the ground was adequately supported when it mined under the waste pillar. 37 FMSHRC at 886-87. The Judge assessed a penalty of $180,000 pursuant to section 110(b) of the Mine Act for a flagrant violation. *Id.* at 894-95.

II.

Disposition

On review, the Secretary contends that in the circumstances of this case section 57.3401 required Hecla to undertake a more rigorous examination and test than it had conducted. The Secretary argues that he reasonably interprets section 57.3401 to require more extensive analysis when the operator knows or should know that it is mining in a manner that creates ground control hazards beyond the risks inherent in normal mining. S. Br. at 14-15. He asserts that the analysis should be sufficient to pinpoint reasonably foreseeable ground control problems. The Secretary also alleges that this interpretation is compelled by prior Commission decisions, i.e., *Asarco, Inc*., 14 FMSHRC 941 (June 1992), and *Dynatec Mining Corp.*, 23 FMSHRC 4 (Jan. 2001). Finally, he maintains that, in this case, the hazardous practice of undermining a pillar for an extensive length required Hecla to undertake a geomechanical or engineering analysis.[11]

Hecla argues that section 57.3401 does not require a geomechanical or engineering analysis. Hecla further maintains that it lacked notice of the Secretary's interpretation, in that a reasonably prudent miner would not interpret the language of the safety standard as the Secretary has.

A. The Secretary Reasonably Interprets Section 57.3401 to Require Examinations and Testing Sufficient to Identify Reasonably Foreseeable Ground Control Problems.

The language of section 57.3401 does not dictate or explain what is required by an "examination" of ground conditions. The text of the standard is silent or ambiguous as to how supervisors or other designated persons should "test" "as ground conditions warrant" in novel situations. As our dissenting colleagues identify, in the majority of mining environments, testing for loose ground involves physically tapping or vibrating the roof with a scaling bar. Slip op. at 13. However, when a mine operator engages in a novel mining practice, ordinary techniques may not be appropriate to identify dangerous ground conditions in areas where work is to be performed. Accordingly, that ordinary technique cannot be an effective "test" for loose ground.

Here, Hecla took the previously unprecedented step of undermining a rock pillar for a length of 72 feet. Hecla's chief mining engineer, Ron Krusemark, testified that undercutting a waste rock as was done in cut three was "way out of the norm."[12] Tr. 143-44, 153. He only knew of three situations where a large pillar was undercut for more than 50 feet at the mine (15 Stope west cut three, 15 Stope east cut three and in the 12 Stope). *Id*. (citing 159). Krusemark testified

[11] The American Society of Civil Engineers states that "[g]eotechnical engineering utilizes the disciplines of rock and soil mechanics to investigate subsurface conditions. Geotechnical engineering evaluations also include a review of geologic conditions." Geotechnical Engineering, Am. Soc'y of Civil Eng'rs, www.asce.org/geotechnical-engineering/geotechnical-engineering/ (last visited Aug. 29, 2016).

[12] Bayer testified that in his 17 years at the mine it was not uncommon to undercut a pillar by 10 to 30 feet; however, it was not common to undercut a pillar by more than 70 feet. Tr. 544.

that he was not aware of the plan to undercut the pillar until after the accident. Tr. 150, 152-53. Terry DeVoe, Hecla's chief geologist, testified that he had only undercut a pillar for a similar distance on one other occasion prior to the cuts in the 15 Stope. Tr. 655.

The Secretary maintains that the safety standard at issue was drafted broadly enough to require a mine operator to take all necessary steps to detect hazards when engaged in a novel mining technique such as the one used in this case.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a "regulation is silent or ambiguous with respect to [a] specific point at issue, we must defer to the agency's interpretation as long as it is reasonable." *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001); s*ee generally Auer v. Robbins*, 519 U.S. 452 (1997).

In upholding the Secretary's interpretation of another regulation regarding examinations, the D.C. Circuit stated that it is compelled to "defer to the Secretary of Labor's interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulations." *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005). In fact, deference is appropriate when the agency advances a permissible interpretation even if that interpretation diverges from what a first-time reader of the regulation would conclude is the best interpretation of the regulation. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citing *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)).

The Secretary's proffered interpretation is consistent with both the language and specific purpose of section 57.3401, as well as with the general purpose of the Mine Act: to protect the safety and health of miners. The drafters of the safety standard intended its language to be "flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines." 51 Fed. Reg. 36192, 36192-93 (Oct. 8, 1986).

It is consistent with the policy goals of the Mine Act to require in a highly unusual mining situation the type of examination or testing that is necessary to discover latent hazards that cannot readily be observed, such as rock fractures above a roof, before miners are exposed to the hazards in their working area. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) (("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (alteration in original) (quoting *Emery Mining Co. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984))). In addition, the Secretary's interpretation is congruent with our decision in *Dynatec* in which we broadly held that an examination must be "designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards." 23 FMSHRC at 24 (quoting *Dynatec Mining Corp.*, 20 FMSHRC 1058, 1086 (Sept. 1998) (ALJ) (emphasis omitted)).

As demonstrated by the facts of this case, the use of novel and more hazardous mining techniques without prior technical analysis to pinpoint hazards puts miners' lives at risk.

Faults were common at the mine. Tim Ruff, a former production geologist at Hecla, testified that throughout the mine there were faults, which could cause some rocks to be "free hanging." Tr. 351. As a result, Ruff testified that he thought it was "crazy" to undermine the pillar. Tr. 354. Ruff voiced his concerns to Bayer. Tr. 354-58. The miners working in this section told Ruff that they were nervous that they had mined too far under the pillar and had compromised its stability. Tr. 360.[13]

There is also evidence in the record that ground conditions warranted additional tests based on the reports of miners actively mining cut number three. Dan McGillis, a retired Lucky Friday miner, testified that the miners working in the 15 Stope discussed with each other their concerns about mining underneath the pillar. Tr. 322-23. McGillis told Bayer that a miner on his section saw the back "dribbling," that is, he saw little rocks fall from the roof. Tr. 325. McGillis understood that to be an indication that the roof was unstable. Tr. 325. Bayer reportedly responded to McGillis' concerns by stating "maybe next cut we can do something different." Tr. 326. The Judge specifically credited McGillis' testimony. 37 FMSHRC at 884.

The limited visual observations performed by Hecla employees were not sufficient to determine if the pillar was stable or if it was compromised by the rock fractures that commonly occur in this mine. The Secretary's Report of Investigation states that the accident occurred because

> [m]anagement did not conduct an evaluation, engineering analysis, or risk assessment to determine the structural integrity of the stope back. The back that struck the victim was comprised of a combination of paste fill and waste pillar. As shown on projection maps, geologic structures in the form of joints, faults, and fractures intersected the waste pillar at various angles. These intersecting discontinuities cut the pillar rock mass into angular blocks and wedges which facilitated gravity failure. The large blocks and wedges observed in the fall rubble were not sufficiently supported by the 6-foot long rock bolts installed in the undercut surface of the waste pillar.

Gov. Ex. 8, at 9. Where an unusual technique is used in an area compromised by rock fractures

[13] Even Bayer acknowledged that it was possible that the pillar was affected by faults. Tr. 537. Bayer also testified that he believed that no mining had occurred above the pillar and, therefore, it was about 7000 feet tall. Tr. 536.

and faults, it is reasonable to interpret the examination and testing provisions of section 57.3401 to require a technical analysis that is necessary to pinpoint hazards that imperil miners.[14] [15]

Our dissenting colleagues contend that the language of the safety standard is plain, and does not allow such a broad application of its requirement to "examine" and "test ground conditions." Slip op. at 12. According to them, the Secretary would need to institute rulemaking before requiring the geomechanical and engineering analysis he claims was needed here. We disagree. The Secretary cannot anticipate every unusual mining technique an operator chooses to institute and then promulgate a rule that explains the testing and examination that is required to protect miners from roof falls through that mining process. Safety standards can be issued using general terms like "examine" and "test" and an operator is then expected to implement the appropriate tests and exams sufficient to detect reasonably foreseeable ground problems.

Our colleagues also assert that we cannot "explain how this duty is triggered or how far outside the working place it would extend." *Id.* at 11. We anticipate, however, that the specific parameters of the duty will be developed on a case-by-case basis. As the Secretary argues, when an operator adopts a "new and unusually hazardous mining technique" that departs from the norm, as was the case here, it is reasonable for the Secretary to require that the examination and testing obligations under section 57.3401 also depart from the norm. S. Br. at 14.

Our dissenting colleagues also suggest that after the accident MSHA should have cited the operator only under 30 C.F.R. § 57.3360 for the failure to provide adequate ground support and should have refrained from also citing it for failing to examine and test for loose ground. Slip op. at 11. We again disagree. Enforcing section 57.3401 according to the Secretary's proffered interpretation promotes the elimination of future hazards (by ensuring adequate examinations of

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[14] We note that geomechanical analyses have been performed at the Lucky Friday Mine in the past. For example, in 2001, engineers from the National Institute for Occupational Safety and Health (NIOSH) and Hecla Mining collaborated on a study which included instruments embedded in the rock bolts to determine if the strength of the rock bolts installed in the backfill at the Lucky Friday Mine was being exceeded. *See generally* T.J. Williams et al., Nat'l Inst. For Occupational Safety and Health, *Geomechanics of Reinforced Cemented Backfill in an Underground Stope at the Lucky Friday Mine, Mullan, Idaho* (July 2001), https://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/2001-138.pdf

[15] Our dissenting colleagues have asserted that the safety standard's requirement to examine and test the ground does not require an operator to examine or test a waste pillar roof above the head of miners working in a stope. Slip op. at 13, 20. In fact, the requirement of the safety standard is simple: When an operator sends miners to work under a waste rock pillar, the waste pillar then becomes an area where work is to be performed, and the operator is required to examine and test it for loose ground. Thus, the phrase "in areas where work is being performed" modifies the words "ground conditions." The "areas where work is being performed" include all areas that affect working miners and are not limited just to the spots where miners are standing or walking. In this case, ground about 30 feet above the roof in cut three fell; this means the point of failure was about 10 feet above cut one (and not "several thousand feet above the working place"). *See* dissent slip op. at 13.

working places with a high risk of ground failure), rather than simply reacting after the fact to hazards that have already occurred.

Unlike an underground coal mine, where an operator must mine according to a roof control plan approved by MSHA that is suitable to the roof conditions and mining system of each mine, 30 U.S.C. § 862(a), the Mine Act imposes no similar obligation upon underground metal and non-metal mines. *See Amax*, 8 FMSHRC at 1149 ("[A]pproved roof control plans are not required in underground metal-nonmetal mining operations . . . .").[16] Because there is no plan-approval process, and metal and non-metal mine operators have the latitude to depart from their normal mining plans, it is reasonable for the Secretary to interpret the safety standard at section 57.3401 to require technical analyses when he believes it is necessary to safeguard miners' lives; it is a check against recklessness in the pursuit of production. In short, it is necessary to ensure miner safety.

B. Hecla Did Not Have Adequate Notice of the Secretary's Interpretation.

While we have determined that the Secretary's interpretation is reasonable, Hecla is entitled to due process protections prior to enforcement of that interpretation. To comport with due process, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.,* 13 FMSHRC 1341, 1343 (Sept. 1991). The "fair notice doctrine" has been incorporated into administrative law and "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Suburban Air Freight, Inc. v. Trans. Sec. Admin*., 716 F.3d 679, 683-84 (D.C. Cir. 2013) (alteration in original) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission asks "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).

Because the standard had consistently been applied in a more limited fashion, we hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis. As we stated *supra*, we consider the Secretary's interpretation to be a permissible one, although it would not be an obvious reading of the standard to a person familiar with the mining industry. *See Gen. Elec.*, 53 F.3d at 1330 (finding that although the interpretation was permissible, fair notice was lacking where the agency's "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed [regulated parties] of the agency's perspective"). In fact, the Secretary readily

[16] The *Amax* decision concerned a prior safety standard that governed examinations at metal and non-metal mines, 30 C.F.R. § 57.3-22.

acknowledges that his interpretation is not obvious and advocates simply that the regulation is "susceptible of such reading." S. Br. at 15.

Contrary to the Secretary's assertions, the broad holdings of the *Asarco* and *Dynatec* decisions likewise do not provide notice that a geomechanical or engineering analysis may be required to comply with section 57.3401. These cases are factually dissimilar to the circumstances of the present proceeding. Neither case involved a geomechanical or engineering examination, nor was there any indication that such technical examinations were required by the standard.

In *Asarco*, a drill operator was fatally injured by a large ground fall. MSHA issued a citation alleging that Asarco had failed to examine and test for loose ground in the stope. 14 FMSHRC at 944. However, MSHA never alleged that compliance with the standard required geomechanical or engineering analysis. The Commission ultimately vacated the citation at issue. *Id.* at 955.

In *Dynatec*, the Commission again vacated a citation issued for a violation of section 57.3401. 23 FMSHRC at 24. The Commission held that pursuant to the safety standard an examination must be "designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards." *Id.* at 24 (quoting 20 FMSHRC at 1084 (emphasis omitted)). However, that decision also contained no mention that a mine operator may be required to perform a geomechanical or engineering analysis or when such an obligation is triggered. As a result, we reject the Secretary's argument that Commission precedent put Hecla on notice that it was required to perform a geomechanical or engineering analysis.

Hence, we rule that Hecla did not have fair notice of the Secretary's interpretation.

III.

Conclusion

For the aforementioned reasons, we conclude that the Secretary's interpretation of section 57.3401 is prospectively entitled to deference. However, we also conclude that Hecla did not have notice of this interpretation at the time the order in this case was issued. Therefore, we affirm the Judge's decision to vacate the order and not impose civil penalties on Hecla and Bayer.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Althen, concurring in part and dissenting in part:

This case arises from a massive rock fall from a point approximately 25 feet above the mine roof in an extended stone pillar above the area where work was being performed. MSHA properly cited the operator for a flagrant violation of 30 C.F.R. § 57.3360 — that is, failure to provide adequate ground support.[1] The Judge found the violation of section 57.3360 directly applicable to the fatality due to the failure to provide adequate ground support for an extensive overhead rock pillar. He further found the violation was flagrant and levied a fine of $180,000 — substantially more than the fine proposed by the Secretary. Thus, MSHA cited and the Judge sustained and substantially fined the failure to provide ground support related to the tragic event.[2]

Rather than prosecuting the operator only under the appropriate section of the regulations, MSHA chose to pursue a novel claim and additionally cited the operator for a flagrant violation of 30 C.F.R. § 57.3401. That section provides:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

In citing a violation of section 57.3401, the Secretary proposes to layer upon the common and ordinary examinations routinely conducted in working places a new, undefined, and extraordinary duty to conduct a highly technical geomechanical analysis. Neither the Secretary nor the majority can explain how this duty is triggered, or how far outside the working place it would extend. We think it unwise to endorse an ad hoc and unclear imposition of responsibility in this context.

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[1] 30 C.F.R. § 57.3360 provides:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

[2] MSHA also cited the operator for two other violations not related directly to the rock fall but arising from the same mining practice. The Judge sustained each violation and levied fines of $50,000 for each violation.

The upshot of the majority decision is to allow the Secretary to create a new substantive regulation under the guise of a new interpretation of a 30-year-old regulation despite the plain wording of the existing rule and the unreasonableness of the new interpretation. The majority agrees that no reasonably prudent person could read the section to require the type of pre-operational testing demanded in this unique case. Slip op. at 9. Further, they do not dispute that in the 30 years since promulgation of the regulation MSHA has never proposed such an interpretation. They find that, because no reasonable operator could have understood the regulation to require this novel type of analysis, they must vacate the citation. *Id.* at 10. We concur in vacating the citation, but respectfully disagree with the majority's reasoning. We would find the Secretary's lawyers' interpretation of section 57.3401 as presented to the Commission is unreasonable, non-persuasive, and invalid.

Discussion

I. The Plain and Unambiguous Wording of Section 57.3401 Does Not Require Undefined Geomechanical Engineering Analyses.

Under *Auer v. Robbins*, 519 U.S. 452 (1997), an agency's interpretation of its own regulation may be entitled to deference, "[b]ut *Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). In this case, we owe no deference to the Secretary's interpretation of section 57.3401 because the Secretary's post-hoc litigation position is inconsistent with the plain words of the regulation as they have been understood for more than 30 years. The Secretary's interpretation cannot be reconciled with the plain, obvious, and accepted meaning of section 57.3401.

The Secretary does not define what the term "geomechanical analysis" means. More importantly for present purposes, whatever the Secretary may envision, the requirements of section 57.3401 plainly do not include an unspecified type of geomechanical analysis of an extended rock pillar above the working place before work occurs in the mine.[3]

The Commission must give words in statutes and regulations their common, ordinary meaning unless they are otherwise defined. *Perrin v. United States*, 444 U.S. 37, 42 (1979). As used in the metal and nonmetal regulations, the word "examine" has an ordinary meaning. An operator "examines" an area by inspecting the designated area — the working place — visually to determine dangers or deficiencies. For example, 30 C.F.R. § 57.18002(a) requires that a competent person "shall examine each working place at least once each shift for conditions which may adversely affect safety or health." No one would suggest that such an examination requires some sort of computer analysis of areas above and around the working place during each shift, and neither the majority nor the Secretary cites any authority supporting this

[3] Perhaps the language of the regulation may be ambiguous with respect to the precise nature of its application to examinations and testing of the place where work is being performed. It is not ambiguous, however, with respect to the fact that its wording plainly does not require examinations of places in the mine that are not places where work is being performed. *See* 30 C.F.R. § 57.3401("[D]esignated persons shall examine and, where applicable, test ground conditions *in areas where work is to be performed* . . . .") (emphasis added).

extraordinary expansion of the scope of the term "examine."[4] Further, section 57.3401 requires examination of the "area where work is to be performed." By statutory definition this means "the working place." 30 C.F.R. § 57.2. Certainly, a stone pillar extending several thousand feet above the place where miners are working is not "the working place."

Ignoring the definitions in the regulations and case law, the majority states that "areas where work is being performed"— that is, working places — "include all areas that affect working miners and are not limited just to the spots where miners are standing and walking." Slip op. at 8 n.15. Thus, the majority does not even recognize the clear regulatory distinction between "active workings" at 30 C.F.R. § 57.2, which are "areas at, in, or around a mine or plant where men work or travel," and working places at 30 C.F.R. § 57.2 which are "areas where work is being performed." Not only does the majority fail to acknowledge that the final regulation was limited from the scope of the proposed regulation, they defy the commonsense reading of the English language by asserting a "working place" extends into a rock column up to 6000 feet above the working place. Because miners must visually examine and physically test a working place for loose ground in order to scale it down, the portion of the roof that could contain scalable ground is part of the working place. However, under section 57.3401, the working place does not include a pillar of rock several thousand feet above the working place. *See* 37 FMSHRC 877, 879 (Apr. 2015) (ALJ).[5]

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[4] The Commission should construe the duty to "examine" a working place harmoniously with other regulations. *See Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993); *Gen. Elec. Co., Aerospace Grp. v. United States*, 929 F.2d 679, 681 (Fed Cir. 1991) ("[W]e are mindful of the canon of statutory construction, equally applicable to regulations, 'that, where the text permits, statutes dealing with similar subjects should be interpreted harmoniously.'" (quoting *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring))). "[R]ules of statutory construction are equally applicable to the interpretation of administrative regulations." *Buckley v. United States*, 51 Fed. Cl. 174, 192 (2001). "In determining the meaning of such regulations, rules of interpretation applicable to statutes are appropriate tools of analysis." *Gen. Elec. Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979); *see also Ala. Tissue Ctr. of Univ. of Ala. Health Serv. Found., P.C. v. Sullivan*, 975 F.2d 373, 379 (7th Cir. 1992) ("The same rules of construction apply to administrative rules as to statutes."(citation omitted)); *accord Wronke v. Marsh*, 787 F.2d 1569, 1574 (Fed. Cir. 1986) (stating that for the interpretation of regulations, just as in the interpretation of statutes, courts must begin with their plain language).

[5] The majority seems to suggest that we imply the fall may have occurred from more than 30 feet above the actual working place. Slip op. at 8 n.15. Of course, we do not. We simply reflect that the majority does not assign any vertical limit to the newly imposed duty to perform a geomechanical analysis of some undefined dimension under some undefined circumstances. It does not opine, for example, that if the break occurred at 100, 200, 500, or 1000 feet, it would not find a violation. As we point out in this dissent, neither the Secretary nor the majority provides meaningful guidance as to the actual content, meaning, or duties of this newly found obligation.

Further, our precedents reflect the common understanding that the purpose of the standard is to permit scaling and removal of loose ground. The need to scale roof or ribs in the working place is determined by testing the roof and ribs. In *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), the Secretary alleged a failure to examine and test a roof in violation of section 57.3401. *See id.* at 945. The Commission reviewed the plain language of the regulation and found that the regulation contains two requirements: "First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions otherwise warrant during the workshift. Second, where applicable, ground conditions in work areas must also be tested." *Id.*

Regarding the examination requirement, "the judge interpreted the examination requirement of the regulation to require a careful visual inspection." *Id.* (citing *Asarco, Inc.*, 12 FMSHRC 2073, 2083-84 (Oct. 1990) (ALJ)). The Secretary did not dispute that interpretation. *Id.* The examination requirement of section 57.3401 cannot be interpreted to require an engineering or geomechanical analysis outside the working place when "examination" in the context of examining the area where work is to be performed plainly means "a careful visual inspection" of the working place.

Further, inherent in *Asarco* is the common understanding that the phrase "testing for loose ground" means physically tapping or vibrating the roof to determine if there is loose ground that needed to be scaled down with a scaling bar.[6] Indeed, ironically, in *Asarco* the Secretary argued for a narrow interpretation of section 57.3401, alleging that the respondent failed to test the roof because it used a jumbo drill to vibrate the roof to reveal loose ground conditions, rather than thumping the roof with a scaling bar. The Judge had agreed with the Secretary's witnesses, who testified that "sounding the roof with a steel bar was the only effective method to test a mine roof." *Id.* at 944 (citing 12 FMSHRC at 2084-87).

The Commission stated that "[t]he Secretary seems to take the position in this case that a scaling bar is the proven and effective means of testing for loose ground." *Id.* at 948. However, the Commission held that the Secretary failed to provide notice that he did not consider a jumbo drill to be a permissible means to test a roof, so the Commission did not defer to the Secretary's interpretation and found that use of a jumbo drill was allowed under section 57.3401. *Id.* at 947, 948, 950. Therefore, while the Secretary now seeks to read the term "test" to require undefined

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[6] The Commission has found that

> [t]he term "loose ground" has a specific meaning within the mining industry and is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole . . . . As used by miners, rock that must be barred down to make an underground workplace safe . . . ." *DMMRT* 658. Accordingly, the term loose ground, as used in this standard, refers generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling.

Amax Chemical Co., 8 FMSHRC 1146, 1148 (Aug. 1986).

geomechanical and engineering analyses, it is clear that "test" has always been understood by the Secretary, the Commission, and regulated parties to be a plain industry-specific term that refers to testing the immediate roof and ribs to determine if loose rock ("loose ground") needs to be taken down.

Auer deference is inappropriate because the plain meaning of the regulation clearly does not include the geomechanical and engineering analysis the Secretary seeks to require for the first time in this case. However, even under *Auer*, the law provides four separate reasons not to defer to the patently unreasonable, post-hoc interpretation offered by the Secretary in this case. *See Christopher v. SmithKline Beecham*, 132 S.Ct. 2156 (2012).

II. Applying the *Auer* Standard, the Secretary's Interpretation Is Not Entitled to Deference.

In *Christopher*, the Supreme Court identified four reasons to withhold deference to an agency interpretation of its own regulation. Where *any* of these circumstances pertain, the Secretary is not entitled to deference. All four are present here.

A. The Secretary's Interpretation Does Not Reflect MSHA's Fair and Considered Judgment.

The Secretary's current interpretation does not reflect MSHA's fair and considered judgment for several reasons. There is no reason to defer if there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question:

> [D]eference is . . . unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra*, at 462; *see also, e.g.*, *Chase Bank*, *supra*, at ___ (slip op., at 14). This might occur . . . when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988), or a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," *Auer*, *supra*, at 462 (quoting *Bowen*, *supra*, at 212; alteration in original).

Id. at 2166-67.

First, the Secretary's current interpretation of § 57.3401 is a new one inconsistent with his prior interpretation of the regulation. MSHA's Program Policy Manual contains no mention of an obligation to conduct a geomechanical analysis when an operator departs from normal mining practices nor is there any evidence that the Secretary has ever, in the 30 years since promulgating section 57.3401, required an operator to conduct such an analysis. Furthermore, the Secretary has never urged his current interpretation in previous litigation before the Commission.

Second, the Secretary's interpretation in this case is only a convenient litigating position[7] and post hoc rationalization of past agency action to support a citation for actions cited appropriately and directly by another regulation in this case. *See Christopher*, 132 S.Ct. at 2166. These two recognized exceptions are well-established principles of administrative law. *See Bowen,* 488 U.S. at 212; *Auer*, 519 U.S. at 462 (also citing *Bowen* for the same two limits on deference).

In his reply brief before the Commission, however, the Secretary contends that his "interpretation before the Commission is 'agency action, not a post hoc rationalization of it.'" S. Reply Br. at 11 (quoting *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (quoting *Martin v. OSHRC*, 499 U.S. 144, 157 (1991))).[8] The Secretary may believe that incantation of "deference" is enough to prevent meaningful review of his lawyers' litigating positions — regardless of whether such positions express the considered views of policy makers rather than the tactical interests of trial attorneys — but his reliance on *Martin* for the proposition that the Commission must defer to his litigating position, no matter how unreasonable the new obligations imposed upon a regulated party, is misplaced and disregards subsequent precedent.

As the law of deference has evolved, courts have conformed their deference to interpretations of regulations depending on how the interpretation has been developed — interpretive rule, policy statement, opinion letter, litigation position, etc. As part of such evolution, federal courts are unwilling to afford full *Auer* deference to agency litigating positions when, as here, agency lawyers offer the interpretation in litigation without review by policymakers and when the lawyers' positions are a post hoc rationalization made for the first time before a reviewing courts or boards. Interpretations offered for the first time by appellate counsel during judicial review, and especially post-trial review, without any demonstrated input from policy makers within an agency are entitled to no deference or, if at all, deference under the power to persuade standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In such circumstances, reasons for deference to agency expertise simply do not apply.

As the Ninth Circuit has recognized, Martin's distinction between agency adjudications and court reviews of agency action has been abrogated. In *Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820 (9th Cir. 2012), the circuit court recognized that *Martin* drew a distinction between the Secretary's litigating position taken before OSHRC and that taken before a circuit court. However, the Ninth Circuit dismissed such a distinction:

> The distinction in *Martin* between administrative and court adjudication did not survive *Mead*, *Auer*, and *Auer's* progeny,

[7] When we speak of interpretations as mere litigating positions, we mean interpretations of regulations announced for the first time in a brief before the Commission or a reviewing court, not interpretations, for example, that simply "articulate an explanation of longstanding agency practice." *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000).

[8] The Secretary's argument that "when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress," S. Reply Br. at 11 (quoting *Akzo Nobel*, 212 F.3d at 1304), is inapposite. MSHA did not embody the Secretary's lawyers' interpretation in the citation in this case, nor was it argued before the Administrative Law Judge.

> although the deference accorded the Secretary's litigating position in *Martin* is fully consistent with those cases. Notably, *Martin* involved interpretation of regulations, not a statute. Under *Auer* and its progeny, the line *Martin* drew between agency interpretations advanced during administrative versus court adjudications no longer obtains when interpretation of regulations is at issue.

Id. at 831 n.7.

Moreover, *Martin* was decided prior to *Auer*. In the post-*Auer* era, courts are clearly in agreement that interpretations announced in litigation for the first time on appeal do not warrant *Auer* deference. *See, e.g.*, *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1077-78 (9th Cir. 2016) (declining to defer to government's litigating position when no court had previously had occasion to construe the relevant provision, there was no prior interpretation of the provision by the government, and the government admitted that the interpretation was developed for the purposes of that litigation); *Rancheria v. Jewell*, 776 F.3d 706, 715 (9th Cir. 2015) ("The agency presented its position for the first time in its brief, and it offered sparse explanation for it. We need not defer to an agency position when taken for purposes of litigation."); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) ("Where the agency's interpretation seeks to advance its litigating position, deference is typically not afforded to the agency's position announced in a brief."); *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010) ("[D]eference is inappropriate, however, where the interpretation is a novel litigating position 'wholly unsupported by regulations, rulings, or administrative practice.'" (quoting *Bowen*, 488 U.S. at 212)); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 838 (Fed. Cir. 2006) ("[An] interpretation must truly be one that had been applied by the agency, either prior to or, at the latest, during the exercise of its administrative powers in the present matter. An 'interpretation' is therefore not a position advanced by the agency for the first time before the [Merit Systems Protection] Board or in a court of review. Such an 'interpretation' is then no more than a litigation position to which no deference is due.").[9]

Regarding the regulation at issue in this case, section 57.3401, the Secretary has never construed that section to be so broad as to require a geomechanical or engineering analysis in policy manuals, citations, or litigation before the Commission or circuit courts. The Secretary's

[9] To the extent courts have decided they must exercise their right to review such litigating positions independently for conformance with the agency regulation, we note that Commission Administrative Law Judges spend their careers in the study and application of the Mine Act. They are part of a specialized independent agency, a principal purpose of which is to adjudicate disputes regarding MSHA citations for violations of mandatory safety standards. Commission Judges, therefore, are equipped (respectfully, better equipped than courts) to interpret mandatory safety standards vis-à-vis legal opinions by the Department of Labor Solicitor's Office developed during litigation.

interpretation did not appear in the citation,[10] and the Secretary did not even urge this interpretation before the Administrative Law Judge. In his post-hearing brief, the Secretary instead argued liability on the basis that "Hecla management failed to design any sort of a ground examination system . . . that could pinpoint problems with ground support before they became a hazard." S. Post-Hrg. Br. at 19.[11]

Rather than specifying what section 57.3401 required, and what Hecla failed to do, the Secretary instead stated that "[i]f a full timber ground support had been installed, visual examination might have been sufficient." *Id.* Thus, according to the Secretary at that point, if the operator had not violated section 57.3360, the absence of a geomechanical analysis would not have been a violation. That is not a sensible interpretation of regulations. If a mandatory safety standard requires the operator to perform the analysis before any mining, then providing additional ground support would not obviate the violation but rather hide it. Essentially, the Secretary admits his interpretation does not make sense.

The Secretary first announced this interpretation in his petition for discretionary review. The Secretary argues before the Commission that the Judge failed to apply the correct standard even though at the time of the Judge's decision, the Secretary had not articulated the standard pressed before the Commission.

By definition, this is a post hoc rationalization of past agency action. The Secretary issued a section 104(d)(1) citation on August 8, 2011, charged Hecla with a flagrant violation of section 57.3401, proposed a penalty of $159,100, and fully litigated the case at the trial stage, all without raising his proposed "geomechanical and technical analysis" requirement until he filed his petition for discretionary review on May 28, 2015.

The litigating position offered by counsel post-citation does not set forth the fair and considered judgment of any policymaking position within the MSHA but has been asserted before the Commission only after the hearing and after the Judge's Order. Even before the Commission, the Secretary does not argue in this case that the regulation mandates his reading, nor that he has interpreted and enforced the regulation as if it included a "geomechanical and engineering" analysis requirement. *See* PDR at 15 ("Section 57.3401 does not explicitly require . . . an engineering or geomechanical analysis of the ground conditions"). Instead, the Secretary's

[10] The Secretary asserts that the citation embodied the interpretation now placed before the Commission. *See* S. Reply Br. at 11. However, the citation contains no mention of a geomechanical or engineering analysis, and merely parrots the requirement of the regulation, stating that "[m]anagement failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken." Gov. Ex. 1, at 8.

[11] While the Judge noted that the inspector testified that an examination should have been performed by someone "with a geomechanic background," he rejected this suggestion, correctly holding that it "is not required by the safety standard." 37 FMSHRC at 891 n.10. The Judge also correctly noted that the failure to perform an engineering analysis "relates directly to the requirement to design suitable ground control under section 57.3360," the standard under which the operator was properly cited, with the Judge affirming the flagrant penalty in all respects and increasing the penalty requested by the Secretary. *Id*. at 890, 895.

counsel argues that "the standard is certainly susceptible of such a reading." *Id.* Furthermore, the Secretary's counsel himself seemed unsure of what would be required under the new interpretation of the standard. *See* Oral Arg. Tr. 30, 34 (characterizing it as "do[ing] the math and crunch[ing] the numbers"). There is no indication that this interpretation reflects an MSHA policy judgment. In other words, the Secretary's counsel's argument before the Commission does not show any "fair and considered judgment as to what the regulation required at the time [the citation was issued]." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210 (2011).

Accordingly, we afford deference in the same manner as would a reviewing court and hold that the Secretary's litigating position does not set forth a considered judgment by MSHA.[12]

B. The Secretary's Interpretation Is Plainly Inconsistent with the Regulation.

There is no reason to defer when the interpretation is plainly erroneous or inconsistent with the regulation: "Deference is undoubtedly inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Christopher*, 132 S. Ct. at 2166 (quoting *Auer*, 519 U.S. at 461).

As described above, the meanings the Secretary now ascribes to the terms "examine," "test," and "area where work is performed" are far different from the Secretary's prior interpretations, from other sections of the regulations, and from the Commission's and regulated parties' understanding. *See discussion supra* pp. 12-14. We do not need to remake those points here, but we must note that the new interpretation set forth in litigation is plainly inconsistent with the regulation. The regulation's examination requirement has never been construed to mean anything beyond a visual inspection, and the regulation's testing requirement is a specific term within the mining industry to denote tapping or rattling the ground to determine if any loose ground needs to be scaled down with a scaling bar prior to continuing work.

1. MSHA Limited the Scope of Section 57.3401 During the Drafting Process.

Section 57.3401, originally proposed for public comment as section 58.3401(b), provided:

> A person designated by the operator, shall examine, and test where applicable, ground conditions *in active workings* prior to work or travel in these areas and as ground conditions warrant during the work day. After blasting, a designated person shall examine ground conditions in areas affected by the blast before any other work is performed. Designated person shall be experienced in

[12] Indeed, it would be an odd standard that would require one level of deference when introducing a new interpretation on appeal before the Commission, yet, if the Commission were to deny review, and the Secretary were to appeal the case to a circuit court, his new interpretation would be owed a different level of deference.

> examining and testing the ground and understand the nature of the hazards involved.

Safety Standards for Ground Control at Metal and Nonmetal Mines, 49 Fed. Reg. 8368, 8374 (March 6, 1984) (emphasis added).

As long defined in the regulations, "active workings" means "areas at, in, or around a mine or plant where men work or travel." 30 C.F.R. § 57.2. Therefore, as proposed, the regulation was expansive in terms of the area that would have been covered: the proposal required examination of all areas where men work or travel rather than just areas where work is to be performed. At the same time, of course, no one suggested that "in active workings" included a mountainous area *above* where miners work or travel.

In finalizing the regulations, MSHA decided that, by requiring examinations "in active workings," the proposed regulation was too broad. In the final rule notice, MSHA discussed the proposal's requirement that a supervisor examine ground conditions during visit to "active workings." MSHA explicitly described its action:

> [T]he agency limited the application of this standard in the proposed rule to "working places," which was defined as "any area where work is being performed."

Safety Standards for Ground Control at Metal and Nonmetal Mines, 51 Fed. Reg. 36192, 36195 (Oct. 8, 1986).

In response to one commenter's worry that the language would require "'firebossing,' or examining the mine each day for all types of hazards," MSHA stated that "the final rule clarifies the agency's intent" that it "requires examination for loose ground in areas where work is to be performed prior to commencing work, after blasting, and as ground conditions warrant." *Id.*

Further, after discussing application of the regulation to haulageways and travelways, MSHA clarified that "[e]xaminations may be done by appropriate supervisors or other designated persons experienced in examining and testing for loose ground who have been designated by the mine operator to perform the task" and stated that "the qualifications for such persons are set out in the standard." *Id.* at 36196.

Thus, whereas the Secretary contends that a specialized geomechanical engineer is an "appropriate supervisor or designated person," PDR at 15, the regulation itself provides that "appropriate supervisors or other designated persons" are those who are "experienced in examining and testing for loose ground." 30 C.F.R. § 57.3401. As explained *supra*, both "examining" and "testing for loose ground" have long-understood, specific meanings. *See supra* Part I. Conspicuously absent in the final rule notice is any mention of any intent, on the part of

MSHA, to require a geomechanical analysis of an extended pillar above the working place prior to mining activities.[13]

Thus, the intent of the regulation expressed in the regulatory history cuts directly against affording deference to the Secretary's new interpretation. As the Federal Circuit held in *Gose v. U.S. Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006), "[j]ust as an agency's inconsistent interpretation of its regulation detracts from the deference we owe to that interpretation, so does evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation."

In finding a need to defer to the Secretary's interpretation, the majority quotes from the final rule notice that section 57.3401 was intended to be "flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines." Slip op. at 6 (quoting 51 Fed. Reg. 36192-93). The majority, however, mischaracterizes the context in which MSHA stated that section 57.3401 was intended to be flexible. In proposing the regulation, MSHA included a section 57.3402, which stated: "Supervisors shall examine ground conditions during each visit of a working place to determine that proper ground control practices are being followed." 49 Fed. Reg. 8368, 8374 (Mar. 6, 1984). However, MSHA deleted that provision in the final rule:

> Commenters recommended that the portions of this standard proposed as 58.3402 be deleted because of redundancy with other standards. MSHA agrees. Section 56/57.3401 in the final rule appropriately addresses the needed ground examinations. The final rule must be flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mine. Circumstances may occasionally require the attention of a supervisor at a particular area of the mine, preventing a visit to a work place during a shift. Requiring inspection during each visit by a supervisor, as was proposed by MSHA in 58.3402 could actually discourage supervisory visits.

51 Fed. Reg. 36192-93. The statement that the rule be "flexible enough" was made in the context of deleting a provision that would have required a supervisor to inspect a working place during each visit, because that could prove too onerous a burden given that circumstances may call a supervisor elsewhere in the mine. Properly read *in context*, therefore, MSHA's statement does not support the majority's reasoning.

[13] The majority contends that "[s]afety standards can be issued using general terms like 'examine' and 'test' and an operator is then expected to implement the appropriate tests and exams." Slip op. at 8. That observation is irrelevant, because the Secretary did not demonstrate any intent to draft section 57.3401 so broadly as to require anything resembling a geomechanical or engineering analysis. Where an "interpretation runs counter to the 'intent at the time of [a] regulation's promulgation,' . . . *Auer* deference is unwarranted." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

Not only did MSHA never express any intent to require the Secretary's new geomechanical engineering analysis, we again note that the Secretary never before asserted that interpretation even in litigation. As explained above, inherent to the *Asarco* decision is a common, shared understanding that the phrase "testing for loose ground" meant physically tapping or vibrating the roof to determine if there was loose ground that needed to be scaled down with a scaling bar. While the Secretary's attorneys now argue the term "test" means a geo-mechanical engineering analysis, it is clear that "test" has always been understood by the Secretary, the Commission, and regulated parties to be an industry-specific term referring to physically hitting the roof to determine if there is loose rock that needs to be taken down.

2. <u>Case Law Demonstrates the Meaning of the Regulation.</u>

The Secretary and the majority rely on *Dynatec Mining Corp.*, 23 FMSHRC 4 (Jan. 2001), asserting without explanation that the Commission "broadly held that an examination must be 'designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards.'" Slip op. at 6 (quoting *Dynatec*, 23 FMSHRC at 23).

In fact, *Dynatec* did not concern the testing requirement of section 57.3401. It concerned only the examination requirement. In *Dynatec*, the Secretary alleged, and the judge had found, that the respondent failed to examine sufficiently a structure that it had built and failed to examine the surrounding rock for issues. The Commission applied the judge's "pinpoint the hazards" examination requirement, but disagreed with both the Secretary and the judge that the examinations were insufficient. 23 FMSHRC at 23-24.

Regarding the examination of the structure, the respondent had found problems and reported them to the operator of the mine, along with recommendations for repairs, but the operator did not heed the respondent's warnings. *Id.* at 23. Thus, because the respondent had found and reported the issues, the Commission held that it "pinpointed the problems that needed to be fixed." *Id.* Regarding the examination of the surrounding rock, the Secretary argued that even though it "appeared stable, Dynatec did not know that because it did not attempt to examine the ground." *Id.* The respondent argued that "a reasonably prudent person would not have removed timber in the raise structure to examine ground conditions absent some indicia that ground conditions were problematic." *Id.* at 15, 24.

The Commission agreed with the respondent, and found that, because there was no indication that the respondent needed to remove the timber structure to examine the surrounding ground, there was no failure to examine. *Id.* While the majority and the Secretary focus on the "pinpoint the hazards" requirement, they fail to either note or notice that "examination," means a "careful visual inspection." *Asarco*, 14 FMSHRC at 945.

C. The Secretary's Interpretation Does Not Give Fair Warning of the Conduct Section 57.3401 Prohibits or Requires.

It is well understood that adjudicators need not defer to an interpretation that does not give fair warning of the conduct a regulation prohibits or requires:

> To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (C.A.D.C. 1986) (Scalia, J.). Indeed, it would result in precisely the kind of "unfair surprise" against which our cases have long warned.

Christopher, 132 S.Ct. at 2167 (footnote omitted).

In *Christopher*, the Supreme Court warned that deference to an agency interpretation for which there was not fair notice, "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 132 S.Ct. at 2167 (alteration in original) (quoting *Gates & Fox Co.*, 790 F.2d at 156). Because we concur with Part II.B of the majority's decision, we necessarily would find that the Secretary's new interpretation does not give Hecla fair warning of what was required under section 57.3401. As the majority succinctly held, "a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis." Slip op. at 9. The majority, however, defies precedent in nevertheless affording the Secretary deference even though the Supreme Court has stated explicitly that deference is not warranted in exactly this situation.

The majority appears to glean this bifurcated, two-step consideration from *General Electric Co. v. U.S. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), a pre-*Auer*, pre-*Christopher* deference case. In that case, the D.C. Circuit found that the EPA's interpretation of a regulation was permissible, but found that the "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the regulated party] of the agency's perspective." *Id.* at 1330. In relying on *General Electric*, the majority effectively disregards 20 years of subsequent, controlling precedent without comment in order to afford deference where it is unwarranted.

Coal operators are required to perform pre-shift examinations in accordance with 30 C.F.R. § 75.360. Section 75.360(b) states that "[t]he person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health and safety standards . . . . test for methane and oxygen deficiency, and determine if the air is moving in its proper direction." Section 75.360(b) does not contain any requirement for, or indeed any mention of, a requirement to perform a geomechanical or engineering analysis. The absence of a comparable requirement in a comparable standard serves to illustrate that a reasonably prudent miner would not recognize a geomechanical analysis to be an inherent part of an "examination."

The majority states that section 57.3401 has "consistently been applied in a more limited fashion" than that which the Secretary seeks in this case. Slip op. at 9. This is quite the understatement. The preamble to the final rule contains no mention of the Secretary's new requirement, nor does MSHA's Program Policy Manual. *See* IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 57, at 12 (2003). In fact, we are unaware of any instance where the Secretary has imposed or even sought to impose such a requirement on any mine operator in the thirty years since the regulation was issued. Because the Secretary has never asserted his new interpretation in any format whatsoever, the Commission finds that no reasonably prudent person in the mining industry would have suspected that section 57.3401 required a geomechanical or engineering analysis. Under the Supreme Court's analysis in *Christopher*, this is precisely a situation in which deference should not be given.

D. <u>The Secretary's Interpretation Would Impose New Liability in a Case Involving Fines or Damages.</u>

Finally, in terms of the *Christopher* standard, courts need not defer to an agency's interpretation "where doing so would impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements' or in a case involving 'fines or damages.'" *Christopher*, 132 S.Ct. at 2167 (alterations in original) (quoting *NLRB v. Bell Aerospace Co.*, *Div. of Textron, Inc*., 416 U.S. 267, 295 (1974)).

"In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule." 1 R. Pierce, *Administrative Law Treatise* § 6.11, p. 543 (5th ed. 2010); *see also Christopher*, 132 S.Ct. at 2167 n.15 (quoting Pierce for the same proposition). In *Christopher*, the Court found that the agency engaged in just such a practice:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here.

132 S.Ct. at 2168.

In the present penalty proceeding, we concur with the majority that Hecla and Bayer should not be held liable for violating section 57.3401 because they had no notice whatsoever of the Secretary's current interpretation. There is no distinction between this case and the Supreme Court's statements in *Christopher*. The Secretary is attempting to assert a new interpretation that no reasonable person in the mining industry could have foreseen in order to impose a duty on Hecla and Bayer of which they had no notice, and the Secretary has proposed penalties of

$159,100 and $4,500 for Hecla and Bayer, respectively. In nevertheless deferring to the Secretary, the majority disregards clear precedent without comment. As the First Circuit has found, "deference is inappropriate where significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue." *Sun Capital Partners III, LP v. New England Teamsters & Trucking Ind. Pension Fund*, 724 F.3d 129, 141 (1st Cir. 2013).

III. Under *Skidmore* Deference, the Secretary's Interpretation Lacks the Power to Persuade.

Here, there is no doubt that the position taken by the Secretary is simply a litigating position adopted at the late stage of review before the Commission. As the majority agrees, there is no hint that MSHA has ever taken such a position in the past, and the interpretation was crafted by the Secretary's attorneys for presentation to the Commission itself. Though we would find the Secretary's litigation opinion is not entitled to deference, it is useful to demonstrate that the interpretation fails to satisfy the familiar elements of a *Skidmore* review: "[the] thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other relevant] factors." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140). As set forth below, an analysis of these factors demonstrates the litigating position of the Secretary has no power to persuade.

A. There Is No Evidence of a Thorough Consideration.

MSHA promulgated section 57.3401 on October 8, 1986. Since that date, MSHA has not proposed any amendment to the regulation or issued any formal or informal guidance suggestive of the interpretation offered in this litigation. Indeed, even in this litigation, the Secretary's lawyers rather than MSHA propose the interpretation for the first time before the Commission. There is no evidence any policymaker within MSHA has ever considered the interpretation. The Secretary's lawyers developed the interpretation in an effort to sustain the application of a clearly irrelevant regulation to a tragedy to which the appropriate standard was fully applied. Thus, there is no evidence that MSHA has interpreted the regulation at all, let alone thoroughly.

B. The Secretary's Reasoning for the Proffered Interpretation Does Not Support His Interpretation.

The majority offers the best consideration of this factor by concluding in its decision that no reasonable person would have understood the section to mean the interpretation now posited by the Secretary. Slip op. at 9. We must be careful to understand here that this element refers to the reasoning for the interpretation of the standard, not whether a standard as proposed by the Secretary's clearly incorrect interpretation might be useful. As demonstrated below, a post hoc interpretation of a long-existing standard is not a legitimate substitute for rulemaking, including public notice and opportunity to comment. *See infra* Part IV.

C. The Proffered Interpretation Is Not Consistent with Prior Interpretations.

The Secretary has not cited any prior interpretation of section 57.3401 that is consistent with, or that would even hint at, the interpretation taken by the Secretary before us. Indeed, as described above, in *Asarco*, the Secretary took the position that "a scaling bar is the proven and effective means of testing for loose ground." *Asarco*, 14 FMSHRC at 948.

D. Other Relevant Factors

Three other factors demonstrate that the Secretary's litigating position has no power to persuade. We discuss them briefly.

First, as the majority also finds, acceptance of the Secretary's interpretation would deprive the operator of fair notice. Slip op. at 2, 9. Further, adoption of such interpretation would amount to promulgation of a new substantive requirement without public notice and comment. Certainly, implementation of an interpretation resulting in denial of fair notice and basic statutory rights is not persuasive.

Second, the proffered interpretation is completely undefined and, as offered by the Secretary, still does not provide fair notice or guidance as to how mine operators should apply such an interpretation in the future. The Secretary never explains what the interpretation offered by it in this case means operators must actually do in future situations. Section 57.3360 is clear: operators must provide adequate ground support. But the Secretary's "interpretation" in this case regarding section 57.3401 is simply that the operator did not perform an analysis that, in hindsight, it should have performed. There is no guidance whatsoever as to the scope of duties the proffered interpretation would require in ongoing operations.

The majority simply couches the requirement in terms of "the use of novel and more hazardous mining techniques without prior technical analysis," thereby incorporating three hopelessly ambiguous elements into a mandatory safety standard — "novel mining techniques and more hazardous mining techniques without prior technical analysis." *See* slip op. at 6. What is a "novel" technique? What is a "more hazardous" technique? What is a "prior technical analysis?" In the absence of guidance, the interpretation offered by the Secretary amounts to a hopelessly vague invitation for post hoc citations. If something goes wrong, the operator should have done more because the activity was "novel" or "more hazardous" or required some previously never used sort of "prior technical analysis." Such an interpretation is unenforceable as hopelessly vague. Certainly, it is not a persuasive interpretation of section 57.3401.

IV. The Secretary's Interpretation Is a Legislative Rule, Requiring Notice-and-Comment Rulemaking.

Here, the Secretary essentially seeks to issue a new legislative rule under the guise of interpreting an existing one. That is impermissible. The unlawfulness of an agency seeking to create a new legislative rule through a litigation interpretation overlaps to a certain extent with the absence of fair notice and the failure of a litigating position to reflect a fair and considered

judgment of agency policymakers. However, this element of our review implicates the indispensable right to notice and opportunity for public comment before imposition of substantive obligations—a bedrock principle of administrative law.

Two principles are at play: (1) the right of citizens to express their views on government actions imposing obligations enforced by fines before imposition of the obligations, and (2) the interest of rulemaking that results in clear, feasible, and enforceable standards. Here, for example, the "rule" resulting from the Secretary's litigating position portends enforcement though large fines, but the contours of the "rule" are completely undefined.

"Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983)). Thus, "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties — and that would be the basis for an enforcement action for violations of those obligations or requirements — is a legislative rule." *Id.* at 251. Interpretive rules, on the other hand, are not required to go through notice and comment rulemaking. *Id.* at 250 (citing 5 U.S.C. § 553(b)(3)(A)). "[A]n agency action that merely interprets a prior statue or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule." *Id.* at 252.

In *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the D.C. Circuit articulated criteria to determine whether an asserted "interpretative rule" is actually a legislative rule that requires notice and comment.[14] The criteria for determining whether an interpretation of a regulation is a legislative rule, and thus subject to notice and comment, applicable to this case are:

> (1) Whether in the absence of the interpretive rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties;
>
> (2) Whether the legislative rule the agency is claiming to interpret is too vague or open-ended to support the alleged interpretive rule;

[14] Initially, the court identified four criteria, including "whether the agency has published the rule in the Code of Federal Regulations." *Am. Mining Cong*., 995 F.2d at 1113. However, in *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994), the court stated that publication or lack therefor has never been taken "as anything more than a snippet of evidence of agency intent." Professor Pierce in *Administrative Law Treatise* characterizes this as having reduced the criteria to three. 1 Pierce, *supra*, § 6.4, at 453. Subsequently, in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), the Supreme Court articulated an "anti-parroting rule," which Pierce explains is an application of the rule, also articulated in *American Mining Congress*, that an agency cannot use an interpretive rule to provide real content to amorphous legislative rules. 1 Pierce, *supra*, § 6.4, at 453.

(3) Whether the interpretive rule effectively amends a prior legislative rule.

1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 454. If the answer to any of these questions is affirmative, the newly proffered interpretation is a legislative rule. *Id.*

First, in the absence of the Secretary's litigating position, section 57.3401 clearly does not require an operator to conduct a geomechanical and engineering analysis prior to mining. As the majority correctly found, no reasonable person in the mining industry would have interpreted § 57.3401 to include that requirement, and there is no indication that the Secretary, prior to this litigation, would have done so either. This new interpretation is legally binding on the regulated parties, as evidenced by the fact that the Secretary seeks to assess large penalties in this case, even though Hecla and Bayer had no notice that section 57.3401 could be read to require a geomechanical or engineering test.

Second, the Secretary's interpretation would render the words of section 57.3401 so vague and open-ended as to mock the rationale for the Administrative Procedure Act. To characterize this interpretation as "interpretive" would allow the Secretary to conduct rulemaking while bypassing the APA's notice and comment requirements.

Third, because the Secretary, Commission, and any reasonable person in the mining industry have never considered section 57.3401 to contain the Secretary's new requirement, the Secretary is, effectively, amending section 57.3401 to include the requirement of a geotechnical and engineering analysis.

There can be no dispute that the Secretary's new interpretation is a substantive amendment to expand the existing rule. Such an expansion of a substantive rule may issue only after notice-and-comment rulemaking.

CONCLUSION

For the reasons stated above, we find no reason to defer to a post-hearing litigating position that plainly conflicts with the words and well-understood purpose of section 57.3401 and would impose liability without any prior notice of its interpretation. Therefore, while we concur with affirming the Judge's decision, we dissent with respect to the majority's interpretation of section 57.3401.

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

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

Appendix A

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and UNITED STEELWORKERS, LOCAL 235A v. SHERWIN ALUMINA COMPANY, LLC	Docket Nos. CENT 2015-151-RM CENT 2015-152-RM CENT 2015-185-M

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

ORDER

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On October 30, 2015, the Commission granted the petition filed by Sherwin Alumina Company, LLC ("Sherwin") seeking review of the decision of the Judge in

this proceeding dated October 5, 2015. Sherwin has now moved to dismiss the pending review proceeding due to bankruptcy, and states that the Secretary of Labor and the United Steelworkers have stated that they neither support nor oppose the motion.

The motion is granted and this case is hereby 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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
TELEPHONE: (202) 434-9900 / FAX: (202) 434-9949

August 6, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS: Docket No. WEST 2014-963 A.C. No. 45-00359-356120
v.	Docket No. WEST 2015-503 A.C. No. 45-00359-375229
ASH GROVE CEMENT COMPANY, Respondent	Docket No. WEST 2015-523 A.C. No. 45-00359-377531 Mine: Seattle Plant

DECISION

Appearances: Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

John Nelson, Esq., Ash Grove Cement Company, Overland Park, Kansas, for Respondent

Before: Judge Barbour

These cases are before me upon three Petitions for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"). 30 U.S.C. § 815(d). Between May and August 2014, the Secretary issued four citations to Respondent, Ash Grove Cement Company ("Ash Grove"), for alleged violations of 30 C.F.R. §§ 56.18002(a), 56.14110, 50.10, and 50.12 at its cement plant (the "Seattle Plant"), which is located in King County, Washington. [1] Ash Grove filed an answer denying the violations occurred, or if they did, challenging the Secretary's gravity and negligence findings and his proposed civil penalties.

[1] Citation Nos. 8780591 (30 C.F.R. § 56.18002(a)) and 8611830 (30 C.F.R. § 56.14110) were assigned Civil Penalty Docket No. WEST 2014-963. Citation No. 8780422 (30 C.F.R. § 50.10) was assigned Civil Penalty Docket No. WEST 2015-503. Citation No. 8780423 (30 C.F.R. § 50.12) was assigned Civil Penalty Docket No. WEST 2015-523. Subsequently, the cases were consolidated for hearing and decision.

Despite their good faith efforts the parties were unable to settle any of the citations and the cases were tried in Seattle, Washington. The parties presented testamentary and documentary evidence and filed post hearing briefs.

I. Stipulations

1. During all times relevant in this matter, Ash Grove was the "operator" as defined in Section 3(d) of the Mine Act, at the Seattle Plant.

2. Between May 22, 2014, and August 4, 2014, MSHA inspected the [plant].

3. The individuals whose signatures appear on Block 22 of the citations were acting in their official capacities and as authorized representatives of the Secretary when the citations were issued.

4. True copies of the citations were served on Ash Grove as required by the Mine Act.

5. The certified copy of the MSHA Assessed Violations' History reflects the history of the citation issuances at the Mine for the 15 months preceding the citations at issue and may be admitted into evidence without objection by Ash Grove.

6. Ash Grove demonstrated good faith in the abatement of the citations.

7. Payment of the proposed penalties will not affect Ash Grove's ability to remain in business.

Tr. 248-249, 250.

II. The Mine and Citations

Ash Grove has nine manufacturing locations in the Midwest, West and Northwest. Tr. 106. Ash Grove's Seattle Plant is primarily used to process limestone and other components used to make cement. Tr. 22. Limestone is a rocky and sometimes powdery material that is milled and mixed with other products in a kiln as part of the cement making process. Tr. 23. The plant operates 24 hours a day, every day of the year, in two, twelve hour shifts. Tr. 22. The plant is an extensive operation with a barge for loading and unloading, a kiln, various milling processes, maintenance and repair shops, and roads for both vendor and company trucks to access various parts of the plant. Tr. 23.

Citation Nos. 8780591 and 8611830 were served upon Ash Grove on May 22, 2014, and May 28, 2014, respectively, as a result of a regular MSHA inspection of the plant. Citation Nos. 8780422 and 8780423 were served upon Ash Grove on August 4, 2014, as a result of MSHA's investigation of an accident that injured an employee of a plant customer. The citations involve different standards and distinct factual circumstances and as such will be addressed in turn.

III. Factual and Legal Analysis

A. Citation No. 8780591, Docket No. WEST 2014-963

On May 22, 2014, MSHA Inspector Michael Nelson arrived at the plant to conduct a regular inspection.[2] Tr. 21. Nelson maintained that during the inspection he observed various hazardous conditions including, "unprotected openings," unlabeled electrical panels, insufficiently illuminated areas, several "housekeeping issues," and "slip/trip" hazards. Tr. 38. Many of the alleged hazards were located at or near elevators and hoisting equipment.[3] Tr. 38

When Nelson asked a company representative for examination records of the areas where he observed the alleged hazards, he received records that he described as "extremely vague."[4] Tr. 38-39. Also, according to Nelson, there were several days and shifts with no workplace examination records, which indicated to Nelson that no workplace examinations had been conducted on those days and shifts. Tr. 36.

Nelson spoke to Gerry Brown, Ash Grove's Health and Safety Manager, regarding the workplace examinations, or lack thereof.[5] Tr. 31. Brown indicated that there was no procedure in place for workplace examinations on elevators or adjacent areas because Ash Grove relied solely on inspections conducted by its contractor, Otis Elevator. Tr. 31.

Because of the hazards noted and the lack of consistent workplace examinations, Nelson issued Citation No. 8780591 to the company for an alleged violation of 30 C.F.R. § 56.18002(a),

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[2] At the time of the hearing, Nelson had been an MSHA inspector for seven and one half years. Tr. 19. Nelson estimates that he has completed several hundred inspections during his MSHA career. Tr. 20. Prior to working for MSHA, Nelson was an Environmental Health Specialist for 16 years. Tr. 20. Nelson earned a bachelor's degree in biology at Gonzaga University in Spokane, Washington. Tr. 20. Before college he served eight years in the United States Navy. Tr. 20.

[3] Nelson testified that the plant has two types of elevators. The elevators in the administrative building are used to transport passengers, while the elevators in the plant serve to move both freight and miners. There are five elevators in total. Tr. 25-26. According to Nelson, the "hoisting equipment" is compromised of the mechanical parts that lift and lower the elevators. Tr. 26

[4] Nelson understood that when a workplace examination is completed a written record is required which details the exact workplace that was examined and describes the safety defects that were identified. Tr. 39. These examination records must be kept for at least twelve months. Tr. 36.

[5] Gerry Brown retired on May 24, 2014. Tr. 35. From that point forward, Nelson discussed citation and safety issues at the plant with Craig Becker, who replaced Brown as health and safety manager. Tr. 35.

a regulation requiring the examination of a working place at least once per shift.[6] The citation states:

> Complete workplace exams had not been conducted and hazards [were] noted in several areas of the mine. The operator presented records of some workplace exams being conducted but there were many obvious hazards evident at the mine during the inspection. Hazards identified had existed for more than one shift. Were miners to have accidents due to unabated hazards at the mine, serious injuries would occur.

G. Ex. 3.

Nelson found that the alleged violation was "reasonably likely" to result in "lost workdays or restricted duty," that one person was affected, and that the violation was the result of Ash Grove's "high negligence." He also found that the alleged violation was a significant and substantial contribution to a mine safety hazard (an "S&S" violation).[7] G. Ex. 3.

Inspector Richard Dreyer[8] modified the citation on June 16, 2014, to add the following statement:

> Additionally, the operator did not have an established procedure or requirement for conducting workplace exams, or daily operational inspection and testing of hoisting equipment of the five elevators in use at this site.

---

[6] 30 C.F.R. § 56.18002(a) requires 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. § 56.2 defines a "competent person" as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."

"Working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2.

[7] An S&S violation is a violation "of such a nature as could significantly contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d).

[8] Richard Dreyer presently is a Health Specialist in MSHA's Dallas, Texas District Office, but at the time of the inspection, Dreyer was an inspector in MSHA's Kent, Washington Field Office. Tr. 78. Dreyer has five years of experience working for MSHA and has completed hundreds of inspections. Tr. 79. Before joining MSHA, he worked at a sand and gravel operation in Washington state for seven or eight years. Tr. 79.

The citation, as amended, further reads:

> The purpose of this modification is to include the elevator exams as additional areas cited for failure to complete workplace exams.

G. Ex. 3.[9]

Ash Grove terminated the citation by retraining miners and shift supervisors on workplace exams including elevator checks. G. Ex. 3.

1. **Fact of The Violation**

As written, Citation No. 8780591 is a two-part citation. Tr. 35-36; G. Ex. 3; R. Br. 4. The Secretary originally cited Ash Grove for incomplete workplace examinations, and the modification to the citation more specifically alleges inadequate examinations of the plant's hoisting equipment. G. Ex. 3. Essentially, the citation is grounded on: 1) allegedly incomplete workplace exams in various parts of the mine, and 2) the failure to examine the plant elevators' hoisting equipment. The citation will be analyzed accordingly.

a. The First Prong of 8780591

In charging Ash Grove with a violation of Section 56.18002(a), the citation alleges that Ash Grove failed to conduct complete workplace examinations as evidenced by the hazards that Nelson identified in his inspection. The citation states that although Ash Grove presented some examination records there were still "obvious hazards" evident. G. Ex. 3.

Section 56.18002 requires that a competent person designated by the operator examine each working place once per shift for hazardous conditions and that the operator initiate "appropriate action" to remedy those conditions. 30 C.F.R. § 56.18002. The Commission has held that "[t]he pertinent requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (Sept. 1989).[10] Additionally, in a recent case, the court has set forth its understanding of Section 56.18002(a) and what the Secretary must do to prove a violation.

> [A]s the court understands the standard, it applies to places where work is being performed during a shift, where work is assigned to

[9] Nelson testified that he initially issued a citation to Ash Grove for its alleged failure to have a procedure for inspecting and testing hoisting equipment, but that citation was vacated, and the condition or practice cited was incorporated into Citation No. 8780591. Tr. 32-33; G. Ex. 3 p. 6. Dreyer modified the citation because Nelson had been called to do an inspection in Alaska. Tr. 32-34.

[10] Section 57.18002 applies to the nation's underground metal and non-metal mines, whereas Section 56.18002 applies to the nation's surface metal and non-metal mines. The standards are identically worded and the principals set forth by the Commission in *FMC Wyoming* pertain to both.

> be performed during a shift, or where work can reasonably be expected to be performed during a 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.
>
> *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC ___, slip op. at 13, No. SE 2014-328-M (Apr. 29, 2016).

Here, the court finds that the Secretary has not met his burden of proof. The Secretary's allegations as to the incomplete examinations are so vague they fail for lack of specificity. Section 56.18002(a) requires specificity in that it applies to "each working place." As discussed above, the court has held that in order to prove a violation, the Secretary much show that a designated competent person did not conduct a workplace examination on 1) the shift during which the inspection occurred, or 2) during a specifically identified prior shift. *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC ___, slip op. at 13, No. SE 2014-328-M (Apr. 29, 2016).

Nelson did not describe the hazards observed during his inspection, and he did not link a hazard observed in a specific area with a failure to designate a competent person to perform an examination of the area. Nor did the Secretary establish through direct and circumstantial evidence that required examinations were not done, or if they were done, that a competent person did not conduct them. In fact, Nelson conceded that inspections were done, albeit not well recorded. Tr. 36. As Ash Grove notes in its brief, Nelson himself agreed he did not give any specific testimony as to specific areas that were *not* examined. Tr. 67; R. Br. 3. Nor did Nelson offer testimony as to the precise hazards observed, and what should have been written in an examination record had Ash Grove complied with the standard. *See e.g.,* Tr. 38-40.

In sum, the court concludes there is insufficient evidence to prove that Ash Grove performed incomplete workplace examinations as alleged in the first prong of Citation No. 8780591. This leaves the later amended portion of the citation to be addressed.

b. The Second Prong of Citation No. 8780591

The second prong of Citation No. 8780591 alleges that Ash Grove did not have an established procedure or requirement for conducting workplace exams or inspections and testing of the hoisting equipment on the mine's elevators. G. Ex. 3, p. 2. The Secretary argues elevators are "working places," requiring examinations, as anticipated by § 56.18002(a), and that Ash Grove's admitted failure to inspect elevators constitutes a violation of the standard. G. Br. 6-11. The Secretary also argues that the operator had fair notice of the standard's requirements as applied to elevators. G. Br. 10-11. The Respondent counters that elevators are not "working places," and further that it did not have notice that regular inspections of elevators were required under § 56.18002(a). There are two relevant issues that must be analyzed when addressing the second prong of 8780591. They are whether the Secretary has proven that hoisting equipment of each of the five elevators is a Section 56.18002(a) "working place," and whether Ash Grove had fair notice of MSHA's interpretation of the standard. The court finds that the second prong of the

citation fails because the Secretary did not prove that the hoisting equipment is a working place and also because affirming the citation would deprive the operator of due process.

A précis of the background of the Secretary's "elevator examination" requirement is helpful before addressing the alleged violation. In February 2014 a fatality involving an elevator occurred at a cement plant located in the eastern United States. Tr. 30, 47. An employee working at the plant called an elevator. The doors opened, although the elevator car was not at the landing. Tr. 30. The employee stepped into the empty shaft and fell about 50 feet down the shaft. The employee died from his injuries. Tr. 30. In response, MSHA gave specific training regarding elevator inspections to all of MSHA's non-metal inspectors. Tr. 30, 47. Later that month, MSHA also issued a "fatalgram" regarding this incident.[11] Tr. 47, 109; Jt. Ex. 3. Nelson testified that after the incident MSHA emphasized checking elevators during inspections. Tr. 47.

c. The Secretary Failed to Prove that the Cited Elevator Hoisting Equipment is a Section 18002(a) "Working Place"

Whether § 56.18002(a) applies to elevators depends on the definition of "working place" in the standard, and whether the definition subsumes mine elevator hoisting equipment. Working place" is defined in the standard as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. MSHA's Program Policy Manual regarding workplace examination states:

> The phrase "working place" is defined in 30 C.F.R. §§ 56/57.18002(b) 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.

Jt. Ex. 1

Ash Grove contends that the elevators involved in the inspection were not "working places" because work was not being done at the time of the MSHA inspection. R. Br. 9-10. Ash Grove asserts that the plain language of "working place" as defined in § 56.2 clearly exempts the elevators mentioned from the standard because there was no evidence that work was being done on the elevators at the time the citation was issued and that the hoisting equipment mentioned by Nelson was in a room near the elevator, a room that is not considered a "public place." R. Br. 10.

The Secretary argues that the standard applies to the landing area, the inside of an elevator car, and in a limited capacity to the hoisting area and pit areas that are generally used

[11] A "fatalgram" is a summary of an accident by MSHA that is disseminated to the mining industry; it lists recommended best practices for operators to avoid similar occurrences.

only by licensed contractors. G. Br. 6-7. [12] The Secretary argues that the term "working places" applies to Ash Grove's elevators "because miners perform work [on the elevator] by moving equipment, supplies, and themselves throughout the floors of the buildings." G. Br. 10. The Secretary states that his interpretation and MSHA's application of the standard are "reasonably clear." G. Br. 6.

As the court stated in *Cemex*, there is no duty to "examine all elevators simply because they are elevators." *Cemex,* 32 FMSHRC at 13 (ALJ). Here, Ash Grove was charged with failing to examine the "hoisting equipment of the five elevators . . . at [the plant]." Gov. Exh.3. Therefore, the Secretary must show that the cited parts, in this case, the hoisting equipment of each of the five elevators, and the adjacent areas are working places, i.e., places "where "work-related task[s]" involving the hoisting equipment "[were] being performed, [were] assigned to be performed but not yet started, or where such . . . task[s] reasonably could be expected to be performed." *Id.* at 14.

The Secretary's evidence does not meet this test with regard to the hoisting equipment and the adjacent areas on any of the five elevators. Nelson did not testify as to the specific elevator hoisting equipment where he observed safety hazards, nor did he testify what work was being performed (or expected to be performed) in the areas where the equipment was housed to bring any of them under the ambit of a "workplace." Since he failed to meet the first step of identifying a working place, Nelson's subsequent failure to identify a specific shift where a failure to examine occurred is inconsequential.

Curiously, Nelson himself vacillated in regards to which of Ash Grove's elevators are working places. The narrative portion of Citation No. 8780591 alleges that "[t]he operator did not have an established procedure or requirement for conducting workplace exams, or daily operational inspection of the *five* elevators in use at this site." G. Ex. 3, p. 2 (emphasis added). Nelson testified that he considered landings, hoisting rooms, and places that miners would travel or work on an elevator to be working places. Tr. 29. The court asked if there were such areas involved with *all* five of Ash Grove's elevators. Tr. 29. Nelson testified that the passenger elevators in the administrative building would be an exception. Tr. 29. If so, then apparently only the three elevators in the plant area that transported both miners and freight should have been

[12] In support of the citation, Nelson stated that the areas immediately adjacent to work areas and landings and hoisting rooms that miners might work on or travel through in the performance of their work would be "working spaces," because these areas directly affect the safety of miners in a given location. Tr. 29. Nelson testified that if "elevators are being used to transport persons or material then that is work being performed," and the elevators are an integral part of the mining and milling process. Tr. 67, 73. He further testified that because these areas were "working spaces," the workplace examination standard would require an inspection of the landings adjacent to the elevator, the mechanical room, inoperable lights in the hoisting room (adjacent to the elevator), communication devices in elevators, and call buttons. Tr. 27, 71-72. Nelson explained that a lay person would not have expertise in the minute, inner workings of an elevator, but should be able to observe broken wire, loose connections, or frayed ropes, but the inner workings should be inspected by whoever is contracted to maintain the elevator. Tr. 26-27.

included in the citation. The court continues to be of the opinion that rather than try to make Section 56.18002(a) fit all elevators, the Secretary would be "well advised" to promulgate a mandatory standard "specifically directed to the . . . examination of . . .elevators." *Cemex Inc.*, 32 FMSHRC __, slip op. at 14, n. 14.

The court theretofore concludes the Secretary has not established a violation with regard to the second prong of the citation, because he has not met the burden of proving that the cited elevators and their hoisting equipment were "working places" as anticipated by Section 18002(a). However, even if the court held otherwise, it would still vacate the citation on due process grounds.

2. **Fair Notice Analysis**

Due process considerations require that the court analyze whether Ash Grove had notice of MSHA's interpretation of Section 56.18002(a). Ash Grove posits that it lacked fair notice of the Secretary's interpretation of the standard as applied to elevators. R. Br. 12. The Secretary, anticipating a fair notice argument, states that Ash Grove had fair notice in that it should have known to complete basic visual inspections on elevators, that the term "working place" applies to the elevators because miners use them to move themselves and equipment and supplies, and that MSHA put the mining industry on notice by publishing a "fatalgram." G. Br. 10-11.

The Commission has held that "before a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge North America,* 35 FMSHRC 3497, 3500 (Dec. 2013), *quoting Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). This fair notice requirement is deemed satisfied when a party has received actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard. *LaFarge North America,* 35 FMSHRC 3497, 3500 (Dec. 2013); *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996). In the absence of receiving actual notice of the Secretary's interpretation, a respondent may be held to have fair notice if "a reasonably prudent person familiar with the mining industry and 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).

A respondent has fair notice of the Secretary's interpretation of a standard, justifying its enforcement, when either: (1) the plain language of the cited standard is clear and unambiguous; (2) the Secretary has issued guidance regarding its interpretation of the standard; (3) the company was given pre-enforcement warning; (4) previous citations were issued to the mine; or (5) a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the standard's specific prohibition or requirement. *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1682 (2010); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *Island Creek.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc*., 18 FMSHRC 533, 539 (Apr. 1996); *General Elec. Co. v. EPA,* 53 F.3d 1324, 129 (D.C. Cir. 1995); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). These five fair notice facets will be reviewed in turn.

a. **Whether the Language of the Standard is Clear**

The fair notice analysis begins with the language of the standard, and whether this language is clear enough to provide the regulated entity, Ash Grove, with notice of the

Secretary's interpretation. When the plain language of a standard is clear and unambiguous, the Commission has held that the standard provides operators with fair notice. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997).

Neither the Secretary nor Ash Grove asserts that the language of Section 56.18002(a) is ambiguous. However, they each offer diverging interpretations of the term "working place." *Cf.* G. Br. 10; R. Br. 10. The Secretary asserts that Ash Grove had notice that workplace examinations were required on elevators, because they were "working places," by virtue of miners using elevators for "moving equipment, supplies, and themselves throughout the floors of the building." G. Br. 10. Conversely, Ash Grove avers that the definition of "working place in Section 56.2 indicates that the cited elevators were not working places, that there is no evidence that work was being performed in elevators at the time of the MSHA inspection, and that the hoisting equipment at issue was in a room that was not considered a "public place."
The Commission has held that competing reasonable interpretations of the plain language of a regulation indicate that its language may be ambiguous. *Walker Stone Co. v. Secretary of Labor,* 156 F.3d 1076, 1081 (10th Cir. 1998). *See also Alco Alumina & Chemicals, L.L.C.*, 23 FSMRHC 911 (Sept. 2001). The court finds this to be the case.

When the meaning of a standard is ambiguous, the Secretary's interpretation of his own regulation is sometimes accorded deference. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt"); *Dynamic Energy, Inc.,* 32 FMSHRC 1168, 1171-72 (2010). However, deference is inappropriate if the agency's interpretation is not reasonable or when it is "plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter." *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, __, 132 S. Ct. 2156, 2166 (2012) (internal quotations omitted) (citing *Auer,* 519 U.S at 462). This occurs when, for example, the agency's interpretation conflicts with a prior interpretation. *See*, *e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 515 (1994).[13] Deference to an agency's interpretation in some circumstances is not required, if doing so could create "unfair surprise" or "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp*., __ U.S. __, __, 132 S. Ct. 2156, 2167 (2012) *citing Gates & Fox Co. v. Occupational Safety and Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Ct. App. 1986).

The Secretary's interpretation that some elevators, their hoisting equipment and areas adjacent thereto are working places is a plausible reading of the standard, but not the only such reading. Moreover, an agency's interpretation may be reasonable or permissible, but still fail to provide the operator fair notice. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Due process

[13] The parties submitted MSHA Program Policy Letter No. P15-IV-01 as Jt. Ex. 2. Tr. 68; Jt. Ex. 2. The Program Policy Letter ("PPL") was issued on July 22, 2015, months after the citation was issued. The PPL adds that a working place "includes areas where work is performed on an infrequent basis." The PPL thus expands the definition of working place to include not just actual working places, but potential places that may be utilized less frequently. Tr. 58-59.

requires that regulations be sufficiently specific to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

The court concludes that the language of Section 56.18002(a) did not give Ash Grove actual notice of the Secretary's interpretation. Deference will not be accorded because doing so would result in an "unfair surprise" to Ash Grove, in an affront to due process requirements.

b. **The Agency's Guidance Regarding Work Place Examinations**

Having found that the standard is ambiguous and that deference to the Secretary's interpretation is inappropriate, another step in the fair notice analysis is necessary. An agency may also put a party on notice by issuing public statements and guidance regarding a regulation. When an agency gives no pre-enforcement warning, and instead uses a citation to announce its interpretation of a regulation, "[i]f, by reviewing the regulation and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *General Electric Co. v. U.S. EPA,* 53 F.3d 1324, 1329 (Ct. App. D.C. 1995).

The Secretary contends in the instant case the fatalgram regarding the injury and death caused by a malfunctioning elevator was sufficient to charge Ash Grove with actual notice of the Secretary's interpretation of the workplace examination standard. G. Br. 10; Jt. Ex. 3. According to Nelson, fatalgrams are "disseminated to the public" when MSHA posts them on its website, and they put operators on notice of a standard. Tr. 48. The onus is on an operator to monitor fatalgrams and incorporate proposed changes applicable to its mining operation. Tr. 48. The fatalgram issued shortly after the elevator fatality at another cement operation, lists the following "Best Practices:"

> Immediately report any elevator problems to management.
>
> Ensure that any problems affecting the safety of an elevator are repaired promptly.
>
> Ensure that elevator door interlocks, that prevent the door from being opened unless the elevator car is present, are functional.
>
> Ensure 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 the landing prior to the doors opening.
>
> Train all persons to be aware of their surroundings when entering or exiting an elevator car.

Jt. Ex. 3.

In the court's opinion the fatalgram does not fairly notify the non-metal industry of workplace examination requirements because it does not describe elevators or their hoisting equipment as "working places," nor does it discuss § 56.18002(a)'s requirements, and it fails to set out a best practice for systematic examinations of elevators and hoisting equipment. The fatalgram is laudable for bringing attention to a safety concern, but standing alone does not constitute adequate notice of the Secretary's interpretation of elevators and associated areas as "working places" under the relevant standard.

MSHA's Program Policy Manual ("PPM") regarding 30 C.F.R. §§ 56/57.18002 addresses working place examination requirements. Jt. Ex. 1. The PPM states that MSHA intends to use the definition of "working place" found in Section 56.2 to define the "working place" in Section 56.18002(a). *Id.* The PPM further explains, "[a]s 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 process." *Id.* This implies that to be considered a working place, actual work is being performed at that location, not that the area is simply used as a travelway, or could be a potential working place. Ash Grove's position that the cited hoisting equipment was not a working place actually comports with the PPM's description of a "working place," and the court finds it reasonable that Ash Grove would consider elevators and associated areas generally exempt under the standard unless work was being performed on them at a given time. The court concludes that the PPM, like the fatalgram, did not put Ash Grove on notice of the Secretary's interpretation of the standard.

c. **The Agency's Pre-Enforcement Warning, or Lack Thereof**

In the absence of a clear standard or official guidance regarding a standard, an agency's "pre-enforcement efforts" or "pre-violation" contact to achieve regulatory compliance may provide adequate notice. *Gen. Elec. Co. v. U.S. E.P.A.,* 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Secretary presented no evidence that he notified Ash Grove that examinations of elevators and hoisting equipment would be required or that a citation would be issued for the failure to perform them.

d. **Prior Citations Issued to Ash Grove**

The lack of actual notice is compounded by the fact that Ash Grove was never before cited for a failure to examine any of its elevators and/or the elevators' hoisting equipment. Tr. 103-104; G. Ex. 1. The emphasis on applying Section 56.18002(a) to elevators was a relatively new phenomenon, borne out of the agency's response to a recent fatal elevator accident.

e. **The Commission's Reasonably Prudent Person Test**

Having found that the company did not have actual notice of MSHA's interpretation of the workplace examination standard based on the plain language of the standard, or guidance from the agency, the next question is whether a reasonably prudent person, familiar with the Mine Act and its protective purposes would have considered elevators and their hoisting equipment "working places" subject to Section 56.18002(a)'s inspection requirements.

As stated, the Commission does not require that the operator be given *actual* notice of the Secretary's interpretation of a standard in every circumstance, but rather uses an objective test, which asks, "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." *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087-88 (Dec. 2014) (*citing Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).)

Steve Minshall, Ash Grove's Corporate Director of Safety and Health, testified that he is involved in setting company policy and giving guidance on conducting workplace examinations.[14] Tr. 92. Minshall conducts plant-wide training on workplace examinations. Tr. 93. He bases his training largely on the Program Policy Manual, the regulations, and related standards. Tr. 93-94. Minshall testified that his understanding of the workplace examination standard is that it requires a record of the examination, the name of the person doing the examination, a list of the areas inspected, and the date of the exam. Tr. 94. He understands a working place to be one where individuals are conducting work, not necessarily the plant's elevators. Tr. 94. Minshall testified that Ash Grove has a systemic elevator maintenance program. The company's elevator contractors are licensed and perform state inspections and maintenance that conforms to the state's requirements. Minshall believes the contractor's inspections and maintenance keep the plant in compliance with the Mine Act examination standard. Tr. 104.

As evidenced by his position and experience, Minshall is familiar with the mining industry and the Act, as he often trains employees on the Act's regulations. He gives no indication that he is anything other than reasonable. His belief that examinations by elevator contractors is in compliance with the Mine Act supports the contention that a reasonably prudent person in the mining industry would not think § 56.18002(a)'s requirements are applicable to all elevators.

In addition, the testimony reveals that operators are not the only concerned entity that considers elevators to be something other than "working places." Around the time the citation was issued, Minshall had a conversation with Harvey Kirk, a Health and Safety specialist at MSHA's Headquarters in Arlington, Virginia, regarding the workplace examination requirements in light of the February 2014 elevator fatality. Tr. 102-103. Minshall credibly testified that Kirk has a background in the cement industry and that at the time Kirk was MSHA's de facto "liaison" to the cement industry. Operators often consulted Kirk for guidance. Tr. 107. Kirk told Minshall that elevators were not considered "working places" under the standard requiring examinations every shift. Tr. 102-103. Ash Grove does not argue that it relied on Kirk's guidance in shaping its workplace examination policy, and Minshall could not pinpoint an exact date of his conversation with Kirk. However, the court finds it telling that even an MSHA employee believed that the term "working places" did not include elevators. The opinion of these two individuals with vast experience in the non-metal industry, that elevators do not constitute "working places," suggests that a reasonably prudent person familiar with the industry

[14] Steve Minshall has been the Corporate Director of Health and Safety for Ash Grove since 2008. Tr. 90. Before 2008 he was Ash Grove's Corporate Health and Safety Manager. Tr. 90. In total, Minshall has been involved in industrial safety for 37 years. Tr. 90. Presently he serves as the co-chair of the Portland Cement Association's Occupational Health and Safety Committee. Tr. 91. Minshall has an undergraduate degree in biology and master's degrees in public health, industrial hygiene, and communication studies. Tr. 91. Minshall earned a Certified Safety Professional Designation and is a Certified Industrial Hygienist. Tr. 91.

and purposes of the Act would not have considered an elevator and its associated hoisting equipment to be a "working place."

Additionally, hoisting equipment examinations are governed by § 56.19120. [15] 30 C.F.R. § 56.19120; R. Br. 10. In fact, Nelson initially cited Ash Grove for a violation of this standard. [16] Tr. 32; G. Ex. 3, p.6. This standard requires a systematic procedure to inspect, test and maintain hoisting equipment and shafts. 30 C.F.R. § 56.19120. Ash Grove had a system in place whereby its elevator contractor, Otis, inspected and maintained the elevators, and was called to repair any defects. Tr. 43, 51-52. Nelson testified that he reviewed the records and Ash Grove was up to date and in compliance with state and local elevator inspections. Tr. 52. The court finds it reasonable for an operator to believe elevator hoisting equipment examinations fell under the purview of Section 56.19120, specifically aimed at hoisting equipment and shafts, rather than the broader workplace examination standard.

For all of these reasons it is evident to the court that it was not at all clear to a "reasonably prudent person" that Section 56.18002(a) applied to a cement plant's elevators and areas adjacent thereto, including the elevators' hoisting equipment. Therefore, the court concludes that Ash Grove did not receive fair notice of the Secretary's interpretation of § 56.18002(a) and that enforcing the citation would be an affront to due process. Accordingly, Citation Number 8780591 will be **VACATED**.

B. Citation No. 8611830, Docket No. WEST 2014-963

On May 28, 2014, MSHA Inspector Richard Dreyer issued Citation No. 8611830 to Ash Grove for an alleged violation of 30 § 56.14110.[17] The citation states:

> Material falling during the operation of the conveyor exposed persons in the passageway below to hazards that would be expected to result in serious injury. The typical feed material on this conveyor is a 4" minus limestone product. The distance of the fall from the 331-190 conveyor to the travelway below was

[15] 30 C.F.R. § 56.19120 requires:

> [a] systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

[16] As discussed previously, Nelson issued Citation Number 8780586 to Ash Grove for failing to inspect and test hoisting equipment on the five mine elevators, in violation of 30 C.F.R. § 56.19120. G. Ex. 3 p. 6. This citation was terminated and incorporated in the modified Citation Number 8780591. G. Ex. 3 p. 2; Tr. 32.

[17] As discussed above, Dreyer took over the regular inspection of the Seattle Plant after Nelson was called to another assignment. Tr. 112.

> approximately 45'. This falling material presented a hazard to persons working in and around the raw mill lube room regardless of point of entry. No guards, shields, or other mechanisms were provided to protect persons from this hazard. The condition existed for more than one shift and the operator failed to identify or correct it.

G. Ex. 5.

Dreyer found the alleged violation was S&S, "reasonably likely" to fatally injure one person, and the result of Ash Grove's moderate negligence. G. Ex. 5.

1. The Background and Testimony

On May 28, 2014, as he traveled the stairs and approached the top of Ash Grove's 331-190 conveyor, Dreyer observed a buildup of four inch minus crushed rock material on the conveyor's I-beams.[18] Dreyer did not see material falling from the conveyor during his inspection, but he testified that the material would have been carried by the conveyor belt and that, "[i]t was pretty evident that material had been falling off this conveyor." [19] Tr. 113-14. Dreyer also testified that impact damage on a vertical beam indicated that a skid steer was put in place near the raw mill lube room doors, presumably to clean up falling material from the conveyor. [20] Tr. 163, 165-66. The floor in the area was dirty, indicating that material had fallen from the conveyor to the ground. Tr. 165. There were tire tread marks near the accumulations. Tr. 166.

Dreyer did not take a sample, but stated that the four inch minus material included limestone, which usually is powdery. Tr. 114, 129. However, limestone can harden over time into solid rock if, for example, the powder is introduced to moisture (likely from ambient humidity). Tr. 114. Dreyer testified that the solid rock formed from the normally fine material can do significant damage. He has seen such hardened rock dent a vehicle after falling from a conveyor. Tr. 114-15.

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[18] "Four inch minus" designates the approximate size of the material based on how it would fall through a screen. Tr. 113. If rocks fall through a screen with holes that are four inches in diameter, the rocks are classified as four inch. Tr. 113. The "minus" indicates that there is additional smaller material included with the four inch rock, including powdery material, like limestone. Tr. 114. I-beams are structural supports, in this case structural supports beneath the conveyor. Tr. 122.

[19] The conveyor was not running at the time Dreyer observed the material, but would have been running during continued normal mining operations. Tr. 131.

[20] A skid steer is a four wheeled small machine with a bucket on the front to "move earth or crushed rock." Tr. 163. The machine steers by skidding. Tr. 163. It is akin to a front end loader, but smaller in size. It is used to clean up more restricted areas. Tr. 163.

Dreyer described the conveyor belt as one that ran over trough rollers, idler rollers, head pulleys, and tail pulleys. Tr. 169. Dreyer explained that:

> "[e]very time that conveyor goes over a trough roller it flexes the belt and de-flexes the belt and that's going to cause movements to the material being transported. Any conveyor can have a tracking issue. I mean, there's a number of maintenance things that would also contribute to movement and material being transported."

Tr. 170.

Dreyer maintained that the material built up on the conveyor's I-beams at an angle. Tr. 171. As more material fell on the beams the material would continue to build up or it would fall off the beams to the floor below. Tr. 171. Material on the I-beams could consolidate and be impacted. Tr. 171. Dreyer said that on the day of the inspection the beams could not hold any more material. Additional material would simply fall. Tr. 171. The beams did not negate the hazard of falling materials; in fact, Dreyer noted that material could hit a beam and be deflected or redirected, enlarging the area of concern. Tr. 172-173

Dreyer measured the conveyer or belt's height at around 45 feet. Tr. 115-16. At the bottom of the conveyor there is a travelway leading into the raw mill lube room.[21] Tr. 116. Dreyer testified that material falling from the conveyor could fall down and hit a miner on the travelway below. Tr. 116-17. The material could fall directly from the conveyor to the travelway in some spots, and in other spots it could fall onto the roof of the raw mill lube room. Tr. 118-119. One area of particular concern below the conveyor was the area in front of the lube room mandoors. Tr. 121. The material had built up on the roof, and this buildup was in line with the mandoors. Tr. 118.

Dreyer testified that the company terminated the citation by fabricating and installing protective structures over areas below the conveyor where miners were in danger of being hit by falling material. Tr. 134; G. Ex. 5 p. 3.

2. The Violation

To establish a violation of Section 56.14110, the Secretary must prove, by a preponderance of the credible evidence, that a guard or shield was not installed in an area or in areas where material falling from or flying from screens, crushers or conveyors, presented a

[21] A raw mill is the equipment used to grind raw materials in the cement manufacturing process. TEXAS COMPTROLLER, AUDIT PROCEDURES FOR CEMENT PRODUCTION TAX, (2005), http://comptroller.texas.gov/taxinfo/audit/cement/ch1.htm; PHILIP ALSOP ET AL., THE CEMENT PLANT OPERATIONS HANDBOOK 31, (5th Ed. 2007). The raw mill's lube room is an area that can be accessed to store the lubricants necessary to maintain components such as gears and bearings, and other supplies and equipment. Tr. 121. *See generally Lube Room Best Practices,* MACHINERY LUBRICATION, http://www.machinerylubrication.com/Read/29008/lube-room-essentials. Dreyer testified that the travelway leading to the lube room's mandoors is used multiple times per shift. Tr. 116-117.

hazard.[22] *In re: Contest of Respirable Dust Sample Citations,* 17 FMSHRC 1819, 1838 (Nov. 1995). *See generally Northern Aggregate, Inc.*, 37 FMSHRC 562, 579 (Mar. 2015)(ALJ) (holding that Section 56.14110 requires actual protection against the danger of falling rocks, "by use of a guard, shield or other device.").

Ash Grove maintains that the material Dreyer observed did not fall from the overhead conveyor, as the conveyor belt was not operating at the time of the inspection. R. Br. 15. Craig Becker, presently the maintenance supervisor for Ash Grove, testified that the material that Dreyer observed on the ground was actually rejected material from the cleanup process, rather than material that fell from the conveyor belt.[23] Tr. 141. The rejected rock area, where Becker believes the material originated, is on the north side of the raw mill, in the same area of the conveyor belt.[24] Tr. 141. Becker testified that the transfer point where rock material may have shifted and fallen is too far from the area where the fallen rock material was found to be the source of the observed material. Tr. 150-51. Further, Ash Grove emphasizes that Dreyer did not test the material's composition to confirm that it matched the material on the conveyor. *Id.*

The court finds the lack of testing to be inconsequential. Dreyer testified that in his opinion the material found on the belt was consistent with the observed fallen material. Tr. 174-75. Violations of accumulations standards have been established by inspector observations, particularly where the standard does not require testing. *See, e.g., Amax Coal Co.,* 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.,* 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.,* 19 FMSHRC 5, 20 & n.2, 21 (Jan. 1997). The Commission has held that an inspector's testimony regarding the composition of an accumulated material by observation alone may be credited, especially in the absence of rebuttal evidence. *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275, 1290 (Dec. 1998) (upholding a coal accumulation violation based on an inspector's observation when the operator did not present any evidence to rebut the inspector's testimony that float coal dust was present or establish that float coal dust could not be identified by observation). Dreyer's testimony, given his experience in the industry, was creditable. Further, Ash Grove did not offer any evidence that the fallen material was not the same as the limestone on the conveyor belt.

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[22] The cited standard requires that, "[i]n areas where flying or falling materials generated from the operation of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons." 30 C.F.R. § 56.14110.

[23] Craig Becker was first hired at Ash Grove as a Manufacturing Development Engineer. Tr. 139. On the day of the inspection he acted as a safety manager because the previous safety manager had just retired. Tr. 139.

[24] Becker explained that the rejected rock areas are locations where the rocks accumulate that are not properly ground and are rejected by the raw mill. Tr. 142. There are two such areas, one on the north side, and one on the south side of the mill. Tr. 142. Once the rejected material accumulates to a certain extent, it is cleaned up with a Bobcat or skid steer and reentered into the limestone pile used in the manufacturing process. Tr. 142.

The court concludes that the Secretary proved by a preponderance of evidence that Ash Grove violated Section 56.14110. Dreyer credibly testified that the floor under the conveyor was dirty, consistent with material falling from the conveyor. Tr. 165. Dreyer also credibly testified that a skid steer appeared to have been placed in the area to clean up flying or falling material.[25] Tr. 165-166. The material that accumulated on the beams of the platforms used to access the conveyor, indicates that material regularly fell from the conveyor. R. Ex. 9, p. 6. Finally, Dreyer's credible explanation that incline conveyors, like the one used by Ash Grove, would move and shift limestone causing it to fall, supports the allegation. Tr. 169-70. Dwyer's testimony that falling material could have hit a miner on the travelway below was not refuted. Tr.16-17 Further, as both sides agree, a guard or shield was not installed in the area.

Ash Grove argues alternatively, that there was no violation because the language of the standard "states that not all flying or falling material is a violation. Instead this standard states that only flying or falling material that presents a hazard is a violation." R. Br. 16. The company asserts that the anticipated falling material from a conveyor would be soft like a puff of snow, and thus not capable of causing injury or damage, and thus not hazardous. R. Br. 17. The court rejects this argument, as Dreyer testified that while some material could fall in this form, other material could fall in the form of solid rock, which would obviously injure a miner. Tr. 173.

For the reasons discussed, the court finds that Ash Grove violated Section 56.14110.

3. The Gravity of the Violation and its S&S Nature

The Secretary contends that Citation Number 8611830 was properly designated S&S. G. Br. 19. Ash Grove argues that the testimony "establishes any hazard to be insignificant and unlikely." R. Br. 17.

Under the Mine Act a violation may be designated S&S if the issuing inspector finds that the alleged violation is "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). The Commission has held that an S&S categorization is proper "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

[25] Ash Grove states that a Bobcat or skid steer used in the cleanup process accesses this particular area to turn around, so the tire tracks could have been caused by that vehicle for another reason. Tr. 141-42. The court finds this assertion unsupported by evidence or testimony, and instead credits Dreyer's assertion that a skid steer was in place under an impacted area to clean up falling material.

contributed to will result in an injury;[26] 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 the *Mathies* criteria). This four part analysis, otherwise referred to as the *Mathies* test, will be discussed *in seriatim*.

As a threshold matter, the court has found that the Secretary established a violation of 30 C.F.R. § 56.14110, thus satisfying the first prong of the *Mathies* analysis.

The next step in the S&S inquiry requires that the Secretary identify a safety hazard caused by the alleged violative condition(s). *Highland Mining Co*., 34 FMSHRC 3434, n. 5 (Dec. 2012) ("For each violation alleged to be 'significant and substantial,' the relevant hazard associated with the violation must be identified). A safety hazard, as defined by the Commission is "the dangerous situation that the mandatory safety standard anticipates." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 (Aug. 2012) (citing *Cumberland Coal Res*., *LP*, 33 FMSHRC 2357, 2366 (Oct. 2011), *aff'd*717 F.3d 1020 (D.C. Cir. 2013).

Here, the Secretary alleges that the violative condition was the lack of a shield or guard on the conveyor to prevent injury from falling material, in contravention of the standard. G. Br. 19; Tr. 125. The particular hazard identified by the Secretary is falling or flying rock that could hit and injure a miner traveling or standing below the conveyor. Tr. 116-117, 118, 119. The standard anticipates this hazard, as evidenced by its express language. Section 56.14110 requires a guard or shield where falling materials are generated, to protect individuals from materials falling from a conveyor. *See* 30 C.F.R. § 56.14110.

Ash Grove argues that material was not falling from the conveyor, but if it fell, the falling material would be powdery and soft and would be incapable of injuring anyone. R. Br. 16; Tr. 158-160. Dreyer credibly testified while some material may be powdery and soft limestone, some can also accumulate and consolidate into solid rock, and fall 45 feet, hitting a miner below the unprotected conveyor.[27] The Secretary thus identified a discrete hazard (falling rock) caused by the violative condition (the failure to install a shield or guard as required by the standard) in satisfaction of the second *Mathies* requirement.

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[26] With respect to the "reasonable likelihood of injury" element, the analysis must be made assuming "continued normal mining operations." *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co. (U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984). A proper S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *quoting Knox Creek Coal Corp.,* 36 FMSHRC 1128, 1132 (2014); *McCoy Elkhorn Coal Corp.,* 36 FMSHRC 1987, 1991 (2014).

[27] The Commission has held that an inspector's judgment is an important element in an S&S determination and may be relied upon as part of the analysis. *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275, 1278 (Dec. 1998).

As applied to the present case, the appropriate test under the third step of the *Mathies* analysis, is whether there was a reasonable likelihood that the hazard (i.e., the danger of a rock falling 45 feet from the conveyor and hitting a miner below) contributed to by the violation (i.e., absence of a shield on the conveyor) would cause an injury. *Musser Eng'g., Inc.*, 32 FMSHRC 1257, 1281. The Secretary is not required to prove that the cited violation itself would cause an injury, but that the hazard would be reasonably likely to cause an injury. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC*, 762 F.3d 611 (7th Cir. 2014). The Commission has explained that "reasonable likelihood" is less stringent than "more probable than not." *Amax Coal Co.,*19 FMSHRC 846, 848 (May 1997); *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). Again, the likelihood must be examined in the context of continued normal mining operations. *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985).

Dreyer reasoned that an injury was reasonably likely because significant material had built up above a travelway, and had accumulated "for a while." Tr. 122. Fallen material was present on the conveyor's support structure, as well as on the floor below the conveyor. Tr. 122. Dreyer credibly testified that on the conveyor structure the material had accumulated to the point where additional material was likely to sluff off and fall. *Id.* The material was exposed to ambient moisture and it could consolidate and form solid rock. Tr. 114-115. The resulting rock was capable of producing significant damage if it fell and hit a miner. Tr. 115. There was a travelway 45 feet under the conveyor that was accessed multiple times per shift by several individuals; Dreyer estimated 10 to 12 exposures per day. Tr. 116-117, 118. Moreover, material also had built up on the roof of the raw mill lube room, directly in line with the entrance to the room. Tr. 118.

Ash Grove claims that the hazard of a rock fall is mitigated because Ash Grove's miners are required to wear hard hats, and the evidence shows that they were doing so. [28] R. Br. 17, Tr.

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[28] When asked whether the hard hat policy at Ash Grove, which requires all miners to wear hard hats, would change his fatal designation, Dreyer stated:

> Not at all. You know, if you consider the impact that a rock or any hard object falling that distance is going to have, by the time it gets to the ground it's likely moving—in that 45-foot span it's likely moving in excess of 30 miles an hour. So picture a rock or something hitting you at the speed. Imagine the force and ask yourself, what's that hard hat going to do[?] If the shell of the hard hat actually keeps its integrity and does its job then it's going to distribute that load to the suspension, and that suspension delivers the load to your neck. So even if the hard hat is not physically destroyed and that rock is pushed in to you, it's going to take all of that pressure, all of that load and all that velocity coming down and it's going to destroy your neck. You're still going to reasonably have a fatal injury.

Tr. 131.

126. While commendable, this safety measure will not be considered by the court in its "reasonable likelihood" evaluation. The Commission has held that miners' exercise of caution should not be considered in an S&S analysis, because the alleged "hazard continues to exist regardless of whether caution is exercised." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

Ash Grove also maintains that the likelihood of injury is reduced because accumulated material would be air lanced to prevent build up.[29] R. Br. 17, Tr. 181-183. The court finds that the assertion has no bearing on its S&S determination. Commission judges may not infer that a violative condition will cease. *Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (Dec. 1992). Dreyer testified that he observed significant buildup during his inspection. Tr. 113, 167. In the Commission's S&S paradigm, violative conditions prior to and at the time of the violation are relevant (*Mach Mining, LLC v. SOL*, 809 F.3d 1259 (D.C. Cir. 2016)) and assumptions as to abatement measures are not considered. *Id.*; *Paramont Coal Co. VA LLC*, 37 FMSHRC 981, 985 (May 2015).

Minshall testified that there had never been an injury at Ash Grove caused by falling material in the cited area (Tr. 161), but it is well settled that the absence of an injury-producing event when a cited condition has existed for some time does not preclude a finding of S&S. *See Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996).

Based on the foregoing, the court finds that it is reasonably likely that without a guard or shield in place, a falling rock (made up of consolidated accumulated material) could fall from the conveyor, its structure or the lube room roof and strike and injure one of the several miners who accessed the areas under the accumulated material a dozen or so times a shift.

The fourth and final prong of the *Mathies* test requires the Secretary to prove there is a reasonable likelihood that the injury in question will be reasonably serious. The Secretary has satisfied this element of the S&S test because the evidence supports a finding that the injury would be fatal, or at the very least would result in lost workdays. In support of the fatal designation, Dreyer testified that rock falling 45 feet could "have serious negative consequences on anybody impacted." Tr. 122-23. The record fully supports finding that the impact of a rock falling and hitting a miner would likely result in death or in significant neck or spinal injuries. Tr. 123, 131, 160-61.

For the reasons set forth above, the court affirms the inspector's S&S finding.

Next, the gravity, or seriousness, of the violation must be addressed. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)("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."). The gravity of a violation is distinct from the S&S nature of a violation, as "the focus of the seriousness of the violation is not necessarily on the

[29] An air lance is a wand with a pipe that is attached by a hose to a high pressure air compressor. When engaged, the wand directs compressed air to a particular area. An air lance can be used to blow accumulated material away and clean a particular area. The process is akin to a power washer, but uses air instead of water. Tr. 182-83.

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). Thus, 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. *American Coal Co.*, 36 FMSHRC 2456, 2460 (Sept. 2014)(ALJ). The two concepts are often discussed in close succession because, "[a]lthough the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 10-11 (Jan. 1997) *citing* Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). *See also Elk Run Coal Co., Inc.,* 27 FMSHRC 899, 907 (Dec. 2005).

It is clear the area affected by the violation was regularly visited by miners. Mike Begley, Ash Grove's maintenance manager, informed Dreyer that the area below the conveyor was used at least twice daily by several different miners. Tr. 121. Dreyer estimated that only one person at a time would be injured if a rock fell from above, and indeed this is the most likely scenario. Therefore, there is no reason to disturb Dreyer's designation that one person would be affected by the cited hazard. G. Ex. 5. Tr. 123. Based on the fatal or very serious injury that could result to a miner as discussed previously, and the reasonable likelihood that a rock could fall from an unguarded conveyor and strike a miner, the court finds the violation was serious.

4. Ash Grove's Negligence

Section 110(i) of the Mine Act requires that in assessing penalties, the court also considers "whether the operator was negligent." 30 U.S.C. § 820(i). The Commission has held that each mandatory standard "carries with it an accompanying duty of care to avoid violations of the standard," and the failure to meet this duty will result in a finding of negligence. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether the operator met its requisite duty of care imposed by a particular standard, the court must take account of the relevant facts, the protective purposes of the cited regulation, and what actions a "reasonably prudent person familiar with the mining industry," would take under the circumstances. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703-04 (Aug. 2015). In addition, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976-1977 (Aug. 2014).

Initially, Dreyer determined that the violation occurred as a result of Ash Grove's "moderate" negligence. G. Ex. 5; Tr. 123-24. Dreyer noted that he did so because at the time he did not find anyone in management had specific knowledge of the condition. Tr. 124. However, Dreyer also testified that "high" might have been more appropriate, as the company had extensive discussions with MSHA regarding falling material during a previous inspection. [30] Tr. 124. After the hearing, the Secretary urged the court to consider modifying the level of negligence to "high." G. Br. 21.

[30] Dreyer testified that before starting his inspection he reviewed the report for the prior inspection at the plant and discussed the report and findings with Mike Nelson, the MSHA inspector who conducted it. Tr. 124.

The Commission has described ordinary negligence as characterized by "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987) citing *Black's Law Dictionary* 930–31 (5th ed. 1979). A finding of high negligence, however, "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (1998); *Eastern Associated Coal Corp.,* 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.,* 14 FMSHRC 956, 969-70 (June 1992).

There is sufficient evidence to conclude that Ash Grove was inattentive regarding the accumulation conditions and the attendant hazard of falling material. Dreyer testified that there was significant material build up on the roof, indicating the falling material had accumulated for some time. This indicates that Ash Grove should have been on notice that material had reached a point where it was falling or was in danger of falling from the conveyor. Further, Ash Grove's use of a skid steer to presumably clean up falling material indicates that Ash Grove was aware that material was falling from the conveyor, but neglected to adopt a permanent solution. While Ash Grove's inattention to a solution did not meet the standard of care required, there is no indication the resulting violation was intentional. Therefore, the court agrees with Inspector Dreyer's original conclusion and finds that moderate negligence is the appropriate designation and declines the Secretary's invitation to increase the negligence attribution to "high."

C. Citation Numbers 8780422 and 8780423, Docket Nos. WEST 2015-503 and WEST 2015-523

The citations were issued to Ash Grove as a result of its response to an August 4, 2014, accident at the plant. The accident occurred when a person (a trainee truck driver) riding in a customer's truck got out of the truck's cab while the truck was parked and fell while climbing a ladder on the side of the truck. Inspector Thomas Rasmussen was assigned by MSHA to investigate the accident.[31] As a result of his investigation, including interviews with witnesses, Rasmussen issued Citation Numbers 8780422 and 8780423 to Ash Grove for its response to the accident. Citation No. 8780422 concerns Ash Grove's reporting of the accident to MSHA, and Citation No. 8780423 concerns the treatment of the accident scene.

[31] Inspector Rasmussen works at MSHA's Kent, Washington Field Office. At the time of the hearing he had worked for MSHA for three and a half years. Tr. 185. Rasmussen completed required MSHA training. He also completed an advanced accident investigation course. Tr. 185. Rasmussen testified that he has conducted hundreds of accident investigations on behalf of MSHA. Tr. 185. Prior to working for MSHA, Rasmussen was a contractor at OSHA and MSHA regulated sites, where he was primarily responsible for supervising crews and for training employees in safety and health standards. Tr. 186. Rasmussen spent ten years in this capacity. He also served in the United States Marine Corps. Tr. 186-87.

Citation No. 8780422 charges Ash Grove with a violation of 30 C.F.R. § 50.10(b).[32] The citation states:

> The mine operator did not notify MSHA within 15 minutes after becoming aware of a serious injury of an individual. On July 23, 2014 [,] one truck driver fell while climbing a ladder on a bulk trailer in the Group 2 Loadout and landed on an uneven steel platform at the base of the ladder. The individual was transported to the Hospital with serious and life threatening injuries. The mine [o]perator was aware of the immediate notification requirements, was informed of the accident at approximately 14:00 hours and did not notify MSHA until 14:43 hours on July 23, 2014.

G. Ex. 8.

Rasmussen found that the alleged violation was unlikely to cause an injury, but if an injury occurred, that it was likely to result in a fatality. He also found that the violation was the result of Ash Grove's high negligence. G. Ex. 8.

[32] 30 C.F.R. § 50.10, titled "Immediate Notification," states:

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

Further, Rasmussen issued Citation No. 8780423 to Ash Grove for a violation of 30 C.F.R. § 50.12.[33] Citation No. 8780423 states:

> The mine operator failed to preserve the accident scene where one truck driver fell while climbing a ladder on a bulk trailer in the Group 2 Loadout and landed on an uneven metal platform at the base of the ladder at approximately 14:00 hours on July 23, 2014. Upon arrival at the mine site, at approximately 17:00 hours on July 23, 2014, it was found that the accident scene was altered. After the injured individual was removed, the truck and trailer were taken from the scene, washed then parked in the Group 2 Rail Side Loadout. Removal of evidence from the accident scene hinders the investigation into the cause of the accident. The Mine Operator was aware the accident had occurred and did not preserve the accident scene.

G. Ex. 12.

Rasmussen found that although the violation was neither serious nor S&S it was the result of Ash Grove's "high" negligence. G. Ex. 12.

1. The Background and Testimony

On July 23, 2014, Ronald Cory, an employee of Gresham Transfer ("Gresham"), a customer that bought product from Ash Grove, was injured at the Seattle Plant. Tr. 194.[34] Cory, a Gresham trainee, was being trained by Jamie Goad, who was driving Gresham's truck. Tr. 198. Goad had pulled up to the Group 2 Loadout and parked the truck while it was loaded. *Id*. During the loading process Cory left the truck, but as the process neared its end, Cory returned to the cab. At around 2:00 p.m., after the truck was loaded, Cory could not find his cell phone. He thought he might have left it on the roof of the cab. Tr. 193, 210. Cory again left the truck and climbed up the ladder of the outside of the truck to retrieve his phone. Tr. 210. When Cory

[33] Section 50.12 states:

> Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

[34] Gresham Transfer ("Gresham") purchases bulk product from Ash Grove. Gresham's trucks come to the plant to pick up the material and then haul it off site. Tr. 194. Gresham's trucks park at one of several "loadouts," in this case Loadout Number 2, where the product is loaded. Tr. 255.

approached the top of the ladder he struck his head on the cement loading spout of Loadout Number 2. He lost his grip on the ladder, and he fell about eight feet. Tr. 193,197. Cory hit his head on the way down and landed on the steel tongue of the truck's trailer and on an uneven concrete platform. Tr. 193. Cory was not wearing fall protection. Tr. 223. Paramedics were called to the scene and arrived around five minutes after the fall. Tr. 256-57. Subsequently, Cory was transported to the trauma ICU center at Seattle's Harborview Hospital. Tr. 209. MSHA was called, and Rasmussen arrived at the plant and interviewed numerous people. Tr. 224, 227. Rasmussen also went to the hospital, but he was unable to speak to Cory on the day of the incident because Corey was incoherent. Tr. 209. However, Rasmussen spoke to a trauma center nurse about Cory's injuries, and she emphasized that Cory was lucky to be alive. Tr. 209. Cory suffered blunt force trauma to the head, a cut on the head requiring three staples, broken vertebrae, and a broken sternum and clavicle. Tr. 193, 209; G. Ex. 13. When Cory was finally able to speak to Rasmussen several days later, Cory indicated that he did not remember many details about what happened, other than waking up in a "bunch of blood" and that during the fall he thought he was going to die. Tr. 210-11.

Witnesses to the accident and those who observed the scene immediately after the fall painted a gruesome picture. Goad, the truck driver and a Gresham supervisor described how Cory had left the cab of the truck and how Goad then heard a thump after which the loader operator who worked for Ash Grove yelled that Cory had fallen. Tr. 200-01. Goad got out of the cab. He told Rasmussen that he saw Cory lying motionless face up after the fall. Tr. 203-04. The paramedics soon arrived to help Cory and after they removed him from where he was lying and took him to the hospital, Goad told Rasmussen he saw blood everywhere. Goad took pictures of the blood on the steel tongue and concrete before moving his truck. He later sent the photographs to Rasmussen. Tr. 201.

Romeo Semo, an Ash Grove employee, was working at the loadout and witnessed Cory's fall. He told Rasmussen he thought Cory was dead. Tr. 205. A customer present at the time of the accident, Reggie Soloman, told Rasmussen that he too believed Cory was dead, and that Corey was lucky that he survived the fall. Tr. 205-07.

Ash Grove's witnesses described a less grim scene. Carey Austell, the plant manager, was at the plant when the injury occurred.[35] Tr. 252-254. Austell was informed of the injury and arrived at the scene of the accident after the paramedics had been called and were enroute. Tr. 255. Austell testified that when he got to the scene Cory was conscious, alert, and moaning. Tr. 256. Austell opined that once they arrived, the paramedics were methodical, but not acting with great urgency. Tr. 258. Austell testified that he did not believe that Cory had a reasonable chance of dying since his breathing and bleeding were controlled, and he was alert. Tr. 259-260. Austell decided not to call MSHA to report the accident based on this belief. Tr. 261.

[35] Carey Austell has been the plant manager since September 2013. Tr. 253. Before working at the Seattle Plant Austell was a foreman at Ash Grove's Arkansas Facility for three years. Tr. 253. Austell has worked in the cement industry since 1992. Tr. 253. He also served in the United States Marine Corps for 26 years as an infantryman in which capacity he received a significant amount of first aid training. Tr. 253-54.

Craig Becker, who was filling in for the safety manager on July 23, arrived at the scene within five minutes of being notified of the accident. Tr. 263-64. Becker said the paramedics arrived about two or three minutes after he did. Tr. 264. Becker testified that when he first saw Cory, Cory was alert and responsive to pain. Tr. 265. The paramedics, according to Becker, were not administering CPR; rather they were checking for broken bones and injuries and they were reassuring Corey. Tr. 265-66. Becker discussed with Austell whether to call MSHA. Becker believed that there was not a reasonable chance of death requiring MSHA's immediate notification. As it turned out, Ash Grove called to notify MSHA of the event at approximately 2:43 p.m. Tr. 193-94; G. Ex. 5.

Later that day, when Rasmussen arrived at the scene of the accident, Rasmussen discovered that Goad had moved the truck and washed it. Tr. 202, 304. Ash Grove never asked Rasmussen or any other MSHA official for permission to move the truck. Tr. 191-92. Goad told Rasmussen that he moved the truck because he wanted to wash away the blood. Tr. 200. Goad took pictures of the blood before washing the truck. He sent the photographs to Rasmussen to use in the investigation. Tr. 201. After the truck was cleaned, it was moved back to where the accident occurred, and it was taped off to prevent future use. Tr. 312-15.

2. The Immediate Notification Violation, Citation Number 8780422

Rasmussen testified that he issued Citation No. 8780422 because, in accordance with 30 C.F.R. § 50.10(b), an operator is required to call MSHA within 15 minutes of becoming aware that an accident has occurred resulting in an injury which has a reasonable potential to cause death, and that Ash Grove waited longer than the allotted time to notify MSHA of the accident. Tr. 194. Ash Grove's safety director was aware of the accident at around 2:05 p.m.[36] and called MSHA's notification hotline to notify MSHA of the event at 2:43 p.m. Tr. 193-94; G. Ex. 8, p.5.

The Commission has explained that the immediate notification standard requires a mine operator to report to MSHA, within 15 minutes, an accident that has resulted in an injury which has a reasonable potential to cause death. *Rex Coal Co.*, 38 FMSHRC 208, 212 (Feb. 2016) ("Section 50.10 imposes an affirmative duty on the operator to report accidents immediately within 15 minutes."); *Mainline Rock & Ballast v. Sec'y of Labor*, 693 F.3d 1181, 1188 (10th Cir. 2012). Essentially, to prove a violation of 50.10(b) the Secretary must show that an accident occurred, that the accident resulted in an injury or injuries having the reasonable potential to cause death, and that the mine operator failed to notify MSHA within the 15 minute time frame anticipated by the standard.

Here, it is undisputed that an accident occurred when Cory fell from the truck. R. Br. 17; G. Br. 23; Tr. 193. It is also undisputed that the call to MSHA was made after the allotted 15

[36] According to Ash Grove's accident report, an Ash Grove employee reported Cory's fall to the plant control room at 2:01 p.m. R. Ex. 1. The control room operator immediately dialed 911. R. Ex. 1. Becker, the acting safety manager, found out about the accident and arrived on the scene at 2:05 p.m. R. Ex. 1; Tr. 192-93. Austell, the production manager who had the final authority whether to make the call to MSHA, arrived to the scene of the accident at 2:07 p.m. R. Ex. 1; Tr. 261. Regardless of whether Becker and Austell knew about the accident at 2:01, 2:05, or 2:07 p.m., there was still a more than 15 minute delay in calling the MSHA hotline.

minutes, as the operator made the call 38 minutes or more after being notified of the incident. R. Ex. 1; G. Ex. 8; Tr. 196, 201. The disputed aspect of this case is whether the accident resulted in an injury or injuries having the reasonable potential to cause death, relieving Ash Grove of its duty to report the accident immediately. Ash Grove defends its 38 minute or more delay in calling the MSHA accident hotline by stating that mine officials did not believe Cory's injuries were likely to result in death. R. Br. 19. The Secretary states that numerous circumstances were present that "would lead a reasonably prudent mine operator to conclude that Cory's life may have been in jeopardy." G. Br. 24. To determine whether the accident triggered an affirmative duty for Ash Grove to notify MSHA in 15 minutes the court must analyze whether, based on the evidence presented, the Secretary is right.

Rasmussen concluded the accident resulted in injuries that had a reasonable potential to cause death after considering the extent of the injuries Cory sustained, including his head injury, his fall onto a hard surface, Cory's period of unconsciousness after the fall, his trouble breathing when the ambulance arrived, and various eye witness statements. Tr. 193-94, 237. Rasmussen testified that "people die frequently from falls from a height." Tr. 237. The Commission has held an MSHA inspector's opinion as to the seriousness of an injury, alone, may be relied upon, absent any other evidence of the record. *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003); *Power Operating*, 18 FMSHRC 303, 306-07 (Mar. 1996); *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). Based on the eight foot fall onto an uneven and hard surface, the fact that Cory's head was injured, and Rasmussen's opinion as to the trauma and injuries Cory suffered, the court finds that Rasmussen's decision to cite Ash Grove was correct.

Ash Grove emphasizes that Becker overheard paramedics stating that Cory would be "okay," and as such the injuries did not have the potential to cause death. R. Br. 20. The court rejects this argument, as the opinions of first responders as to a victim's present condition do not render an accident any less serious. In fact, the Commission has held that requiring a medical or clinical opinion of the potential of death before an accident is determined to be reportable under Section 50.10 would frustrate the immediate reporting of near fatal accidents and thwart the purpose of the standard. *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). Moreover, Cory's good fortune in surviving the fall does not negate the seriousness of the accident.

The severity of Cory's injuries, coupled with the circumstances of the fall, and the majority of the witnesses' opinions that Cory seemed dead and was lucky to be alive, indicate to the court that there was a reasonable likelihood the injuries could have resulted in death, triggering the affirmative duty to alert MSHA within 15 minutes of the accident. Ash Grove personnel had the opportunity to make a call within the allotted time, and they did not. Ash Grove violated section 50.10(b) as alleged.

3. Ash Grove's Negligence

Ash Grove contends that its "reasonable belief that there was no immediately reportable accident lowers its negligence." R. Br. 19. Ash Grove asserts that management personnel reasonably deemed Cory's injuries to be nonlife-threatening and that the plant's proximity to a hospital and the paramedics' rapid response make it unlikely that any injury would have been fatal.

The focus of the operator's reasonableness in notifying MSHA of an accident is made considering a totality of the circumstances. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474 (Mar. 2015). The operator must err on the side of caution and "in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015). Additionally, while Section 50.10 accords operators a reasonable opportunity to investigate an incident, the investigation "must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action." *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). In sum, Ash Grove had the duty to make a good faith, but prompt, examination of the incident to determine whether it warranted a Section 50.10(b) call to MSHA, and was required to err in favor of notification.

Austell testified that he did not believe Cory had a reasonable chance of dying because when Austell arrived at the scene of the fall Cory was alert, breathing, and not bleeding uncontrollably. Tr. 259-260. Becker testified that he believed that although Cory indicated he was in pain, Cory's symptoms would not be associated with a fatal injury because Cory was alert and responding to pain. Tr. 267-68. An individual's consciousness when paramedics are present is an inadequate basis to assume an accident is not potentially deadly. In *Cougar Coal,* the Commission rejected an operator's assertion that because an accident victim was conscious and alert when management arrived at the scene, they reasonably surmised that his injuries lacked the potential to cause death. *Cougar Coal Company*, 25 FMSHRC 513, 520 (Sept. 2003).

Ash Grove also emphasizes Becker's testimony that he overheard paramedics make a reassuring statement regarding Cory's condition to support the contention that management reasonably believed the accident was not serious enough to fall under the Section 50.10(b) notification timeframe. R. Br. 19-20. Relying on a reassuring statement made by a first responder does not make an operator any less culpable in failing to call the MSHA hotline in a timely manner. The statement made to Cory that he would be "okay" cannot be presumed to be an assurance to Cory that he would survive and recover. It is equally likely to be a statement made to all victims, whatever the extent of their injuries, to lessen their anxieties and fear. Becker should have erred on the side of caution and reported the incident more expeditiously. The Commission has held that, "[i]n the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident." *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003).

Austell and Becker arrived minutes after the incident, and based their opinions regarding the severity of Cory's injuries largely on the paramedics' responses and demeanors. R. Br. 19-20; Tr. 267-68. The paramedics' calm dispositions are an inadequate basis to conclude an injury is not serious enough to report an accident to MSHA within the fifteen minute timeframe. The Court assumes paramedics are trained to exhibit such an appearance. Relying on a lack of urgency on the part of medical personnel and the absence of any express indication that Cory's injuries were life threatening was unreasonable. Ignorance of the severity of an accident, whether willful or careless, does not excuse an operator's failure to timely report an accident. *Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1189 (10th Cir. 2012).

Ash Grove further asserts that paramedics were on scene within minutes of Cory's fall, and that a hospital is nearby, presumably to indicate that Becker and Austell did not believe Cory's injuries would be life threatening. R. Br. 19; Tr. 256-57. The promptness of first responders and the proximity to a hospital do not weigh in favor of reducing Ash Grove's negligence. If anything, the circumstances indicate that Becker and/or Austell were not needed to administer first aid and could have made a call to MSHA.

Finally, Ash Grove contends that it was not aware of the accident until 2:05 p.m. Tr. 192-193; R. Br. 17; *cf.* discussion *supra* note 36. However, even if this time frame is accurate, the five minutes do not bring Ash Grove into compliance with the 15 minute requirement and will not be considered a mitigating factor in determining negligence. As discussed, management personnel were not needed to administer first aid, and either Austell or Becker could have placed a timely call to MSHA. Rasmussen asked Austell why Ash Grove did not call within the fifteen minute time frame, and instead waited until 38 minutes after the accident occurred, to which Austell responded, "no reason" (Tr. 216), and Craig Becker testified that the only reason MSHA was called was as a "courtesy" to inform them of the accident. Tr. 270-71.

Ash Grove's negligence is compounded by the fact that it had constant notice of the reporting requirement, as shown by evidence that establishes the presence at the time of at least two posters at the mine displaying MSHA's telephone number for reporting accidents. Rasmussen photographed a poster showing the number that was posted on the wall of the control room, the location from where Ash Grove called 911. Tr. 195; G. Ex. 8, p. 3. He also photographed a similar poster that was posted in the break room of the main office. Tr. 195; G. Ex. 8 p. 4.

For the reasons set forth above, and especially for the purposeful nature of the violation, the inspector's high negligence finding is affirmed.

4. Gravity

The failure to notify MSHA in a timely manner when a miner suffers an accident reasonably likely to result in his or her death is a serious violation. Contacting MSHA without delay and within fifteen minutes is one of the critical keys to an effective investigation and an effective investigation is a vital element of the agency's mission to prevent replication.

5. Failure to Preserve Accident Scene, Citation No. 8780423

Section 50.12 requires that after an accident, an operator refrain from altering the site where the incident occurred and preserve the evidence until MSHA's accident investigation is complete. When an injury occurs at a mine with the reasonable potential to cause death, the site of the incident is an "accident site," and the requirements of Section 50.12 are triggered. *Black Beauty Coal Co.*, 37 FMSHRC 687, 691 (April 2015). To establish a violation of Section 50.12, the Secretary must demonstrate that an accident occurred and that the operator altered the site or evidence in some way, without MSHA's permission, and with no compelling justification (as anticipated by the standard). It is undisputed that Gresham's employee moved the truck from the scene of Cory's fall and washed it and that this was done before Rasmussen completed his investigation. G. Br. 28; R. Br. 19; Tr. 304. The Secretary asserts that none of the acceptable

reasons to alter the accident scene existed. The Secretary argues that:

> 1) MSHA's Western District Manager did not grant express consent, 2) the truck did not need to be moved in order to recover or rescue a person, 3) there was no immediate danger present, [and] 4) the truck did not need to be moved in order to prevent the destruction of mining equipment.
>
> G. Br. 28; Tr. 304-306.

Ash Grove relies on its assertions that Cory's injuries did not have the "reasonable potential to cause death," as contended in its challenge to Citation Number 8780423. R. Br.19 Because Cory's injuries do not rise to the level of seriousness to be categorized "an accident," the prohibitions under Section 50.12 were not triggered. *Id.* Ash Grove does not contend that an exception to 50.12 existed justifying the move of Gresham's truck, or that it sought MSHA's permission to move the truck. Therefore, the sole issue is whether the truck qualified as an "accident site," which in turn hinges on whether Cory's injuries had the "reasonable potential to cause death." As discussed above, Cory's eight foot fall and the resulting injuries had a reasonable potential to cause death.[37] The event was an accident, and the situs (i.e., the truck parked at the loadout) became the "accident site." Ash Grove had an affirmative duty to preserve the site so MSHA could investigate. When Goad moved and washed the vehicle, the site was fundamentally altered in violation of Section 50.12.

Goad, an Ash Grove customer, rather than its employee, was never told to wash the truck; he did it on his own. Tr. 304. With that said, the accident site was still within Ash Grove's control and a mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The strict liability regime may be relaxed in limited situations, such as when something occurs outside of an operator's control. *See Sec'y of Labor v. Nat'l Cement of Cal., Inc.,* 573 F. 3d 788, 795 (D.C. Cir. 2009) (stating that strict liability means liability without fault, but does not necessarily mean liability for things that occur outside one's control or supervision.). In this case, Ash Grove had control of the situation, as the truck was washed on its property, using its wash bay. Goad was never told by Ash Grove management to keep the truck at the loadout. Tr. 304, 323. Ash Grove had the ability to intervene and direct its customer to leave the truck at the accident site. It did not do so.

For the reasons set forth, the court finds the company violated Section 50.12 as charged.

6. <u>Gravity</u>

The failure to ensure preservation of an accident scene is a serious violation. Investigation of the unaltered scene with its evidence of an accident's cause and consequences is critical to the agency if it is to prevent similar accidents. Here, where Ash Grove failed to prevent its customers from significantly changing "the facts on the ground" following the

[37] When an injury occurs at a mine with the reasonable potential to cause death, the site of the incident is an "accident site" and the requirements of Section 50.12 are triggered. *Black Beauty Coal Co.,* 37 FMSHRC 687, 691 (April 2015)

accident, the company potentially undermined the effectiveness of the agency's preventative efforts and this in and of itself was a serious failure on the company's part.

7. Ash Grove's Negligence

Rasmussen testified that he charged Ash Grove with "high" negligence because the operator did not offer any mitigating factors or explain its actions in allowing Goad to wash his truck before the MSHA investigation was complete. Tr. 318-19. Rasmussen reasoned that the mine operator has the ultimate responsibility for what happens on its site, and should have directed Goad not to move the truck. Tr. 319.

Because the alteration of the accident scene was the result of a customer's independent action, the court finds the negligence attributable to Ash Grove for the violation of § 50.12 to be moderate, rather than high. Tr. 304, 323. Ash Grove could and should have been more diligent in notifying its customer that the truck needed to remain unchanged and at the loadout pending MSHA's investigation. Ash Grove's later action of taping off the vehicle evidences the ability to control the movement of the truck on its property. Tr. 314. However, Ash Grove had no reason to anticipate Goad's intentional decision to alter the scene.

IV. Other Civil Penalty Criteria and the Assessment of Penalties

The court's assessment of civil penalties must reflect consideration of the six penalty criteria listed in the Mine Act. 30 U.S.C. § 820(i); *Rex Coal Co.,* 38 FMSHRC 208, 214 (Feb. 2016). The criteria are: (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. 30 U.S.C. § 820(i); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000).

As a preface to the analysis, it is important to emphasize that when conducting a penalty assessment, weighing one factor more heavily than others is not an abuse of discretion, provided that all six are considered. *Jim Walter Res.*, *Inc.*, 36 FMSHRC 1972, 1979-80 (Aug. 2014); *Thunder Basin Coal. Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Any substantial divergence of the court from a penalty proposed by the Secretary must be explained in light of the criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

A significant portion of the evidence presented is common to the operation as a whole, and relevant to the civil penalty discussion for all of the violations. Four of the criteria will be approached comprehensively, save for gravity and negligence, because the facts relevant to those components are distinct to each citation. The seriousness of each violation, and the operator's culpability were discussed in the analysis of each violation, and in this case, the gravity and negligence of the violations are the crux of the court's civil penalty determinations. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that a Commission judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria); *Musser Eng'g Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

A. History of Previous Violations

Generally, the operator's past violations of all safety and health standards are considered for this criteria. *Jim Walter Res., Inc.,* 28 FMSHRC 983, 995 (Dec. 2006); *Peabody Coal Co.,* 14 FMSHRC 1258, 1264 (Aug. 1992). One way of gauging all past violations is to consider an operator's rate of violations per inspection day. At the time of the inspection Ash Grove's violation per inspection date rate was .91, lower than the non-metal industry average of 1.11 to 1.14. G. Ex. 1; Tr. 101. There were also no lost time injuries or accidents reported in the fifteen month period at the time of the inspection. Tr. 101. Generally bare information, such as the number of violations, would not be relevant, but when coupled with a qualitative assessment, the violation history becomes more important. *Cantera Green,* 22 FMSHRC 616, 624 (May 2000); *Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.,* 20 FMSHRC 1293, 1305 n.14 (Dec. 1998). Inspector Nelson conceded that "[o]verall Ash Grove runs a pretty good operation." Tr. 62. Nelson's concession that Ash Grove is not a prolific violator, coupled with the relatively lower violation rate than comparable mines, militates in favor of lowering the proposed penalties.

B. Size

The court must determine whether the proposed penalties are appropriate in relation to Ash Grove's size. Ash Grove runs a large operation, including numerous mines in various areas of the country. Tr. 106. No testimony or evidence to the contrary was introduced. Ash Grove's size does not warrant a reduction in the proposed penalties.

C. Ability to Continue in Business

Ash Grove did not aver that the Secretary's proposed penalties, if assessed, will affect its ability to remain in operation. The ability to pay is not in dispute. The Commission has held that, "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg,* 5 FMSHRC at 294 (citing *Buffalo Mining Co.,* 2 IBMA 226, 247-48 (September 1973)); *accord Spurlock Mining Co.,* 16 FMSHRC 697, 700 (April 1994). *See also Broken Hill Mining Co.,* 19 FMSHRC 673, 677 (1997). Ash Grove's ability to pay the proposed penalties does not warrant their reduction.

D. Good Faith

The operator's good-faith compliance after receiving notice of the violation must also be considered. The parties stipulated that Ash Grove abated the citations in good faith. Tr. 248-250. Good faith is assumed, and Ash Grove's timely compliance does not warrant reduced penalties.

WEST 2014-963

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780591	05/22/2014	18002(a)	$1,530.00	$0.00 (VACATED)

The court will vacate Citation Number 8780591. As such, no civil penalty is assessed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8611830	05/28/2014	14110	$1,530.00	$1,250.00

The court finds that the violation was serious, and attributable to the company's moderate negligence. Given these findings, and the other civil penalty criteria, the court assesses a civil penalty of $1,250 for the violation. The reduction is based on Ash Grove's commendable overall history of previous violations.

WEST 2015-503

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780422	08/04/2014	50.10(b)	$5,000.00	$5,000.00

The Secretary proposed a $5,000 civil penalty for Citation No. 8780422. G. Ex. 8. This civil penalty represents the statutory minimum that the Secretary must assess for a violation of an immediate notification violation. 30 C.F.R. § 100.4(c).

Although section 110(a)(2) of the Act, 30 U.S.C. § 820(a)(2), speaks to the Secretary, not to the Commission, the Commission has held that assessment of a non-flagrant violation of Section 50.10(b) is governed by Section 110(a)(2) of the Act and that the Commission's judges must adhere to the minimum and maximum statutory penalties set forth therein. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 483-84 (Mar. 2015). Accordingly, the court has no choice but to assess the $5,000.00 penalty proposed by the Secretary.

WEST 2015-523

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780423	08/04/2014	50.12	$2,000.00	$1,250.00

The court finds that the violation was serious and attributable to the company's moderate negligence. The Secretary proposed a $2,000.00 special assessment for Citation No. 8780423. G. Ex. 9; G. Ex. 10. The court finds that a penalty of $1,250 is appropriate. The reduction is based on Ash Grove's commendable overall history or previous violations.

ORDER

For the reasons set forth above, Citation No. 8780591 is **VACATED**. Citation No. 8611830 and 8780422 are **AFFIRMED** as written. Citation No. 8780423 is **MODIFIED** to reduce the level of negligence from "high" to "moderate." Within 30 days of the date of this decision, Ash Grove **SHALL PAY** a civil penalty of $7,500.[38]

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

Distribution: (Certified Mail)

Daniel Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, Colorado 80204

John Nelson, Esq., Ash Grove Cement Company, 11011 Cody Street, Overland Park, Kansas 6210

/md

[38] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 9, 2016

RBS, INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. WEVA 2014-0691-RM Citation No. 8718116; 02/25/2014 Docket No. WEVA 2014-0693-RM Citation No. 8718118; 02/25/2014 Docket No. WEVA 2014-0694-RM Citation No. 8718119; 02/25/2014 Mine: Greystone Quarry and Plant Mine ID: 46-00018
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RBS, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-0817 A.C. No. 46-00018-346526 Mine: Greystone Quarry and Plant

AMENDED DECISION AND ORDER

Appearances: Daniel T. Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for Petitioner;

Nicholas W. Scala, Esq., Conn Maciel Carey PLLC, Washington, D.C. for Respondent.[1]

Before: Judge L. Zane Gill

[1] At the time of this hearing, Mr. Scala was employed by the Law Offices of Adele Abrams, LLC, as reflected in the transcript dated February 18, 2015.

This proceeding, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves six section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to RBS, Inc., at its Greystone Quarry and Plant. RBS was assessed a total penalty of $24,886.00 for the six violations. The Secretary and the Respondent settled one citation prior to trial: No. 8718115. The parties presented testimony regarding the remaining five citations in South Charleston, West Virginia.

Greystone Quarry is a small limestone quarry near Lewisburg, West Virginia, with a pit area and crushing and screening plants. (Tr. 193:23 – 194:24; 275:2-3) The pit contains a large natural formation of "Greenbrier Limestone," approximately 800 feet deep in some locations. (Tr. 275: 3-6) In the pit area, the operator strips a thin layer of overburden, consisting principally of mud and shale, off of the limestone and then drills and shoots the limestone with explosives leaving behind a "muck pile," also called "shot rock," on the face of the highwall where the material was found. (Tr. 275:7-11) The operator then uses a haul truck to transport the muck pile from the highwall to the crushing plant where it is crushed and classified into numerous different products. (Tr. 275:22 – 276:2)

Inspector Brett Chiccarello was on site for two days in February, 2014, to perform a regular inspection. (Tr. 10:6-8; 118:9-11) Chiccarello had been an inspector for four and a half years and had conducted roughly 250 inspections. (Tr. 27:24-28:11) However, this was his first time at this particular mine, as he was filling in for another inspector from his district field office. (Tr. 10:15 - 11:1; 118:14-16) Chiccarello did not believe that his lack of familiarity with the mine would pose any problem, since he normally inspected other limestone mines as a part of his job. (Tr. 31:4-14) He also had prior experience as a superintendent at a surface coal mine, which Chiccarello testified had similar equipment and highwalls as the Greystone Quarry. (Tr. 28:12 - 29:15; 31:14-17)

Chiccarello issued seven citations and orders during his inspection, four of which he initially designated as unwarrantable failures to correct a health or safety hazard and the result of reckless disregard. (Tr. 118:17 - 119:2) After meeting with his supervisor, Chiccarello vacated one of those four citations entirely and deleted the unwarrantable failure designations for the three remaining 104(d) orders. (Tr. 119:6-21) The level of negligence on those three citations and orders was also reduced from "reckless disregard" to "high." (Tr. 119:12-15).

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

- For Citation No. 8718116, RBS violated Section 56.14101(a)(2), injury was unlikely, the injury could reasonably be expected to be a fatality, the violation was not significant and substantial, one person was affected, and there was low negligence. I assess a penalty of $460.00 for the violation.
- For Citation Nos. 8718118 and 8718119, the Secretary failed to prove a violation of Section 56.9314 and Section 56.320.
- For Citation No. 8718120, RBS violated Section 56.14101(a)(2), injury was unlikely, the injury could reasonably be expected to be fatal, the violation was not significant and

substantial, one person was affected, and there was low negligence. I assess a penalty of $207.00 for the violation.

- For Citation No. 8718121, RBS violated Section 56.14100(a), injury was unlikely, the injury could reasonably be expected to be fatal, the violation was not significant and substantial, one person was affected, and there was moderate negligence. I assess a penalty of $460.00 for the violation.

Stipulations

The following stipulations were submitted in a joint prehearing report:

1. RBS was at all times relevant to these proceedings engaged in mining activities at the Greystone Quarry and Plant in or near Maxwelton, West Virginia.
2. RBS's mining operations affect interstate commerce.
3. RBS is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (the "Mine Act").
4. RBS is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Greystone Quarry and Plant (Federal Mine I.D. No. 46-00018) where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.
6. MSHA Inspector Brett Chiccarello was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from docket at issue in these proceedings.
7. The citations at issue in these proceedings were properly served upon RBS as required by the Act, and were properly contested by RBS.
8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.
9. RBS demonstrated good faith in abating the violations.
10. Without RBS admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of RBS, Inc., to continue in business.

Jt. Pre-Hearing Report at 2.

Basic Legal Principles

Significant and Substantial

The citations 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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

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

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

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

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

Negligence

"Negligence" is 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 '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'g 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 *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co., 7* FMSHRC at 1130.

Penalty

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

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

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 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. 8718116

Inspector Chiccarello issued Citation No. 8718116 on August 14, 2012. It alleges a violation of 30 C.F.R. § 56.14101(a)(2) pursuant to Section 104(a) of the Mine Act. The regulation states, "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). Section 56.14101 is a mandatory safety standard. The citation alleges:

> The parking brake on the Chevy 2500 pickup truck . . . did not work when tested on a grade (7 degrees measured by an abney level). The parking brake did not hold while going up the grade but did hold while facing down the grade. The truck is a standard and exposes miners working in the area to [the hazard of being] struck by [the truck] that has the potential of being fatal. The truck is operated by the superintendent daily on the mine site and he was aware the

> parking brake did not function properly when parked on a grade facing uphill.

Ex. S-4 at 1. The citation further 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-4 at 1-2.

Violation

Citation No. 8718116 was issued during a "manager run" in superintendent Jim Harless's pickup truck. On a typical "manager run" a foreman or superintendent provides the inspector with a guided overview of the mine in a company vehicle at the start of the regular inspection. (Tr. 32: 5-8) Chiccarello issued the citation after asking Harless to check the parking brake in his pickup truck and subsequently discovering that the brake did not "hold" while the vehicle was facing uphill. (Tr. 33:24 – 34:4)

According to Chiccarello, upon being asked to test the brakes, Harless immediately responded that they did not work. (Tr. 32:9-11) Harless then tested the parking brake for the inspector while the vehicle was facing uphill and downhill, on a grade of seven degrees. The brake worked when the vehicle was facing downhill, but did not work in the opposite direction. (Tr. 33:24 – 34:16; Ex. S-4 at 1) Chiccarello and Harless then took the vehicle to a garage at the mine, and a mechanic promptly fixed the brake within 15 minutes. (Tr. 34:23 – 35:3; 263:1-2) After ensuring that the brake now worked both uphill and downhill, Chiccarello terminated the citation at 9:10 in the morning. (Tr. 35:4-12)

The Respondent argues that it did not violate section 56.14101(a)(2) because: (1) the "standard does not state how the parking brakes . . . should be tested" to ensure compliance; and, (2) the Secretary "did not show that the parking brake 'did not hold' when the vehicle was parked in the manner in which the vehicle is parked during actual, day-to-day operations at the mine." Resp't Br. 3, 5. According to the Respondent, its employees normally park the vehicle with its transmission in a low gear, consistent with the guidance in the vehicle owner's manual, and, as a general policy at the mine, with the vehicle facing downhill and into a berm. Resp't Br. 3, 5 (citing Tr. 197:15-22; 303:4-16). According to Harless, the brakes worked properly under these conditions. (Tr. 198:7-22)

Section 56.14101(a)(2) is silent as to the question of whether a vehicle's parking brakes must be capable of holding the equipment both uphill and downhill, and regardless of whether or not the equipment is placed in a low gear prior to testing. The standard is similarly silent as to whether the parking brakes need only hold the equipment when the vehicle is parked in a manner consistent with normal company policy. However, I find that the Secretary's construction of section 56.14101(a)(2) is more "consistent with Commission case law construing regulations to further the protective purposes of the Mine Act." *Sunbelt Rentals, Inc.*, 38 FMSHRC ___, slip op. at 7 n.16, No. VA 2013-275-M, (Jul. 12, 2016).

The standard is undoubtedly directed at the hazard of a vehicle rolling uncontrollably down a grade, which can just as easily occur with a vehicle facing uphill instead of downhill. Therefore, parking brakes must be capable of holding the vehicle in both directions. The

presence of a policy encouraging miners to park the vehicle in only one direction does not alter that requirement, as there is no guarantee that this policy will be followed. (*See* Tr. 41:23 – 42:1) Indeed, Chiccarello credibly testified that miners typically park their vehicles in the direction that they are heading. (Tr. 40:2-6). As to RBS's other parking practice, the fact that the vehicle could remain parked while the transmission was in a low gear does not mean that the defective parking brake complied with the standard's requirement of being able to hold the vehicle by itself. Chiccarello credibly testified that placing the transmission in a low gear could temporarily hold the vehicle in place while masking problems with the parking brake. (Tr. 321:12-24) Since the standard is aimed at the proper functioning of the parking brake, independent of other mechanisms that may also hold the vehicle, the parking brake must be capable of holding the vehicle whether or not it is in a low gear.

For these reasons, I find that the Secretary has established a violation of section 56.14101(a)(2).

Negligence

Chiccarello designated the citation as high negligence because, as a superintendent, Harless was considered a part of mine management, and thus Harless's acknowledgment that the brake was not working meant that management was aware of the violation. Additionally, RBS had been "cited on the exact pickup truck in a previous inspection for the same park[ing] brake." (Tr. 37:8-14) The Respondent argues that Chiccarello incorrectly recalled Harless's statements. Resp't Br. 6. Harless testified that he only told Chiccarello that the brakes were not working *after* Harless had already tested them for him during the inspection and learned of the defective condition himself. (Tr. 196:7-15) Harless claimed that he was not aware of the defective brake prior to that, because he had previously tested it under normal parking conditions at the mine, and the brake functioned properly. (Tr. 197:4-14) The Respondent also argues that the Secretary never introduced the prior alleged citation into evidence and that Chiccarello himself could not remember the precise date or substance of the previous citation. Resp't Br. 6-7 (citing Tr. 139:3-7; 140:13-21).

I find the level of negligence to be lower than alleged. I credit Harless's testimony that he was unaware of the defective parking brake before testing it for Chiccarello and that Chiccarello's belief that Harless acknowledged the defect even before testing it was mistaken. The company's normal testing procedure for the brake would not have alerted Harless to the condition. RBS, as a policy, parked its vehicles downhill into a berm because management believed that to be a much safer practice than parking the vehicle uphill and chocking it. (Tr. 197:15-22; 303:4-16) Harless also typically placed the transmission in a low gear before parking the vehicle, which would have obscured the defective parking brake. (Tr. 198:14-22) While Harless is held to a high standard of care as a superintendent at the mine, there are considerable mitigating factors to explain why he was not aware of the violation. The fact that RBS had violated the same standard with the same pickup truck before is relevant to my negligence evaluation, but the single past violation alone does not establish the "aggravated lack of care" associated with a "high negligence" finding. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Therefore, I find that the level of negligence was "moderate" instead of "high."

Significant and Substantial and Gravity

The first prong of the *Mathies* test has been met. The defective brake also created a discrete safety hazard that the vehicle could fail to remain parked on a grade and roll dangerously toward a miner standing behind it, leading to a fatal injury. (Tr. 37:15-22) Thus, both the "fatal" and "1 person affected" designations were appropriate, and the second and fourth *Mathies* prongs have been satisfied. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury. I find that there was not.

Because the parking brake worked when the vehicle was facing downhill (and presumably on level ground as well), the brake would hold the vehicle in most circumstances, even without the additional steps that the company took to prevent an accident. The company's policy of always parking vehicles downhill into a berm, with the transmission in a low gear, further decreased the likelihood of injury, since the parking brake held the vehicle in each of those scenarios.

The Secretary argues that any parking policy at the mine was not communicated to Chiccarello and not implemented consistently during the inspection. Sec'y Br. 7. However, Chiccarello did testify that Harless told him "he parks in a berm when he stops and never parks uphill." (Tr. 132:14-22) I conclude that Harless parked in this manner because of the company's policy, which was credibly described in detail by the company's vice-president, William Snyder, at the hearing. (Tr. 302:11 – 303:16) To the extent that Harless was inconsistent in following that policy during the inspection, I conclude that he only violated that policy during the inspection in order to comply with Chiccarello's directions during the inspection. (Tr. 196:1-6)

Given these findings, the S&S designation will be deleted.

Penalty

The Secretary assessed the penalty for this citation at $7,578.00. Exhibit A of the Secretary's penalty petition credits RBS with 27,807 hours worked annually at the Greystone Quarry. Ex. S-1. Based on this information, I consider RBS to be a relatively small operator. Additionally, this was the first time that RBS was cited under this standard within the 15 months prior to the inspection, although RBS had committed 37 violations in the prior 5 inspection days. Ex. S-1. As I found above, RBS was moderately negligent. I find that the company demonstrated good faith in the abatement of the violative condition. The parties stipulated to the fact that the assessed penalty will not significantly affect RBS's ability to stay in business. Jt. Pre-Hearing Report. As to the gravity of the violation, I found the violation was not S&S, as it was unlikely that the hazard contributed to by the violation would lead to injury. However, I found that if an injury did occur, it could be reasonably expected to be fatal to one miner.

The Secretary failed to prove that the gravity of the violation or the degree of operator negligence was as high as alleged. Therefore, I assess a penalty in the amount of $460.00.

Citations Nos. 8718118 and 8718119

On February 25, 2014, Inspector Chiccarello observed what he believed to be a hazardous muckpile on a highwall in the pit area, which prompted him to issue three citations alleging violations of the Secretary's mandatory safety standards. One of the three citations (No. 8718117) was subsequently vacated for being duplicative of Citation No. 8718118. (Tr. 142:4-10)

Citation 8718118 alleges a violation of Section 56.9314, which requires that "muckpile faces shall be trimmed to prevent hazards to persons." 30 C.F.R. § 56.9314. The citation states:

> Upon an inspection of the second level mine pit it was observed that unconsolidated material had not been trimmed back and/or sloped to the ang[le] of repose on the 50 foot high muck pile. Employees working in and around this area were exposed to the possibility of injury from the fall-of-material hazard. The mine regularly operates a 9888 front-end loader in this area. The front-end loader was not working in the area at the time of the inspection. I was informed the loader was working against the pile earlier in the day and yesterday February 24th 2014. Mine management indicated they do work out of the pile and he did not consider it a hazard.

Ex. S-6 at 1. The citation further 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-6 at 1, 3. The citation was terminated on March 12, 2014. The termination order states:

> Upon inspection the muck pile in the 2nd level pit was knocked down and no longer has material overhanging the pile. The material is now sloped for easy access for the front end loader to dig from the pile. Mine management has brought in a Hitachi UH261 excavator and CAT OSK bull dozer to maintain the piles. This order is terminated.

Ex. S-6 at 2.

Chiccarello also issued Citation No. 8718119 for an alleged violation of Section 56.3200. The standard states:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be

> posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200. The citation alleges:

> Upon an inspection of the of the pit's 50 foot high wall (Muck Pile), ground conditions were observed that created a hazard to mine employees. Several large boulders had not been scaled down at the southwest corner of the working face of the high wall. No warning signs or barriers were provided to prevent entry in this area, until this condition could be corrected. This hazard exposed the front end loader operator and other haulage equipment in the area to the possibility of fatal injury should the rocks fall. This area is where active mining is being conducted. I was informed work was conducted at the toe of the wall earlier in the day and yesterday February 24, 2014. Mine management was aware of the condition and did not think [it] was a hazard. He also stated they were finished in the area and were going to shoot the high wall next to it to bring down the remaining loose material that was hanging up high on the muck pile. There was no catch berm or signs to warn or prevent entry to the area.

Ex. S-8 at 1-2. The citation was terminated the same day, once a "sign and a berm were put in place to warn and prevent miners from entering the affected area." Ex. S-8 at 3. The citation further 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-8 at 1-2, 4.

Violation

Chiccarello issued Citation Nos. 8718118 and 8718119 after observing a muckpile consisting of several large rocks and boulders on the face of a highwall, hanging roughly 50 feet overhead. (Tr. 49:4-9) Chiccarello felt that the condition posed a hazard due to the size of the boulders and because they were not at an angle of repose. (Tr. 49:6-9; 55:12-24) He worried that miners digging at the toe of the highwall could be crushed if mining activities or thawing caused by fluctuating weather loosened the rocks. (Tr. 50:18-24) Citation No. 8718118 was issued for the failure to trim the muck pile on the highwall, while Citation No. 8718119 was issued for the failure to block off the area below and post a sign to prevent miners from entering the area, where they could be struck by falling rocks. Exs. S-6 at 1; S-8 at 1-2.

Sections 56.3200 and 56.9314 require the Secretary to first prove that the cited ground conditions and failure to trim the muckpile created a hazard to persons. I find that the Secretary failed to meet this burden for both citations. Harless credibly testified that the Respondent had previously scaled the highwall and tried to dislodge the cited rocks with an excavator in the course of its normal mining operations, but that the rocks were tied to the highwall and did not budge. (Tr. 201:19 – 202) Eventually, the rocks were blasted loose from the highwall in order to

abate one of the citations. (Tr. 205:24 – 206:1) Given the difficulty in removing the muck pile, I do not find that the rocks posed a hazard of coming loose and falling on miners below. *Cf. Springfield Underground, Inc.*, 17 FMSHRC 613 (Apr. 1995) (ALJ Maurer) (finding that ground conditions do not create a "hazard to persons" for the purpose of section 57.3200 if the allegedly hazardous "material has to be pried off the rib with thousands of pounds of material force").

It is understandable that the inspector may have believed there was a hazard from his perspective, as the boulders do appear dangerously large, unstable, and capable of falling from the highwall in the photographs he took prior to the citations' abatement. *See* Ex. S-7 at 4-5. Even Snyder, the company's vice-president, believed that the rocks posed a hazard when he viewed them from the bottom of the highwall. (Tr. 296:13-18) However, a closer vantage point and further information about the company's prior unsuccessful attempts to dislodge the rocks convinced Snyder that there was no hazard, and I agree with his later assessment. (Tr. 296:19 – 298:24)

The Secretary argues that the Respondent admitted to Chiccarello during the inspection that it did not have any way of reaching the muck pile with the equipment on site, and that there was no excavator or bulldozer on site during the inspection which could have created a path to the muckpile and trimmed it. Sec'y Br. 13. According to the Secretary's theory, these facts led to RBS failing to address the hazard, instead of any genuine belief that there was no hazard. *Id.* I find that that the inspector simply misconstrued a comment from an RBS agent in reaching this conclusion.

Harless denied ever telling Chiccarello or believing that it was unsafe to travel to the muck pile. (Tr. 210:11-15) However, Chiccarello testified that when he sought an explanation for why RBS had not trimmed the muck pile prior to the citation, he was told that the only way the company could remove the rocks was by blasting them, as the company had no other way of getting them down. (Tr. 159:1-3) It appears that the inspector interpreted this statement to mean that the company had no way of safely reaching the muckpile without further blasting, when in fact it meant that the company had no way of dislodging the rocks without blasting them. Additionally, both Harless and Mark Drennen, the mine mechanic, credibly testified that there was an excavator and bulldozer on site on the day of the inspection. (Tr. 204:9-12; 266:21 – 267:1)

To summarize, I find that RBS did have an excavator and bulldozer on site that could safely access the muckpile and that the company did attempt to trim the muckpile with the excavator prior to being cited, but that the rocks that Chiccarello identified as hazardous could not be dislodged in this manner. Instead, the company had to blast the rocks to trim the muckpile successfully. I cannot find the cited rocks to be hazardous given that they could only be pried loose with explosive material instead of an excavator.

For these reasons, I find that the Secretary has failed to establish the fact of violation for Citation Nos. 8718118 and 8718119.

Citation Nos. 8718120 and 8718121

On February 26, 2014, Chiccarello issued Citation Nos. 8718120 and 8718121 for violations of Sections 56.14101(a)(2) and 56.14100(a), pursuant to Section 104(a) of the Mine Act.

Sections 56.14101(a)(2) states, "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). Citation No. 8718120 alleges:

> The Komatsu WA500, company #L-34, was put into use to load a truck while the loader operator knew the park brake did not work. He stated the park brake has not worked since 2/11/2014. The preoperational checks showed the park brake was not functional on seven different dates from 2/11/2014 through 2/19/2014. The preoperational check list was never turned into mine management.[2] This hazard exposes miners to injuries that have the potential of being fatal. The loader is used throughout the mining operation to load customer trucks.

Ex. S-10 at 1. The citation further 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 low level of negligence. Ex. S-10 at 1.

Chiccarello also issued Citation No. 8718121 for an alleged violation of Section 56.14100(a), which states "Self-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). The citation alleges:

> The pre-operational check was not conducted for the Komatsu WASOO, company #L-34, as stated by the loader operator. The last preoperational check was conducted on 2/19/2014. That preop check indicated the park brake did not work. The loader operator [k]new this and said he had to load a truck and needed a loader and used it. The loader operator knew he is required to do a preop check but neglected to do so. Miners were exposed to a higher

[2] Although a loader operator had apparently conducted pre-op exams on the defective vehicle for nearly two weeks without turning in the documentation for those exams to management, none of the post-hearing briefs reference this fact or explain its relevance to the citation. Chiccarello suggested that this fact mitigates RBS's negligence because management would not have been aware of the defect if they never received the pre-op forms. (Tr. 96:12-19) However, they were aware that the equipment was tagged out for a defect, and the superintendent learned of the specific defect shortly before the company was cited. (Tr. 108:8-9; 109:5-11) The more pertinent issue is RBS's negligence in allowing the defective vehicle to be returned into service.

> degree of hazards and injuries due to the failure to observe, report, and correct potential defects and hazards on the equipment.

Ex. S-12 at 1. The citation further 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 low level of negligence. Ex. S-12 at 1.

Violation

These citations both concern a front-end loader that was improperly put back into service by an RBS employee after being tagged out for repairs due to a defective parking brake. Citation No. 8718120 was issued for the defect itself, while Citation No. 8718121 related to the loader operator's failure to conduct a pre-operation ("pre-op") exam prior to using the loader. Exs. S-10 at 1, S-12 at 1.

The loader had been tagged out due to the defect for at least a few days – possibly up to two weeks prior to the citations – and was sitting unused at the mine during that period.[3] (Tr. 214:3-8) It was not fixed immediately upon being tagged out because it was merely a spare loader, and the mine mechanic, Mark Drennen, was attending to higher priority concerns on other equipment. (Tr. 266:1-3) However, on the day of the inspection, one of the primary loaders at the mine broke down, and a loader operator subsequently informed the mine superintendent, Jim Harless, of the need to fix the parking brake on the spare loader so that he could continue production. (Tr. 214:9-12) Harless told the operator that he would fetch the mechanic and return within about five minutes, and he explicitly instructed the operator not to move the defective loader until he returned. (Tr. 214:12-18)

Before Harless and Drennen returned, Chiccarello observed the loader operator parking the spare loader in defiance of Harless's instructions. (Tr. 87:4-8). Chiccarello questioned the employee and discovered that the parking brake did not work and that he had not conducted a pre-op check on the equipment before using it. (Tr. 87:9-13) When Chiccarello asked him why he would do this, the loader operator responded, "[T]hat's how we do it around here[;] I had to get that customer truck out of here." (Tr. 87:14-17) Chiccarello cited the company for the defective brake and a failure to conduct a pre-op exam, and the citations were abated that day once Drennen repaired the defect and the loader operator was task trained on how to fill out and turn in pre-op exam sheets. Ex. S-10 at 1; S-12 at 1.

The Respondent argues that it complied with both standards because the loader was tagged out. Since "equipment that has been 'removed from service' is not required to be defect-free" for the purposes of 56.14101(a)(2) and the pre-op exam requirements in 56.14100(a) only

[3] The record is unclear about the amount of time that the defective vehicle spent tagged out of service. Harless suggested that it had been sitting out in the tag out area for a few days. (Tr. 214:4-8) Chiccarello speculated that the vehicle had been tagged out for a week or two. (Tr. 108:11-15) Chiccarello noted in passing that the fact that pre-ops were being documented regularly on that vehicle during that timeframe raised his suspicion that an operator may have been putting the defective vehicle back into service on other occasions. (Tr. 109:21 – 110:2) But, the Secretary did not develop this argument any further at hearing or in his post-hearing brief.

apply to "equipment to be used during a shift," the Respondent argues that its removal of the loader from service with no intention to use it during a shift negates the fact of the violation for both citations. Resp't Br. 12-17. I disagree. The vehicle may have been removed from service when it was tagged out, but it was very much in service for the purpose of section 56.14101(a)(2) when the inspector observed it and issued a citation. I also find that the phrase "to be used during a shift" in section 54.14100(a) encompasses situations in which the equipment is actually used during a shift.

Since there is no dispute that the parking brake did not hold the vehicle and that the loader operator failed to conduct a pre-op inspection prior to use of the vehicle, I find a violation for both citations.

Negligence

Chiccarello designated the negligence for both citations as "low" because the mine superintendent had instructed the loader operator not to use the defective vehicle, miners were trained to perform pre-op exams and not to use defective or tagged out equipment, and mine management was not aware of the defect on the vehicle prior to the day of the inspection. (Tr. 95:4-13; 105:4-17; 177:1 – 178:12) The vehicle was parked in the designated tag-out area during that period, so mine management would have known that the vehicle was defective in some way, but they would not have expected the defective equipment to be used or to cause any problems. (Tr. 109:5-11; 117:1-6)

The Respondent argues that the level of negligence should be lowered to "none" for both citations in effect because the violations reflected the willful misconduct of a rogue employee rather than any failure to exercise diligence on the part of the company. Resp't Br. 15, 17. However, the Commission has stated that "[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent." *A.H. Smith Stone, Co.* 5 FMSHRC 13, 15 (Jan. 1983). In assessing an operator's negligence in such cases, the Commission takes into account "such considerations as . . . the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *Id.* I find the employee's statement, "That's how we do it around here[;] I had to get that customer truck out of here," to be relevant to this analysis. (Tr. 87:15-17) Even if the employee was entirely mistaken about the mine's tendency to value production over safety, greater efforts in training and supervision were required to make that clear to him.

Additionally, there is some indication that the failure to conduct a pre-op in Citation No. 8718121 was not an isolated incident, but instead indicated larger problems with the pre-op practices at the mine. Multiple weeks' worth of pre-op documentation, including for the pre-op that originally identified the parking brake defect, was not turned in to management and was instead left inside the spare loader. (Tr. 96:13-22) MSHA requires miners to notify management when they identify a hazardous defect in a pre-op. (Tr. 178:20-23) The same breakdown in training and supervision that presumably led to those repeated failures likely contributed to the loader operator failing to conduct a pre-op before returning the vehicle into service.

I find that the "low negligence" designation was appropriate for Citation No 8718120. However, I find that the level of negligence for Citation No. 8718120 was even greater than originally designated, that is "moderate" instead of "low."

Gravity and Significant and Substantial

Chiccarello found both violations to be significant and substantial and reasonably likely to lead to a fatal injury to one miner. Ex. S-10, S-12. The defective parking brake for Citation No. 8718120 posed a discrete safety hazard of a large front-end loader striking or crushing a single miner in its path, and such injury could reasonably be expected to be fatal to one person. (Tr. 92:19 – 93:4) Citation No. 8718121 presented the additional discrete safety hazard of the loader operator failing to detect further defects on the vehicle without a pre-op inspection. (Tr. 104:19 – 105:3) Operating the vehicle with unidentified defects could likewise prove fatal to a single miner. Therefore I agree with the "fatal" and "one person affected" designations for both citations and find that three of the four *Mathies* prongs have been satisfied. The remaining question is whether there was a reasonable likelihood of injury. I find there was not.

The primary consideration for this finding is the very limited amount of time that miners were exposed to the vehicle's hazard, even assuming continued mining operation. The defective vehicle had been tagged out of service and was not used prior to the inspection in that defective state, and the mine's mechanic was already on his way to repair the vehicle when the inspector cited it. (Tr. 214:9-18; 264:21 – 265:8) I do not find that an accident or injury was reasonably likely in that small window of time between when the vehicle was put back into service and when the mechanic arrived. I find that an injury resulting from this hazard was unlikely.

The S&S designations for Citation Nos. 8718120 and 8718121 will be deleted.

Penalty

The Secretary assessed the penalties for these two citation at $1,026.00 each. I have found RBS to be a relatively small operator. Exhibit A of the Secretary's penalty petition indicates that RBS had an insignificant history of violating the cited mandatory safety standards for these two citations, but a more considerable number of violations generally in the prior seven inspection days. Ex. S-1. I found a low level of negligence for Citation No. 8718120, but a "moderate" amount of negligence for Citation No. 8718121. I find that the company demonstrated good faith in the abatement of the violative condition. The parties stipulated to the fact that the assessed penalties will not significantly affect RBS's ability to stay in business.[4] Jt. Pre-Hearing Report. As to the gravity of the violations, I found the violations were not S&S, as it was unlikely that the hazards contributed to by the violations would lead to injury. However, I found that if an injury did occur, it could be reasonably expected to be fatal to one miner.

[4] The parties argued extensively at hearing and in their post-hearing briefs about whether an increased penalty would affect the operator's ability to remain in business. Since I have not increased the penalties on any of the citations and the parties have already stipulated to the operator's ability to pay the assessed penalties, there is no need to resolve this dispute.

The Secretary failed to prove that the gravity of the violations was as high as alleged. However, the level of negligence for Citation No. 8718121 was higher than alleged. Therefore, I assess a penalty in the amount of $207.00 for Citation No. 8718120 and $460.00 for Citation No. 8718121.

Citation No. 8718115

At the hearing, the parties agreed to settle Citation No. 8718115 for the originally assessed amount of $100.00, without any modifications. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

In view of the above findings, conclusions, and settlement approval, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

- Modify Citation No. 8718116 to reduce the level of negligence from "high" to "moderate," to delete the "significant and substantial" designation, and to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely;"

- Vacate Citation Nos. 8718118 and 8718119;

- Modify Citation No. 8718120 to delete the "significant and substantial" designations and to reduce the likelihood of injury from "reasonably likely" to "unlikely."

- Modify Citation No. 8718121 to delete the "significant and substantial" designations, to reduce the likelihood of injury from "reasonably likely" to "unlikely," and to raise the level of negligence from "low" to "moderate."

WHEREFORE, it is **ORDERED** that RBS pay a penalty of $1,227.00 within thirty (30) days of the filing of this decision.[5]

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

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

Distribution:

Daniel T. Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Nicholas W. Scala, Esq., Conn Marciel Carey PLLC, 5335 Wisconsin Avenue NW, Suite 660, Washington, D.C. 20015

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

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

August 18, 2016

CANYON FUEL COMPANY, LLC, Contestant	CONTEST PROCEEDINGS
v.	Docket No. WEST 2015-676-R Citation No. 8480766; 05/26/2015
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. WEST 2015-677-R Citation No. 8483666; 05/22/2015 Sufco Mine Mine ID 42-00089
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2015-635 A.C. No. 42-00089-380386
v.	Docket No. WEST 2016-214 A.C. No. 42-00089-385868
CANYON FUEL COMPANY, LLC, Respondent	Sufco Mine

DECISION

Appearances: Alicia A.W. Truman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary;
R. Henry Moore, Esq., Jackson Kelly, Pittsburgh, PA, for the Respondent.

Before: Judge Manning

These cases are before me upon notices of contest filed by Canyon Fuel Company, LLC ("Canyon Fuel") and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Canyon Fuel 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 Salt Lake City, Utah, and filed post-hearing briefs. Three section 104(a) citations were adjudicated at the hearing. Canyon Fuel operates the Sufco Mine, a large underground coal mine in Sevier County, Utah. For the reasons set forth below, I vacate Citation No. 8483666, modify Citation No. 8480766, and affirm Citation No. 8483766.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. This decision includes a detailed summary of the testimony because this case raises rather unique issues and an understanding of the evidence presented is necessary to appreciate the legal issues raised.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation Nos. 8480766 and 8483766 both involve the surface termination point of the mine's alternate escapeway. Many of the key facts are the same with regard to both citations. I discuss Citation No. 8483766 first, but the evidence for that citation is also relevant to Citation No. 8480766.

A. Citation No. 8483766

Citation No. 8483766 alleges a violation of section 75.380(d)(5) of the Secretary's safety standards and asserts that, in the event of an emergency, the surface termination point of the mine's designated alternate/secondary escapeway was not accessible via a roadway for land-traveling vehicles. Section 75.380(d)(5) requires that each escapeway be "[l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners[.]" 30 C.F.R. § 75.380(d)(5).

This citation was issued to Canyon Fuel on March 16, 2015. The citation alleges that an injury was unlikely to be sustained and that the violation was not of a significant and substantial nature ("S&S), but that if any injury did occur it would reasonably be expected to result in lost workdays or restricted duty. The citation further alleges that 20 persons were affected by the cited conditions and that Canyon Fuel's negligence was moderate. The Secretary has proposed a penalty of $425.00 for this alleged violation.

Summary of the Evidence Presented by the Secretary

In June of 2014, Russell Riley,[1] the District Manager for Coal District 9, visited Canyon Fuel's Sufco Mine. (Tr. 16, 20). Canyon Fuel operates the Sufco Mine, an underground coal mine with both longwall and conventional mining sections. (Tr. 20). The mine liberates very little methane. (Tr. 100). About 80 to 90 miners work at the mine per shift, with roughly 20 of those miners in the two working sections at the mine. (Tr. 21, 48, 90).

[1] Riley has been in the mining industry since 1975, with MSHA for 16 years, and has been the District Manager for Coal District 9 for two and a half years. (Tr. 16, 18). As District Manager he is involved in plan reviews, over which he has ultimate authority, and oversees the technical division, enforcement division, as well as other divisions. (Tr. 16-17). Prior to his time as District Manager he worked at MSHA headquarters, as well as in MSHA offices in Pennsylvania, West Virginia, and Washington state. (Tr. 17). He has been on mine rescue teams, been a mine rescue instructor, and has taught mine foremen how to read and develop mine maps. (Tr. 19).

During his visit, Riley met with the mine's safety department and asked to see an escapeway map. (Tr. 21-22). He observed that the primary escapeway designated on the map exited the mine through the West Lease Portal, while the alternate escapeway, which was significantly shorter, exited through the 4 East Fan Portal.[2] (Tr. 22-23; GX-2). He noted that other portals existed close to the working sections and asked why those portals were not used for escapeways if they were intakes. (Tr. 22). According to Riley, mine personnel explained that there were no roads to those portals. (Tr. 23). In addition, mine personnel told him that there was no road to the 4 East Fan Portal, which served as the termination point of the mine's alternate escapeway. (Tr. 23-24). When Riley asked how the operator would take away people from that portal in an emergency, mine personnel told him that they did not know and had never been asked. (Tr. 24-25). Although Riley visited other portals in the mine that day, he did not travel to the 4 East Fan Portal. (Tr. 30). It was his understanding that the geography of the 4 East Fan Portal was similar to that of the 3 East Portal, which he did visit. He also understood that the 4 East Fan Portal exited into a steep canyon and onto a 200 foot long, by 50 foot wide ledge. Several structures were present on the ledge including fan structures and an air discharge fan that pointed up into the air to avoid contamination with intake air. (Tr. 28-31). The power for the fan comes from cables that travel through the mine.

Riley testified that he told mine personnel that he was concerned that it would be difficult to evacuate miners from the alternate escapeway's termination point at the 4 East Fan Portal. (Tr. 32). Mine management told him that the alternate escapeway had been that way for at least 20 years and it was the most direct way out of the mine. (Tr. 33). Riley did not cite the mine for a violation of any safety standard because he wanted to get more details. (Tr. 37). He told management that he would look into why the escapeway was allowed to exist that way for so long, but assumed it was an MSHA oversight. (Tr. 33). On cross-examination he acknowledged that inspectors would have performed quarterly inspections at the mine and travelled the air courses and the mine would have submitted ventilation maps, which identified the escapeways and air courses, for annual review by MSHA. (Tr. 93-95). When Riley left the mine that day it was his understanding that the mine was going to take action to correct what he believed was a deficiency and relocate the alternate escapeway to run parallel to the primary escapeway that terminated at the West Lease Portal. (Tr. 38).

On March 16, 2015, about nine months after his earlier visit to the mine, Riley made the decision to issue Citation No. 8483766 following a discussion with mine personnel in which he learned that the mine was not going to change the alternate escapeway route. (Tr. 36, 39). At hearing, Riley explained that, once miners exited the mine at the 4 East Fan Portal, there was "no reasonable means to get the miners, including disabled miners, off of the canyon edge" and, as a result, that mine portal was not suitable for the safe evacuation of miners. (Tr. 40-41). Riley understands the word "evacuation," as used in the standard, to mean "move out of the danger, move out of harm's way to a safe place." (Tr. 40). It was his opinion that the area outside the mine opening presented the potential for hazards, including contamination by gases and smoke in the event of a fire or explosion. (Tr. 41). Riley acknowledged that the standard does not require

[2] Riley testified regarding the primary and alternate escapeways while referring to GX-2, a mine map dated March of 2015. (Tr. 26). The primary escapeway was marked with a blue line on the map, while the alternate was marked with a red line. (Tr. 27-28)

that the portal be accessible by a road but opined that, when there is a disaster and miners get CO poisoning, burns, or are in shock, they need to get to medical assistance or transport immediately. (Tr. 42).

Riley explained that MSHA looked at potential alternatives to the mine's 4 East Fan Portal alternate escape route. After looking at other potential alternate escapeways, MSHA determined that an alternate escapeway which paralleled the primary escapeway out the West Lease Portal would satisfy the standard's requirements and make the primary and alternate escapeways separate and distinct for the full length.[3] (Tr. 42-44; GX-2). Riley stated that, in evaluating the best route, MSHA considers all three factors in the standard, i.e., whether the proposed route is the most direct, safe, and practical. (Tr. 50-51). He also pointed to MSHA's Program Policy Manual, which states that the chosen route does not have to be the shortest and that other considerations are important. (Tr. 58-59; GX-4). Finally, he noted that the decision should be made while taking into account all of the standards that apply to escapeways and evacuations and not just section 75.380(d)(5). (Tr. 59).

Riley acknowledged that the 4 East Fan Portal route was more direct than MSHA's proposed alternate route out the West Lease Portal and it would be easier for miners to carry someone on a stretcher out to the 4 East Fan Portal. (Tr. 52, 98-100). However, he explained that distance is not the primary factor of concern in every situation and, in this case, the proposed West Lease alternate escapeway route was approximately the same distance as the primary escapeway that also exited out the West Lease Portal. (Tr. 56, 133). Moreover, roughly two thirds of the proposed West Lease alternate escapeway could be driven if the mine staged vehicles in the escapeway. (Tr. 133-134).

Riley agreed that the number of overcasts in an escapeway is something that a mine operator must consider but did not believe that overcasts make a route much more difficult because going over them only takes a few seconds. (Tr. 53-54). He conceded, however, that if injured miners have to be carried over overcasts, it could take more than a matter of seconds. (Tr. 109). Evacuating out the proposed West Lease route would require crossing over twelve overcasts using stairs. (Tr. 111). While he acknowledged that the number of SCSR caches needed along a route should be taken into consideration, he did not believe that a difference in that number makes one route safer than another route and stated that, since the proposed West Lease route was ventilated with intake air, it was unlikely that miners traveling out that way would need SCSRs. (Tr. 54, 132-133). He agreed, however, that miners carrying an injured miner on a stretcher would use up the oxygen from the SCSRs faster, thereby requiring them to change SCSRs more often. (Tr. 101). Riley acknowledged that there were a number of seals along the proposed West Lease route. (Tr. 106).

Riley concluded that the proposed West Lease alternate route was safe, direct, and took miners out a portal where medical transportation could be waiting for them. (Tr. 43, 132). This alternate escapeway would be in return air from the working sections south to the 4 East turnout, but would then be in a separate fresh air intake all the way out of the mine. (Tr. 44). Riley opined

[3] Riley testified that the alternate escapeway route proposed by MSHA is marked with a green line on GX-2. (Tr. 43).

that, in order for the proposed West Lease alternate escapeway to be compliant, the mine would need to rehabilitate the entries and put in signs, reflectors, a lifeline and some SCSR caches. (Tr. 70, 106, 108).

Riley testified that Canyon Fuel offered to make changes to the 4 East Fan Portal termination point in an effort to satisfy the standard, but he did not think the proposed changes were sufficient. (Tr. 59). Mine personnel said they would develop a safe house and provide additional medical supplies and food in line with what was required for a refuge alternative in the mine. (Tr. 59, 129). Riley acknowledged that the area would probably have power since there was a generator outside the portal. (Tr. 129-130). Because some escaping miners may well need immediate medical transportation, the use of a refuge at the 4 East Fan Portal would not meet the requirements of the safety standard. (Tr. 60, 134-135). Although Canyon Fuel officials said they would look into the possibility of retrieving miners from the 4 East Fan Portal using a helicopter, they had not taken those steps prior to the issuance of the Citation No. 8483766. (Tr. 60).

Canyon Fuel looked into the availability of helicopter rescue services from Intermountain Life Flight and communicated its findings to MSHA. Riley learned the helicopter service cannot land the helicopter on the fan pad at the portal and would be required to drop a basket from the helicopter in order to retrieve miners. (Tr. 62, 65-66; GX-5 and 6). These helicopters cannot fly in winds greater than 45 mph, with less than three miles of visibility, nor in "rain, ice, sleet, fog, snow, heavy cloud cover, and could not drop a basket [in winds] over 10 [mph.]" (Tr. 62-65, 67-68, 118; GX-5 and 6). In addition, rescue operations cannot be performed at night. Moreover, this helicopter service is the only civil helicopter operator in the area capable of basket rescues, which presents the possibility that its helicopters could be on another job. Given that the mine operates in the winter months when the helicopter service experienced the most "non-flying weather days," as well as during the night, Riley felt that helicopter rescues are too unreliable and cannot provide the 24 hour a day, 7 day a week coverage required under the Secretary's regulations. (Tr. 63-65, 68, 118).

Sydel Yeager,[4] a Supervisory Coal Mine Inspector for MSHA, traveled to the mine prior to the hearing and marked a map of the proposed West Lease alternate escapeway while walking the route with an inspection party. (Tr. 174-175; GX-16). It took Yeager and her inspection party five to six hours to travel the proposed alternate escapeway while conducting an inspection along the way. (Tr. 199-201, 208). They walked from crosscut 212 to 176, which was not drivable and required them to make their way over three banks of overcasts, then took a vehicle from crosscut 176 to crosscut 4. (Tr. 181, 182, 198-199, 212). She stated that, while a miner could walk all the way out, she would hope that the mine would stage enough vehicles for miners to drive out. (Tr. 200-202, 208). Yeager noted that, with the exception of the first eight blocks outby crosscut 212 in the North Mains, the proposed alternate escapeway was in intake air and the risk of smoke inhalation was unlikely. (Tr. 177, 180). According to Yeager, the proposed alternate escapeway out to the West Lease Portal would not be affected by a fire in the working section or in the belt

[4] Yeager has been with MSHA for four years, during which she has been a ventilation specialist, mining engineer, and part of MSHA's Mine Emergency Operations Division of Technical Support. (Tr. 170-172). Prior to working for MSHA she worked in the mining industry as a ventilation engineer and industrial hygienist. (Tr. 173).

entry. (Tr. 180). While the proposed route did make a number of turns, the route was easy to identify because it was bolted, meshed, and had been cleaned up fairly well. (Tr. 181). Yeager acknowledged that there were a few areas where the route would need to be widened, including some of the overcast stairs and that some rehabilitation, supplemental support, extra SCSRs and other changes would be needed. (Tr. 182-186, 203). Yeager also acknowledged that, although there were seals along the route that were outgassing at the time, it was unlikely that the outgassing would render the route unsafe. (Tr. 346-347).

Subsequent to the issuance of the citation, James Preece,[5] the Assistant District Manager for Coal District 9, traveled to the mine to examine the alternate escapeway and the 4 East Fan Portal. (Tr. 149). Preece confirmed Riley's estimated measurements of the ledge area and described it as being on the side of a canyon. (Tr. 150). He noted that the multiple structures on the ledge took up 50-70% of the available area leaving two open areas, both roughly 25 feet by 25 feet. (Tr. 150-151). He testified that the mine is in a remote, mountainous area, with the portal on the side of a canyon. (Tr. 151-154; GX-10, 11, 13). Like Riley, he believed that, given these factors, the 4 East Fan Portal was not a suitable area from which to transport an injured miner off the mine site. (Tr. 150, 154-155).

Summary of the Evidence Presented by the Canyon Fuel

Gary Leaming,[6] the mine's safety manager, was involved in developing the 4 East Fan Portal when the fan was installed around 1991. (Tr. 223-224). He accompanied multiple MSHA inspectors during mine inspections of escapeways and airways. (Tr. 238). Both he and Jacob Smith,[7] the mine's engineering manager, testified that, prior to Riley, MSHA officials had never questioned whether the 4 East Fan Portal was an appropriate place to terminate an escapeway. (Tr. 224-225, 239, 296). The area was first designated as an escapeway in 1992, at which time it was the primary escapeway before later being changed to the alternate escapeway. (Tr. 296-297). Canyon Fuel contends that the 4 East Fan Portal is the best alternate escapeway because it is the

[5] Preece has been with MSHA for 16 years, and the Assistant District Manager of Coal District 9 since October of 2015. (Tr. 146-147). As the Assistant District Manager he is responsible for managing and overseeing the inspection program. (Tr. 147). Prior to his time with MSHA, he worked for coal companies and contractors in positions ranging from mine foreman and superintendent, to coal engineer. (Tr. 148-149).

[6] Leaming has worked at Canyon Fuel for 42 years and has been the safety manager since 1995. (Tr. 215-216). As safety manager he is responsible for mine rescue efforts. (Tr. 219-220). He is a certified professional, holds fire boss and foreman papers, and was a member of a mine rescue team in the 1970s and 1980s, during which he responded to multiple events, including underground fires and roof falls at other mines. (Tr. 219-223).

[7] Jacob Smith has worked at the mine since March of 2013. (Tr. 295). As the mine's engineering manager he is responsible for overseeing the engineering in the mine, which includes the ventilation, belt systems, water systems, roof control and surface facilities. (Tr. 293-294). Prior to this he was the mine's ventilation engineer and was responsible for preparing and submitting the ventilation plan, which included escapeways. (Tr. 294).

most direct, safe, and practical way out of the mine to fresh air. (Tr. 226, 240, 262, 268, 297-298). The term "evacuation" in the standard requires miners to exit the mine. (Tr. 262).

Leaming does not consider the area of the 4 East Fan Portal to be a ledge but described it as a flattened pad containing multiple structures. (Tr. 232). There was no surface road that led to the portal, so an ambulance could not drive there. (Tr. 264, 281-282). The fan house outside the portal included the fan and motor, first aid and communication equipment, and an internal area that was warm year round as long as the fan was running. (Tr. 227, 315). A backup diesel generator was in another building on the pad and the generator would operate in the event the power went out. (Tr. 229). Leaming testified that, in the event of an evacuation, there was enough room in the generator building and fan building for 20 miners. (Tr. 230). Smith also testified that 20 miners could fit in the fan house. (Tr. 316). A storage shed in the area housed fan blades and other parts. (Tr. 230). Leaming believed that there was enough room for a helicopter to lower a basket onto the pad. (Tr. 230-231).

Leaming, Smith, and John Byars,[8] the operations manager at the mine, described the 4 East Fan Portal in relation to the canyon. The slope to a dry creek bed at the bottom of the canyon from the 4 East Fan Portal was gradual and miners could easily angle themselves down. (Tr. 232). Leaming and Smith acknowledged that they had never walked out along the creek bed, nor had the mine tested the route and there was no way to get an ambulance down into the creek bed area. (Tr. 234, 274-275, 317). Smith testified that he was familiar with the area and there was a game trail that paralleled the creek at the bottom of the canyon and could be used to walk out to a road. (Tr. 303, 317-318). Byars, who grew up in the area and ran cattle in the canyons when he was younger, has walked the four to five miles from the 4 East Fan Portal to the bottom of the canyon and out to the gravel road. (Tr. 335). It took him approximately two hours to travel from the portal to the gravel road without any snow on the ground. (Tr. 340). Byars described the cattle trail as unpaved, approximately two feet wide and free of trees. (Tr. 335, 341). He stated that the area could have eight inches to a foot of snowpack in the winter, but it never stopped him from taking a horse or walking the area on foot. (Tr. 338). A Forest Service road was located at the top of the canyon on the plateau above the 4 East Fan Portal. (Tr. 234, 299-300; GX-11; CFX-17) (Forest Service road marked in red). The plateau has a large, open, flat area. (Tr. 299-300). Miners who exited the mine at the 4 East Fan Portal would have to travel 400 to 500 yards up a drainage area to get to the top and then walk a short way to the Forest Service road where Leaming and Byars believed a helicopter could land. (Tr. 235-237, 200, 339, 343; CFX-17). However, Leaming acknowledged that the Forest Service road was not plowed during the winter months. (Tr. 276-277). While it would be difficult for miners to carry someone on a stretcher to the top, he believed it could be done. (Tr. 237). Neither Leaming nor Smith had tried to walk from the 4 East Fan Portal to the top of the canyon and they did not believe that this route had ever been tested. (Tr. 235-236, 276, 317).

[8] John Byars has worked at the mine for eleven years. (Tr. 329). As operations manager he is responsible for safety, maintenance, and production at the mine. (Tr. 330). Prior to his current position, Byars was the engineering manager for ten years. (Tr. 330). Byars has also worked as a ventilation engineer and is certified as a professional mining and mechanical engineer, fire boss, and mine foreman. (Tr. 331-334).

Leaming described the mine's access to medical services. The closest hospital to the mine is approximately 50 miles away. (Tr. 256). While the mine has its own EMTs and ambulance service, it only provides basic services. (Tr. 256, 274). The mine has an agreement with an EMS service to provide ambulance transportation from the mine. (Tr. 256-258; CFX-10). Leaming acknowledged that there are restrictions on when a helicopter can be used and recognized that a letter from the helicopter service stated that the service was bound by "a set of very conservative weather criteria." (Tr. 258, 265-266; GX-5). Leaming agreed that the mine operated at night as well as during the winter months, when the helicopter service is restricted, and that miners could be stuck at the portal until daylight or the weather improved. (Tr. 266-267, 280-281). He acknowledged that Intermountain Life Flight was the only provider identified by the mine as being capable of conducting hoist removal operations from the surface at the 4 East Fan Portal. (Tr. 264-265). The mine did not make initial contact with Intermountain Life Flight until after Citation No. 8483766 was issued and has never conducted a test using the helicopter service during an escapeway drill. (Tr. 267-268).

Leaming explained that, at MSHA's request after Riley's 2014 visit, Canyon Fuel considered other alternate escapeways. Mine personnel sent MSHA a letter examining four alternate escapeway possibilities: (1) the cited route out the 4 East Fan Portal, (2) the proposed route out the West Lease Fan Portal, (3) a route out the Link Canyon Portal, and (4) a route out the 3 East Breakout Portal. (Tr. 240-241; CFX-2). Mine personnel determined that the distance from the deepest point of penetration in the working sections to the 4 East Fan Portal was 2.34 miles, which was the shortest distance of the four possibilities. The distance from that same point using the route suggested by MSHA to the West Lease Fan Portal was 5.88 miles, which was the second longest route. (Tr. 242-243). Further, mine personnel determined that the 4 East Fan Portal route was the least difficult route to travel because it was the shortest, had the fewest overcasts, and fewer SCSR change-out stations would be required. The West Lease Fan Portal route was the most difficult route to travel because it had the most overcasts and some of the route was particularly difficult to travel compared to the other options. (Tr. 242-245). It would also require the second most SCSR change-out stations. Leaming explained that overcasts are obstacles which cannot be driven over and make travel more difficult, especially when carrying a miner on a stretcher. (Tr. 247-248, 251).

Leaming acknowledged that MSHA's proposed West Lease alternate escapeway route largely parallels the current primary escapeway route and is similar in length. (Tr. 269). He agreed that the proposed route could be partially driven, but stated that miners cannot count on vehicles being there when they need them. (Tr. 249). The first people who come to the vehicles are going to take them. (Tr. 249-250). There would be sufficient vehicles in the primary escapeway because the miners would have used these same vehicles to get into the mine. (Tr. 269-270). It took Leaming just under three hours to walk the proposed alternate escapeway out from where the 4 East entries intersect the North Mains. (Tr. 252-253, 280). He opined that an injured miner, a miner wearing a SCSR, or a miner carrying another miner on a stretcher would take much longer, and there is a chance that they might not have transportation to take them out. (Tr. 253-255, 280).

Smith testified that the seals along the proposed West Lease alternate escapeway could create issues. (GX-16). The seals along the proposed alternate escapeway are used to seal out

mined areas. (Tr. 313). According to Smith, there are times when the seals outgas and harmful gases travel through the seals from the mined out areas and into MSHA's proposed route. (Tr. 314-315). Byars testified that there are approximately 90 to 100 seals along the route. (Tr. 339).

Brief Summary of the Parties' Arguments

The key facts are not disputed. The Secretary argues that, because there was "no reasonable and reliable means to evacuate miners, including disabled miners," from the ledge outside 4 East Fan Portal, the mine opening was not suitable for the safe evacuation of miners, and the operator violated section 75.380(d)(5) of the Secretary's regulations. Sec'y Br. 7. Canyon Fuel contends that the 4 East Fan Portal meets the requirements of the safety standard because miners, including injured miners, can easily and quickly escape from the dangerous conditions within the mine using that route.

In making his arguments, the Secretary stresses the fact that the 4 East Fan Portal is in a remote, mountainous area with no road access. The use of a helicopter to evacuate miners is unreliable and this evacuation method would not be available at night or in inclement weather. The Secretary avers that the operator, in selecting the 4 East Fan Portal as the termination point of its alternate escapeway, focused almost entirely on the safety standard's "direct" element and not the element in the standard that requires that the route lead to a mine opening "suitable for the safe evacuation of miners." Requiring miners to stay in a structure at the portal for an unknown length of time cannot be considered safe evacuation nor can asking miners to hike up a steep canyon to a forest road or to hike four miles down the canyon to another gravel road. Rather, the Secretary argues that an alternate escapeway running "largely parallel to the Mine's current primary escapeway" was the only acceptable route. Sec'y Br. 15. Even though the route is "not the most direct way out of the mine, it is safe and practical[.]" *Id*.

The Secretary further argues that the plain meaning of the standard requires that escapeways lead to a mine opening suitable for the safe evacuation of miners. "Evacuate" is defined as to "[r]emove (someone) from a place of danger to a safer place." Sec'y Br. 19 (citation to dictionary definition omitted). As a result, the plain language of the standard demands that the escapeway route "lead to a mine opening that is suitable for removing miners from places of danger." Sec'y Br. 19-20. The 4 East Fan Portal is not such a place. The standard does "not allow use of the shortest escapeway route in all cases, but instead requires first determining if a route leads to a mine opening suitable for the safe evacuation of miners and then weighing the remaining factors." Sec'y Br. 19.

In the event the judge determines that section 75.380(d)(5) is ambiguous, the Secretary argues that he should defer to the Secretary's interpretation that an alternate escapeway that ends at a location where miners cannot be reliably rescued does not constitute safe evacuation. Sec'y Br. 20. This interpretation gives effect to the clause "suitable for the safe evacuation of miners" and advances the Act's goal of protecting the safety of miners. Further, while this condition may have existed for some time, the fact that MSHA had not previously cited it does not preclude the agency from finding a violation in this instance.

Canyon Fuel argues that the plain language of the cited standard supports vacating the citation. It asserts that, while the Secretary understands the phrase "for the safe evacuation of miners" to mean evacuation from the mine site once the miners are outside, Canyon Fuel contends that the phrase refers to the "evacuation out of the mine." CF Br. 7. "Evacuation" means "the removal of persons or things from an endangered area." CF Br. 8 (citation to dictionary definition omitted). Here, the endangered area is the underground area of the mine. Arrival at the portal eliminates the potential for injury from events in the mine. Because the Secretary's proposed alternate escapeway out the West Lease Portal is longer and more difficult to travel than the cited route to the 4 East Fan Portal, he has not met his burden under Commission case law to establish a violation of the standard.

Canyon Fuel argues that, even if the plain language is not conclusive, the standard, when viewed in the context of the regulatory history, as well as MSHA's own PPM, clearly is focused on evacuation from the mine, not the mine site. Further, given that MSHA had accepted the mine's escapeway to the 4 East Fan Portal since 1992, it is clear that the agency's interpretation was in line with that of Canyon Fuel until Riley became District Manager. Canyon Fuel argues that the enforcement history of the safety standard demonstrates that MSHA agreed with Canyon Fuel's interpretation of the standard until Riley became District Manager.

Finally, Canyon Fuel argues that no deference should be afforded to the Secretary since the plain language of the standard controls and the enforcement history of the standard is inconsistent, conflicts with his prior position and, as a result, does not reflect the agency's fair and considered judgement on the matter. CF Br. at 18.

Analysis

I find that the Secretary has established a violation of the cited safety standard. The Commission and courts have stated that where the language of a standard is clear, the "terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results." *Northern Illinois Service Co.*, 37 FMSHRC 1514, 1520 (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). If however, a standard is silent or ambiguous with respect to the specific point at issue, the Commission defers to the Secretary's interpretation as long as it is reasonable. *Small Mine Development*, 37 FMSHRC 1892, 1894 (Sept. 2015) (citing *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001) and *Auer v. Robins*, 519 U.S. 452 (1997)).

I find that the standard is ambiguous. In reaching this conclusion I find that the standard, and in particular the phrase "suitable for the safe evacuation miners," can be reasonably interpreted several ways. I accept the Secretary's definition of the term "evacuate," i.e., to remove someone from a place of danger to a safer place, which is also consistent with the definition used by the operator. With that definition in mind, I find that there are two reasonable readings of the plain language of the standard.

The standard can be read to require that escapeways follow the safest, direct and practical route to the surface. The standard can also be read to require that escapeways follow the safest,

direct and practical route to a surface portal where miners can be easily rescued, i.e., removed from the mine site. The 4 East Fan Portal meets the first interpretation of the standard while the route proposed by the Secretary to the West Lease Portal fits the second interpretation.

Until 1996, this safety standard required each escapeway be "[l]ocated to follow the most direct, safe and practical route to the surface[.]" The "suitable for the safe evacuation of miners" language was added that year. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9812-9813 (Mar. 11, 1996). The preamble to the final rule is instructive but it does not resolve the issue. The preamble states as follows:

> A question arose during an informational meeting as to whether MSHA intended that the existing rule eliminate the requirement that escapeways be routed to the "nearest mine opening." It was not MSHA's intent to change this requirement from the previous standard. The existing requirement that the escapeway follow the most direct route to the surface would, in fact, require the route to go to the nearest mine opening. However, to eliminate any confusion that may exist, the final rule revises paragraph (d)(5) . . . [to require] that the escapeway must follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners.

Id. at 9812. The preamble further provides:

> MSHA acknowledges that the nearest mine opening may not always be the safest route to the surface. A number of factors affect whether or not the safest, most direct, practical route has been selected. These factors include roof conditions, travel height, fan location, physical dimensions of the mine opening, and similar considerations. For example, if bad roof conditions are present along the shortest direct route and those roof conditions are beyond reasonable control, then an alternate "safe" route designated by the mine operator may be appropriate. However, the presence of roof falls does not necessarily indicate that the passageway would not be suitable for evacuation if it is reasonable to rehabilitate the area. By way of another example, where coal seam thickness varies to the extreme, the shortest route may be through lower coal, making travel relatively slow and difficult. An alternate route through a high passageway may permit easier travel. Such an alternate route, although longer, may be more practical and therefore may be more appropriate. Similarly, there can be other instances where the "nearest mine opening" may not be suitable for safe evacuation of miners. For example, an old mine shaft may not be safe for travel because of badly deteriorated conditions, such as a deteriorated

> shaft lining or deteriorated timbers, even though the shaft is still suitable for mine ventilation purposes.

Id. at 9812-13. Each of the examples provided concern conditions within the mine and the preamble suggests that MSHA was interpreting the safety standard to require miners to follow the "safest route to the surface." *Id.* Nothing in the preamble suggests that MSHA was concerned about conditions that might exist once miners reach the surface. Based on this discussion in the preamble, one could interpret the safety standard to require that each escapeway be located to follow the most direct, safe and practical route suitable for the safe evacuation of miners to the nearest mine opening. Under this reading, the phase "suitable for the safe evacuation of miners" modifies the phrase "most direct, safe, and practical route" rather than the phrase "to the nearest mine opening."

I conclude that deference is owed the Secretary's position that the safety standard should be interpreted to take into consideration surface conditions as well as underground conditions. I believe that the drafters of the safety standard quite naturally assumed that once miners reach the surface, they would be safe. When MSHA promulgated and revised the safety standard, it is unlikely that the drafters of the standard thought that a situation would arise in which miners escaping from a mine might be required, after arriving at the mine opening, to hike four to five miles along a wildlife/cattle trail over rough terrain or hike up to the top of a canyon. Likewise, it is unlikely MSHA contemplated that injured miners would require rescue via baskets suspended from a helicopter. As a consequence, conditions at the surface were not specifically addressed in the standard or in the preamble. In addition, each standard in Part 75 should be interpreted in a manner that is in harmony with other related safety standards to protect the safety and health of miners. As discussed below, section 75.1713-1(b) requires, in part, that mine operators "provide for 24-hour emergency transportation for any person injured at the mine." 30 C.F.R. § 75.1713-1(b).

When a safety standard is ambiguous, the Commission gives deference to the Secretary's interpretation of the standard as long as it is not plainly erroneous or inconsistent with the language or the purpose of the standard. *Lodestar Energy, Inc*., 24 FMSHRC 689, 692 (2002). The Secretary's interpretation of a safety standard is reasonable where it is "logically consistent with the language of the regulation and … serves a permissible regulatory function." *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192 (1998) (citations omitted). I find that the Secretary's interpretation is logically consistent with the language of section 75.380(d)(5). Canyon Fuel argues that the language of the standard and the regulatory history make clear that the purpose of the standard is "to get miners out of the mine, not to address what happens afterward." CF Br. 10. I agree that the focus of the standard is to get miners out of the mine, but typically that is all that is necessary to get them to a safe place. That is not the case here. The evidence demonstrates than miners who evacuate through the 4 East Fan Portal would not necessarily be safe once they reach the surface. The Secretary's interpretation reasonably applies the phrase "for the safe evacuation of miners" to the entire standard. "[A] fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless." *Daanen & Janssen, Inc*., 20 FMSHRC at 194 (citations omitted).

Canyon Fuel argues that deference should not be granted to the Secretary's interpretation of the safety standard because his interpretation has not been consistent and the fact that his present interpretation conflicts with his prior position, "evidences that the Secretary's current position "does not reflect the agency's fair and considered judgment on the matter in question'" CF Br. 18 (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)).

Although the Secretary's interpretation of the Mine Act or a standard adopted during litigation "is not a formalized statement of statutory interpretation of the sort that usual[ly] invokes *Chevron* deference," it may still be entitled to deference under the Mine Act. *Twentymile Coal*, 411 F.3d 256, 261 (D.C. Cir. 2005) ("But because 'in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard, [it] is therefore deserving of deference.'" *Id.* (quoting *Sec'y of Labor v. Excel Mining, LLC,* 334 F.3d 1, 6 (D.C. Cir. 2003) (citations omitted)).

In any event, I find that the evidence does not establish that the Secretary's interpretation of the safety standard has changed. Rather, the record shows that MSHA had not seriously considered the ramifications of the use of the 4 East Fan Portal as an escapeway termination point prior to District Manager Riley's visit to the mine. It appears that no MSHA official had previously focused on the issue of how miners would be evacuated from the 4 East Fan Portal during an emergency once they leave the mine. Indeed, mine personnel told Riley that they did not know how miners would be evacuated from that portal and had never been asked that question. (Tr. 24-25). The Secretary's failure to enforce the safety standard at the Sufco Mine until District Manager Riley's visit is more accurately attributed to a lack of attention by MSHA than to a change in the interpretation of the standard. The parties agree that this case is one of first impression before the Commission.

The next issue is whether the Secretary established a violation of section 75.380(d)(5). In *Southern Ohio Coal Co.*, the Commission interpreted a safety standard containing similar language, as follows:

> [I]t is the Secretary's burden to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that she has determined more closely complies with the standard's requirement of "the safest direct practical route." Thus, in order for the Secretary to establish a prima facie case of violation, she must show that the operator's designated escapeway is deficient because it is not "the safest direct practical route." It is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation. She must present a specific escapeway alternative that she believes is more appropriate.

14 FMSHRC 1781, 1785 (Nov. 1992). I find that the Secretary established that Canyon Fuel's route was deficient. The escapeway to the 4 East Fan Portal did not account for the fact that miners would be stranded there once they exited the mine. This fact would create a hazard to

escaping miners particularly in cold or snowy weather and more especially if any miners are seriously injured. The Secretary presented a specific escapeway alternative he believes provides for a safer, direct, practical route for escaping miners. The Secretary took into consideration a number of factors, including those discussed above. MSHA's proposed escapeway is drivable for most of its length and is mostly in a separate intake air course. This air course would not be affected by a fire in the working section or the belt. Although the alternate escapeway favored by the Secretary is longer than Canyon Fuel's, it is similar in length to the primary escapeway. Yeager traveled the Secretary's proposed route and testified that the overcasts are not difficult to negotiate, noting that there were well-built stairs. (Tr. 182). The Secretary acknowledges that if SCSRs are needed, miners will need to change them out more frequently using the West Lease Portal escape route. Finally, any escaping miners who must remain at the 4 East Fan Portal for a period of time before they can be rescued, could be overcome by smoke and toxic fumes. The Secretary maintains that in considering all the factors set forth in the safety standard, his designated alternate escapeway is the safest direct practical route.

I affirm the citation as written. I have considered the evidence presented in this case and I conclude that an injury was unlikely, the violation was not S&S, and Canyon Fuel's negligence was moderate.[9] I find that the Secretary's proposed penalty of $425.00 takes into consideration the penalty criteria set forth in section 110(i) of the Act.

B. Citation No. 8480766

Citation No. 8480766 alleges a violation of section 75.1713-1(b) of the Secretary's safety standards and asserts that the mine failed to make arrangements for 24-hour ambulance service at the surface termination point of the mine's alternate escapeway. Specifically, the Secretary asserts that because helicopter service is not reliable, Canyon Fuel failed to make arrangements for 24-hour emergency transportation of injured miners. Section 75.1713-1(b) requires that the operator "make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for any person injured at the mine." 30 C.F.R. § 75.1713-1(b).

The citation was issued on May 26, 2015, a little more than two months after Citation No. 8483766 was issued. MSHA determined that the alleged violation was reasonably likely to result

[9] This citation is similar to a technical citation MSHA issues when a mine operator wishes to contest a provision that MSHA seeks to include in a roof control or ventilation plan in that the parties did not focus on the gravity and negligence criteria at all. As a consequence, I accept the Secretary's proposals on the gravity and negligence criteria and the penalty.

in a permanently disabling injury, was S&S,[10] affected 20 persons, and was the result of Canyon Fuel's moderate negligence. The Secretary proposed a penalty of $3,143.00 for this alleged violation.

Summary of the Evidence

Riley testified that, based on the information he learned about the helicopter service's limited capabilities, discussed above, he determined that Citation No. 8480766 should be issued to the mine for its failure to arrange for 24 hour emergency medical transportation. (Tr. 72-73, 74). Although the mine had an agreement for 24 hour ambulance service by land, it was not sufficient since that service could only be provided at the West Lease Portal, which was accessible by road, and not at the 4 East Fan Portal, which was not accessible by road. (Tr. 73-74). The cited standard requires that that 24 hour emergency transportation arrangement be made for any person injured at the mine. (Tr. 75).

Brief Summary of the Parties' Arguments

The Secretary argues that, given the lack of road access to the 4 East Fan Portal, as well as the inability of the helicopter service to provide 24-hour service, the operator violated section 75.1713-1(b). The 4 East Fan Portal was an established exit point from the mine in the event of an emergency. The Secretary avers that "[t]he only logical interpretation that satisfies the purpose of the regulation is that 24-hour emergency transportation must be provided to wherever miners are instructed they should leave the mine." Sec'y Br. 26.

Canyon Fuel argues that it has made emergency transportation arrangements from the mine. Specifically the operator argues that it has its own ambulance which it can use to provide initial transport from the mine before handing off a patient to an EMS service. The standard does not require that emergency transportation be required at every portal. The Secretary's interpretation that separate arrangements need to be made for each portal that miners might use in an emergency has never been put forth and assumes an event that has never occurred, i.e., one that requires the use of the 4 East Fan Portal escapeway by injured persons. No notice of this new interpretation was provided. MSHA had never discussed the cited standard until Riley raised issues concerning the termination point of the 4 East Fan Portal escapeway.

[10] 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).

Analysis

The cited standard requires that underground coal operators make arrangements with an ambulance service or otherwise provide for 24-hour emergency transportation for any person injured at the mine. Neither the Commission nor its judges have addressed this standard. However, the plain language of the standard makes clear that the operator is responsible for arranging or providing for round the clock emergency transportation of injured miners. Therefore, a violation will be found when a mine operator fails to arrange or provide for any type of emergency transportation. Likewise, a violation is established if, as in this case, an operator has arranged for emergency transportation, but that transportation is not available 24 hours a day at the alternate escapeway.

I find that Canyon Fuel did not make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for *any person* injured at the mine. It only provided for such service for injured miners who are able to use the primary escapeway to exit the mine. The area outside the termination point of the alternate escapeway was inaccessible by land ambulance. In addition, as discussed in detail above, the helicopter service the operator investigated could not provide 24-hour service at this termination point. Consequently, I find that Canyon Fuel did not make arrangements with an ambulance service or otherwise provide, for 24-hour emergency transportation, from the 4 East Fan Portal.

There is no dispute Canyon Fuel met the requirements of section 75.1713-1(b) at the West Lease Portal. Canyon Fuel argues that, as a consequence, it fully complied with the safety standard. It points to the fact that the plain language of the standard does not require ambulance services to be available at the portal of each escapeway. This interpretation is illogical and ignores the language that transportation must be arranged for "any injured person at the mine."[11] In order to provide transportation to "any injured person at the mine," reliable emergency transportation must be available at both designated escapeways. The primary escapeway is unavailable during the emergency. Based on the above findings, Canyon Fuel did not comply with the standard and a violation has been proven. My findings are limited to the facts of this case and the provision of transportation from the 4 East Fan Portal when it is the termination point of a designated escapeway.

Gravity and S&S

The issuing inspector designated the violation as reasonably like to result in a permanently disabling injury. (Tr. 75). Riley agreed with that assessment and stated that, in general, when an ambulance or helicopter is summoned, someone is in serious need who requires

[11] While Canyon Fuel argues that it was not provided with notice of the Secretary's interpretation of the standard to require arrangements be made for transportation from the 4 East Fan Portal, I disagree. "[I]f the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary." *DQ Fire & Explosion Consultants*, Inc., 36 FMSHRC 3083, 3088 (Dec. 2014) (citing *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) and *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000)). I find that the language of the standard is clear and that no further notice was required.

medical attention immediately. (Tr. 75). He explained that the types of injuries that could require an ambulance or helicopter would include smoke inhalation, burns, shock, and CO poisoning, which can lead to heart attacks. (Tr. 76).

The Secretary argues that the violation was S&S. Specifically the Secretary argues that, as a result of the violation, a discrete safety hazard was created because injured miners at the 4 East Fan Portal would be delayed in attempting to obtain "prompt, critical medical treatment." Sec'y Br. 27. Assuming the presence of a mine emergency in which miners use the alternate escapeway, it is reasonably likely that the delay in obtaining necessary care would result in a permanently disabling injury.

Canyon Fuel argues that the violation was not S&S. It asserts that there has never been an event at the mine requiring evacuation out the 4 East Fan Portal. Further, in the Secretary's scenario miners would not be exposed to burns because the fire would have to be in the alternate escapeway thousands of feet away from the working sections where miners would be. In addition, miners would likely be able to evacuate out the primary escapeway ahead of any smoke from a fire in the alternate escapeway. Miners who do exit the 4 East Fan Portal would no longer be exposed to underground mine hazards and would have the option of walking up to the plateau or out the bottom of the canyon and, subject to certain weather conditions, would be able to be transported via helicopter during daylight hours. CF Br. 40.

I find that the violation was S&S. When evaluating the S&S nature of a violation involving escapeways, judges must assume the occurrence of an emergency necessitating an evacuation of the mine. *Cumberland Coal Resources,* 33 FMSHRC 2357, 2367 (Oct. 2011). I hold that the logic behind that decision also necessitates that, when evaluating the S&S nature of the current violation, I must assume an emergency that requires miners to exit the alternate escapeway. I find that a discrete safety hazard certainly existed. The purpose of the standard is to promptly provide injured miners with emergency medical transportation. As a result, the safety hazard that exists when 24-hour emergency medical transportation is not provided is the inability of miners to obtain needed treatment. Here, the delay in obtaining care once a miner exited the mine via the alternate escapeway through the 4 East Fan Portal was reasonably likely to result in a serious injury. I reject the operator's argument that miners would not be exposed to possible burns. Contrary to the statement in Canyon Fuel's brief, a fire, explosion, or other underground emergency requiring the use of the 4 East Fan Portal route need not occur in the alternate escapeway to trigger the use of that escapeway. The emergency event could occur on the working section, or in the primary escapeway. I also reject the operator's argument that miners who exited the 4 East Fan Portal could walk up or down the canyon to reach emergency medical transportation. If miners are in need of emergency medical transportation, the additional time and effort required to travel up or down the canyon could reasonably be expected to exacerbate their injuries. Accordingly, I find that the violation was S&S.

Negligence

Riley testified that the violation was the result of the operator's moderate negligence because the mine had not made arrangements for medical evacuations at the termination point of

the alternate escapeway. (Tr. 77). It had contacted a helicopter service and learned that it could not provide medical evacuation services unless the atmospheric conditions were good.

The Secretary notes that because MSHA previously discussed this issue with Canyon Fuel months earlier, it was on notice that it was not in compliance with the cited standard. Because the operator knew or should have known that it was failing to provide 24-hour emergency transportation for injured miners exiting the mine at the 4 East Fan Portal, Respondent was at least moderately negligent.

I reduce the negligence designation from that proposed by the Secretary to low. The operator had arranged for reliable emergency transportation from the portal at its primary escapeway and it investigated the use of a helicopter to provide transportation from the 4 East Fan Portal. It was impossible for Canyon Fuel to arrange for reliable medical transportation from that portal, however, and it did not believe it was required to do so. The operator's notice argument, although unconvincing, indicates that the operator believed it was in compliance with the standard. I find that a penalty of $2,000 is appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Act.

C. Citation No. 8483666

Citation No. 8483666 alleges a violation of section 75.380(c) of the Secretary's safety standards and states that the operator failed to maintain a separate and distinct alternate escapeway. Specifically, the citation asserts that the alternate escapeway from the 4 East Fan Portal to crosscut 6 of the 4 East entries, which is ventilated with intake air, was not being maintained separate and distinct up to the junction of the 4 East intake and the North Mains intake from crosscut 220.[12] A fire in the alternate escapeway of the 4 East intake from crosscut 6 to the 4 East Fan Portal would contaminate both the alternate and primary escapeway with smoke and other contaminates for all miners working inby that location. Section 75.380(c) requires that "[t]he two separate and distinct escapeways required by this section shall not end at a common shaft, slope, or drift opening, except that multiple compartment shafts or slopes separated by walls constructed of noncombustible material may be used as separate and distinct passageways." 30 C.F.R. § 75.380(c).

MSHA Inspector James J. Pruitt issued the citation on May 22, 2015, and determined that an injury resulting in lost workdays or restricted duty was reasonably likely to be sustained, that the alleged violation was S&S, affected 20 persons, and was a result of Canyon Fuel's moderate negligence. The Secretary proposed a penalty of $2,106.00 for this alleged violation.

Summary of the Evidence

District Manager Riley testified that, while reviewing a map of the mine, he observed that the designated primary and secondary escapeways were not separate and distinct. (Tr. 79). Riley

[12] This is the same alternate escapeway that the Secretary determined did not meet the requirements of section 75.380(d)(5) as set forth Citation No. 8483766, discussed above.

explained that, in order for the escapeways to be separate and distinct, both the travelways and air courses must be separate and distinct and cannot "intermix." (Tr. 81, 83). Here, the intake air that came in the 4 East entries and traveled along part of the alternate escapeway eventually merged with the intake air in the primary escapeway in the North Mains. (Tr. 122). At hearing, Riley, referring to GX-2 p. 2, testified that, based on the mine's designated primary and alternate escapeways,[13] if miners were inby crosscut 220 and traveling out the primary escapeway through the North Mains, they would encounter smoke or other contamination from a fire anywhere in the alternate escapeway outby crosscut 6 of the 4 East entries. (Tr. 81-82).[14] Riley testified that the mine had diesel pickup trucks that it used underground and a vehicle fire in the alternate escapeway outby crosscut 6 of the 4 East entries would "immediately pollute or contaminate both escapeways . . . [w]ithin minutes[.]" (Tr. 82).

Riley explained that there are situations where the primary and alternate escapeways in mines can share air from the same intake air source, but in those situations the shaft or slope that provides the air has to be separated by a non-combustible divider. (Tr. 84). Here, the routes were not physically separated by walls constructed of non-combustible materials and a miner could travel from one escapeway to the other without passing through any doors or running into anything that would stop their travel. (Tr. 83-84). Specifically, he noted that a miner inby crosscut 220 and traveling in the primary escapeway in the North Mains could walk right into the alternate escapeway without traveling through a mandoor. (Tr. 83, 124).

On cross-examination Riley was presented with a hypothetical and agreed that, when developing a three entry longwall section, you generally have an intake entry that is usually the primary escapeway, a return entry that is sometimes the alternate escapeway, and a belt entry. (Tr. 125-126). He further agreed that, except for the air that goes up the belt, all of the air that comes through the intake will go into the return. (Tr. 126). Finally, he agreed that, in that scenario, if there were a fire in the intake escapeway, once the air travels through the face area it would contaminate both the primary and alternate escapeways. (Tr. 126-127). However, he explained that, unlike the hypothetical situation presented to him, escapeways are designed for each working section and are defined by the section loading point. (Tr. 139). It is at that loading point that the separate and distinct requirement starts and then continues for the entire length of the escapeways out of the mine. (Tr. 139). Here it was unacceptable because the loading point was inby where air from the 4 East intake alternate escapeway mixed with the air from the North Mains intake primary escapeway. (Tr. 139-140). On cross-examination Riley agreed that a fire in the North Mains primary intake escapeway would contaminate that escapeway inby the fire and then the air would travel through the sections and out the return, which would contaminate the alternate escapeway. (Tr. 127-128).

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[13] In GX-2 p. 2 the primary escapeway is indicated by a solid blue printed line, while the alternate escapeway is indicated by a dashed red line. At hearing, Riley drew a solid blue line with a marker which indicated the intake air course from the 4 East Fan Portal. (Tr. 82).

[14] Riley explained that miners using the alternate escapeway would not enter intake air from the 4 East fans until they went through the doors at the 4 East "dogleg," which he indicated by circling with a red marker on GX-9 p. 1. (Tr. 123-124).

Based on his review of the of the mine map, and after consulting with his office's ventilation supervisor, Riley instructed Inspector Pruitt to issue Citation No. 8483666. (Tr. 79, 85). Riley acknowledged that the condition had probably existed for several years and, as a result, he allowed the mine to continue to use the escapeway as long as a certified examiner traveled the area every two hours until the mine could change the route to comply with the standard. (Tr. 86-87).

Yeager, who has worked as a ventilation engineer, also did not believe that the primary and alternate escapeways were separate and distinct. (Tr. 190). She based her opinion on a 1992 MSHA publication that states that "physical separation is required[,]" which means the air courses cannot intermix. (Tr. 190-192; GX-17). Her review of the mine maps revealed that the air was able to intermix because due to the lack of physical separation. (Tr. 192). Specifically, the ventilation from the alternate escapeway coming from the 4 East went directly into the primary escapeway. (Tr. 193). Accordingly, the escapeways were not physically separate and distinct as explained in the MSHA publication. (Tr. 193; GX-17). She believed that the exception for ventilation from a common intake air shaft was not applicable here. (Tr. 194).

Leaming and Smith testified for Canyon Fuel about the mine's escapeways. Referring to a mine map, CFX-1B, Leaming explained that the alternate escapeway route had followed the green line since 2008. (Tr. 260-261). Both Leaming and Smith agreed that MSHA inspectors never questioned whether the 4 East alternate escapeway and the primary escapeway were separate and distinct. (Tr. 239-240, 261, 304).

Smith, explained that the mine map, CFX-1B, showed where the alternate escapeway was located both prior to and after the citation was issued, as well as the primary escapeway, and the air courses in the subject area. (Tr. 305). He described the dogleg in the alternate escapeway and the two doors that isolated the intake air coming down the 4 East from the rest of the alternate escapeway in North Mains return. (Tr. 305-307). Both equipment and men can travel through the doors in the dogleg from the North Mains into the 4 East. (Tr. 306). Intake air coming down the 4 East empties out into the North Mains and heads north after passing the dogleg and under a series of overcasts. (Tr. 307-308). The intake air from the 4 East that comes into the North Mains, 144,000 cubic feet, is separated from the intake air in the primary escapeway, approximately 360,000 cubic feet, by a beltline until the two air courses join at crosscut 220 in the primary escapeway in the North Mains. (Tr. 308, 311, 322). Smith acknowledged that no stoppings or doors would prevent the intake air in the alternate escapeway from going into the intake air in the primary escapeway and that, in the event of a fire outby the dogleg in the alternate escapeway, smoke from the alternate escapeway would go into the primary escapeway. (Tr. 322-323). Smith explained that the alternate escapeway and primary escapeway are separated from each other for the entire length that they parallel each other in the North Mains. (Tr. 308). However, he agreed that a miner could walk from the alternate escapeway into the primary escapeway at crosscut 220 of the North Mains without anything stopping him. (Tr. 323). He believed that the two escapeways were separate and distinct because they were fed from two separate air sources and were not parallel entries within an air courses. (Tr. 308-309). He explained that the intake air from the primary escapeway went into the working sections and the return air in the alternate escapeway, up until the dogleg, came from the working sections. (Tr. 309).

Smith further testified that, during longwall development you have three entries, with the first being the beltline, the second being the primary travelway with intake air, and the third being the return air and alternate escapeway. (Tr. 309-310). He explained that, in that scenario, you can walk from the intake escapeway to the alternate without passing through a stopping by going to the face or last open crosscut which does not have a stopping. (Tr. 310).

Brief Summary of the Parties' Arguments

The Secretary argues that the travelways and air courses involved in the primary and alternate escapeways were not separate and distinct, as required by the cited standard. The Secretary asserts that a fire in the 4 East entries would have caused smoke to pollute the alternate escapeway in the 4 East entries and this smoke would travel into the North Mains where it would contaminate the primary escapeway. In the event of a fire, miners leaving the working section would encounter smoke in the primary escapeway and, if they switched over to the alternate escapeway, would also encounter smoke there. Further, the Secretary asserts that physical separation of the escapeways is required and, in this instance, a miner could walk from one escapeway into the other without passing through a stopping or other barrier.

Canyon Fuel argues, first, that the Secretary did not establish a violation of the safety standard cited. Contrary to the Secretary's argument, section 75.380(c) does not actually require two separate and distinct escapeways, but rather only requires that the escapeways not end at a common shaft, slope or drift opening unless certain conditions are met. Here, the two escapeways do not end a common shaft, slope, or drift opening, so there can be no violation.

Canyon Fuel next argues that the two escapeways are in fact separate and distinct travelable passageways. The two escapeways are "physically/geographically separate and in the area where they are parallel, they are separated by ventilation controls." CF Br. 23. The Secretary's interpretation that the air in the passageways has to be "separate and distinct is not supported by the language of the standard or the common sense of mine ventilation." *Id*. The ordinary meanings of the terms "separate" and "distinct" do not suggest that separation of the escapeways by ventilation controls is necessary. Here, the two escapeways are in separate and different entries.

Analysis

I find that the Secretary has failed to prove a violation of the cited standard. Section 75.380(c) provides that the "two separate and distinct escapeways required by this section shall not end at a common shaft, slope, or drift opening, except that multiple compartment shafts or slopes separated by walls constructed of noncombustible material may be used as separate and distinct passageways." 30 C.F.R. § 75.380(c). The Secretary's case is premised on the argument that the mine failed to maintain "separate and distinct escapeways."

Nothing in section 75.380(c) regulates the separation of air courses between the primary and alternate escapeways. It is possible that other safety standards prohibit the mixing of intake air as alleged in the citation. Section 75.380(a) provides that "at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of

this section." 30 C.F.R. § 75.380(a). Section 75.380(h), entitled, "Alternate Escapeway," provides that "[o]ne escapeway shall be designated as the alternate escapeway. The alternate escapeway shall be separated from the primary escapeway for its entire length, except that the alternate and primary escapeways may be ventilated from a common intake airshaft or slope opening." 30 C.F.R. § 75.380(h). Sections 75.380(a) and (h) appear to have some relevance to the alleged violation, but at no point during the prosecution of this case did the Secretary seek to amend the citation to plead a violation of either of those sections in the alternative.[15] The Secretary had multiple opportunities to do so. As a consequence, I limit my analysis to what is before me, i.e., an alleged violation of section 75.380(c).

I find that, in order for the Secretary to prove a violation of the cited standard he must show that the two escapeways ended at a common shaft, slope or drift.[16] Here, the Secretary has not met his burden of proof. The standard is clearly concerned with the "ends" of the respective escapeways and that they not be "common." There is no dispute that the primary escapeway exited out the West Lease Portal while the alternate escapeway exited out the 4 East Fan Portal. Indeed, the Secretary issued Citation No. 8483766, discussed above, because the alternate escapeway ended at the 4 East Fan Portal, which is in a remote, inaccessible area. These two portals, which were the termination points of the escapeways, were miles apart from each other and did not end at a common shaft, slope or drift. To hold otherwise would ignore the plain meaning of the standard.

I agree with the operator that section 75.380(c) does not govern the issues raised by the Secretary in Citation No. 8483666. In *Marco Crane*, 36 FMSHRC 1610, 1614 (June 2014) (ALJ), Judge Zane Gill, when addressing a similar issue, explained that "[i]t would be inappropriate to stretch and twist the plain meaning of a regulatory provision so that the Secretary can prove a citation that was issued under the wrong standard, but that is what the Secretary is asking me to do. This request is especially problematic in light of the availability of a much more appropriate provision[.]" Although pleadings in these proceedings are, in general, easily amended by the Secretary, he chose not do so in this instance and it appears that the

[15] I allowed the parties to file sequential briefs. In her reply brief filed August 12, 2016, counsel for the Secretary noted that "Respondent has been well aware of the nature of the violation since issuance, tried the issue noted in the standard, and would not be prejudiced by amending the citation to a violation of the other standard." Sec'y Reply Br. 6-7 n. 4. The Secretary did not move to amend the citation, however. In addition, District Manager Riley noted at the hearing that section 75.380(h) has additional language concerning the requirement to separate escapeways. (Tr. 84) (due to a transcription error the reference to 75.380(h) was incorrectly reported as 75.388).

[16] The exception set forth at the end of section 75.380(c) concerns situations where, due to constraints in mine design, an operator is permitted to comply with the safety standard by building noncombustible walls to create two "separate and distinct passageways" so that they can terminate at what otherwise would have been "a common shaft, slope, or drift opening." 30 C.F.R. § 75.380(c).

Secretary believes that he established a violation of section 75.380(c).[17] The Secretary has failed to prove a violation under section 75.380(c) and the citation is **VACATED**.[18]

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). Canyon Fuel had a history of 117 violations during the 15 months preceding the issuance of the subject citations, 17 of which were S&S. Canyon Fuel is a large operator that produced over 6,000,000 tons of coal in both 2014 and 2015. The Petitions for the Assessment of Penalty in the civil penalty dockets indicate that the Secretary credited Canyon Fuel with good faith abatement. The proposed penalties will not have an adverse effect upon Canyon Fuel's ability to continue in business.

III. ORDER

For the reasons set forth above, Citation No. 8483766 is **AFFIRMED**, Citation No. 8480766 is **MODIFIED** to reduce the level of negligence, and Citation No. 8483666 is **VACATED**. Based on the penalty criteria, I assess a total civil penalty of $2,425.00. Canyon Fuel Company, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $2,425.00 within 40 days of the date of this decision.

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

[17] In *Faith Coal Co.*, 19 FMSHRC 1357, 1361-1362 (Aug. 1997), the Commission reversed a judge's decision vacating a citation where he found that the Secretary had alleged a violation of the wrong standard and had failed to prove a violation of that standard. There the Secretary mistakenly cited a standard which had been amended and renumbered prior to the filing of the Secretary's brief. The Commission, in remanding the case back to the judge, instructed the judge to determine whether a violation had occurred under the proper standard. Unlike the situation in *Faith Coal*, it appears that the Secretary believes that he correctly cited section 75.380(c)

[18] Because I upheld the Secretary's interpretation of section 75.380(d)(5) in Citation No. 8483766 with the result that the 4 East Fan Portal can no longer be used as the endpoint of the alternate escapeway, as discussed above, the issues raised in the present citation are moot for all practical purposes. If a road is built and maintained to that portal, the parties would need to revisit the issues adjudicated in these cases.

Distribution:

Alicia A.W. Truman, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204-3516 (Certified Mail)

R. Henry Moore, Esq., Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

August 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0746 A.C. No. 11-03141-360105
v.	
MACH MINING, LLC, Respondent	Mine: Mach No. 1 Mine

DECISION AND ORDER

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Chris Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for the assessment of civil penalty 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). Docket No. LAKE 2014-0746 involves thirteen section 104(a) citations issued by the Secretary of Labor ("the Secretary") between July 14 and 28, 2014, charging Mach Mining, LLC ("Mach") with violations of mandatory health and safety regulations. On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, which I approve below.

A hearing was held in St. Louis, Missouri on November 2, 2015 on Citations Nos. 8450924 and 8450926. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered.

[1] In this decision, "Tr." refers to the hearing transcript, "ALJ Ex. #" refers to the ALJ's exhibits, "P. Ex. # refer to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. ALJ Exs. 1 and 2; P. Exs. 1, 2, 4, and 5; and R. Exs. 1 and 2 were received into evidence at the hearing. R. Ex. 4 (Longwall Production Reports for July 12-14, 2014) and R. Ex. 5 (Continuous Miner Production Reports for July 12-14, 2014) were submitted after the hearing, and I now admit them into the record.

Citation No. 8450924 charges Mach with violating 30 C.F.R. § 75.400 for failing to prevent and clean up accumulations of coal dust, loose coal, and other combustible material. The Secretary alleges that the violation was significant and substantial (S&S)[2] and the result of Mach's high negligence. Citation No. 8450926 charges Mach with violating 30 C.F.R. 75.363(b) for failing to properly record the accumulation hazard alleged in Citation No. 8450924. The Secretary alleges that this violation was also S&S and the result of Mach's high negligence. The issues presented in the case are whether Mach violated the standards cited by the Secretary; if so, whether the Secretary properly assessed the gravity of the violations and the level of negligence attributed to Mach; and what penalties, if any, should be assessed against the Respondent. For the reasons set forth below, I affirm Citation No. 8450924, as written, and assess a civil penalty of $15,570. I also affirm Citation No. 8459026, as written, and assess a civil penalty of $6,996.

Based on a careful review of the record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following findings of fact and conclusions of law:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing the parties stipulated to the following:

1. Mach was at all times relevant to these proceedings engaged in mining activities at the Mach Number One Mine located in or near Johnson City, Illinois.

2. Mach's mining operations affect interstate commerce.

3. Mach is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

4. Mach is an "operator" as the word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mach Number One Mine (Federal Mine I.D. No. 11-03 141) 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 Act.

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

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the MSHA citations.

7. The MSHA citations at issue in these proceedings were properly served upon Mach as required by the Mine Act.

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance.

9. Mach demonstrated good faith in abating the violations.

10. In 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal.

11. The penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business.

Resp't's Pre-Hrg. Rpt. 1-2; Pet'r's Br. 2-3.

B. General Factual Background

1. Mine Examiner Adams' Shift Examination

On July 14, 2014, mine examiner David Adams conducted a midnight shift examination of the slope belt at approximately 6:00 a.m.[4] Tr. 116. The slope belt is located in the mine travel way, which slopes downward from the surface to the underground sections of the mine. Tr. 54-55. The ceiling is approximately ten feet high, and is supported by a steel, arch-supported line opening. Tr. 55. The travel way is divided into two parts: a 12-foot-wide road for vehicles on the left-hand side and a seven-foot-wide slope belt flanked by a four-foot-wide walkway on the right-hand side. Tr. 55, 68, 222. The travel way and the slope belt are separated by steel beams placed at five foot intervals. Tr. 197. There are four carbon monoxide ("CO") detectors and a fire suppression system present along the slope. Tr. 346-47.

Adams conducted his examination by driving along the 3,600-foot slope belt and checking for accumulations of coal, structural damage, and hazards on both the driving side and

[4] David Adams worked full time for Respondent from 2007 until March of 2015. Tr. 212. At the time of the inspection, Adams was a mine examiner, who was required to check all working sections, belt lines, and air courses for hazardous conditions or violations. Tr. 214. At the time of the hearing, Adams had retired and was working for Respondent as a part-time contractor. Tr. 212. Adams began mining in 1972, and held mine examiner, mine manager, EMT and electrical certifications. He has thirty years of experience in the mining industry. Tr. 213-15.

back side of the slope belt. Tr. 215, 222, 239. At the end of his examination, Adams filled out the examination book for each belt line and travel way, which takes about 20 minutes. Tr. 231. He observed spillage on the slope belt due to washback, but denied observing any accumulations in contact with the belt. Tr. 227, 229.

At the time of the inspection, Respondent was mining a new panel, which resulted in water coming off the longwall face, and spillage onto the slope belt. Tr. 283. Although some of this water was discharged through water pumps and pipes, some was transported with coal and rock via the belt. As the material was transferred from one belt to another, the weight of the water and other material made it difficult for the belt to force the material uphill and out of the mine. Tr. 98. As a result, the material washed back downhill, flooding the area below. Tr. 98. Mine manager Rorer described this as "washback," which happens when water builds up to a certain peak on the belt, and rolls back on the belt instead of exiting the slope.[5] Tr. 334.

Adams testified that accumulations can occur very quickly on a slope belt due to spillage resulting from "washback," which consists of water, coal, and other materials sliding down the slope belt as a result of efforts to remove the water discharged from longwall mining operations. Tr. 253. Mach has a 44-46 percent recovery rate, meaning that 44 to 46 percent of what is mined by weight is coal. The rest is rock or other rejected material. Tr. 390.

Respondent had previously investigated the washback phenomenon, and mine manager Parker Phipps visited other mines to view their dewatering systems.[6] Tr. 389. After these visits, Phipps ordered a new dewatering system to address the washback issue. Tr. 337, 389. It took about three months to purchase and install the system. Tr. 339. The dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Tr. 389.

In the interim, Phipps testified that additional miners were hired to shovel as needed each shift, and company foremen patrolled the belt for rollers contacting accumulations. Tr. 227, 383, 399. The number of shovelers varied from day to day, but more miners were needed early in the week because the longwall was idled on Saturdays and Sundays, and then started again on Sunday, causing washback. Tr. 391. Rorer testified that in order to combat the water, the mine would set pumps over the weekends. On Sunday night, before the long wall began production, the gates on the tail would be opened to run water off the long wall before coal was produced. Tr. 333.

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[5] Rorer has worked at Mach for over seven years. Tr. 321. He spent one year running a scoop, three years as a belt foreman, and the three years before the inspection as a certified mine manager. Tr. 321, 323-24. Prior to working at Mach, Rorer worked at the Eagle Valley mine for five years as a roof bolter, and then at the Willow Lake mine as a roof bolter and a scoop operator. Tr. 322.

[6] Phipps has a Bachelor of Science in Mining Engineering. Tr. 382. He holds underground mining foreman papers from Colorado, and a mine manager certification for Illinois. Tr. 382. Phipps has seven years of underground mining experience. Tr. 382. He began working for Mach Mining in 2013, and was promoted to general manager in July of 2014. Tr. 383.

After his examination, Adams spoke to mine manager Rorer to relay the results of his examination and the progress that the shoveling miners had made at that point. Tr. 232; 236. Adams noted in the slope belt examination book that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1. This July 14, 2014 entry was standard practice at the mine. Adams testified that Rorer would "know what [his notation] meant." Tr. 264. Adams testified that he would verbally have told Rorer any additional or more specific information. Tr. 264.

2. The Instant Inspection

MSHA Inspector Bernard Reynolds arrived at the mine at 7 a.m. on July 14, 2014 to conduct a regular E01 inspection.[7] Tr. 51, 186. During that inspection, miner Guy Webster drove Reynolds into the mine.[8] Tr. 54, 56, 301. As they proceeded down the travel way, an unidentified miner stopped their vehicle to inform Webster that a set of rails on the slope was broken, and that the belt was running in contact with coal accumulations. Tr. 56.[9] Hearing this, Reynolds decided to inspect the broken rail on foot. The broken rail was located approximately 300-500 feet from the top of the slope. Tr. 57-58.

When Reynolds set out on foot, there were five to seven miners at the top of the slope cleaning the belt. Tr. 69. Reynolds observed coal accumulations up to 30 inches deep and six feet wide. Tr. 60. In some places, rollers touched the accumulations. Tr. 60. Based on the extent of the accumulations, Reynolds estimated that the accumulations had existed for several shifts. Tr. 63-64.

As Reynolds walked the belt, he found accumulations 12 inches deep on the back side of the belt approximately 100 feet from the slope collar. Tr. 65. At 200 feet, he found accumulations approximately 14 inches deep. Tr. 66. The accumulations increased to about 16 inches at 250 feet. Tr. 66. At 570 feet down the belt, Reynolds observed that the belt and three of the bottom idler rollers were running in approximately ten feet of coal dust accumulations that were 24-30 inches deep. Tr. 69-70, 72.

At 650 feet, Reynolds found that three bottom roller brackets were hot from contact with the moving belt. Tr. 78. Further, the belt had cut into the I-beam approximately one-eighth of an

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[7] Reynolds has been an inspector with MSHA for 7 years. Tr. 33. He is a ventilation specialist and has a Bachelor's of Science degree in Mining Engineering. Tr. 33. Reynolds had 22 years of experience in underground mining. Before becoming an inspector, most of this experience involved long-wall mining. Tr. 34, 37.

[8] Webster has twenty years of experience in underground mining. Prior to the hearing, Webster worked for Mach for ten years, the last six as an out-by boss. Tr. 278. As an out-by foreman, Webster led a team performing various jobs and projects, other than producing coal. Tr. 279-80. Webster has mine examiner and mine manager papers. Tr. 279. At the time of the inspection, Webster supervised underground miners, who were performing tasks other than extracting coal, such as shoveling the belt. Tr. 277.

[9] The rail is part of the belt structure's framework and supports the rollers on the belt. Tr. 57-58.

inch. Tr. 78. Reynolds estimated that the rubber belt had rubbed into the steel I-beam for at least 24 hours. Tr. 79.[10]

Approximately 1,100 feet down the belt, near the slope tripper drive, Reynolds observed another area of significant accumulation, where five rotating rollers were rubbing the belt, creating a frictional heat source. Tr. 80.[11] Reynolds testified that dust was visible in the air near the slope tripper drive, which led Reynolds to conclude that the coal in that area was fairly dry. Tr. 83, 131. Although Reynolds did not observe any miners in the immediate area, Reynolds noted that the air would take the suspended dust up the slope, toward the location where the five to seven miners were cleaning the belt at the top of the slope. Tr. 81, 83-84. Water sprays were installed near the slope tripper drive to suppress the dust, but they were non-functional on the day of the inspection because the water from the main pipe had been shut off. Tr. 86-87.

Approximately 1,600 and 2,000 feet down the belt, Reynolds observed even more significant accumulations in contact with roughly fifteen feet of the moving belt and two rotating belt rollers. Tr. 87-88. Further down the belt, at 2,000 to 2,200 feet, Reynolds observed varying amounts of accumulations, up to 30 inches deep, in contact with two rollers and ten feet of the belt. Tr. 88. At 2,200 feet, Reynolds observed 24-inch-deep accumulations in contact with one bottom belt roller. Tr. 89. At 2,300 feet, Reynolds observed accumulations between four and 24 inches deep along half the width of the belt, but no potential heat sources were present. Tr. 90.

In sum, Reynolds observed six discrete locations where bottom rollers contacted accumulations. In total, 14 bottom rollers and 105 feet of belt were in contact with coal. Tr. 100; P. Ex. 4, at 14.

Initially, Reynolds thought it would be necessary to shut the belt down to clean up the accumulations, but thereafter he determined that the accumulations could be cleaned while the belt was running. Tr. 91. Reynolds declined to issue a closure order because he determined that shutting the belt down would cause a buildup of water. Tr. 93-94.

Based on his observations, Reynolds issued Citation No. 8450924, alleging a violation of 30 C.F.R. § 75.400. Section 75.400 provides that "coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not

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[10] This estimate is in dispute. Webster testified that this result would have occurred after a "long time." Tr. 301-302. Adams testified that it would not take very long, possibly four hours. Tr. 268-269. In light of their substantial combined experience, I credit the testimony of Reynolds and Webster indicating that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours, and I reject Adams' contrary testimony.

[11] The slope tripper drive provides increased power to the belt to keep it moving and transporting coal. Tr. 81. The slope tripper drive is a transfer point, where coal travels from one belt to another. When coal is dumped onto another belt, it travels through the air before landing on the next belt. This transfer often generates coal dust as the coal being transferred breaks and creates dust. Tr. 82.

be permitted to accumulate in active workings, or on diesel powered and electric equipment therein." 30 C.F.R. § 75.400. The condition alleged in Section 8 states:

> Loose coal was allowed to accumulate in excessive amounts along the slope belt, from approximately 100 feet below the slope collar to the bottom. These accumulations were in continuous windrows along both sides of the belt (the majority of the instances were along the back side of the belt), which ranged from 4" to 30" deep & from 16" to 72" wide, and occasionally up to the full width of the belt. Additionally, the accumulations were in contact with the moving belt and bottom rollers at the following approximate locations: 570' station; 1100' station; 1900' station; 2100' station; 2200' station; 2300' station.

P. Ex. 2. Reynolds designated the violation as significant and substantial, and determined that, as a result of Respondent's high negligence, the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners. *Id*. The Secretary initially proposed a penalty of $15,570.

After his underground inspection, Reynolds inspected the Respondent's record books for the previous month. Tr. 119. The belt inspection examination entries are kept in a separate book. A review of the belt examination book indicates that each of the eleven belts at the mine is inspected every shift, and the results are recorded on a separate page for each morning, evening, and midnight shift. Thus, each page represents one shift, and contains eleven entries, one for each belt examined during the shift. The pages include spaces to designate the mine name, the date of the examination, and the shift, and contain the following instruction:

> List all belts checked and make notation of any corrections needed or made in the following spaces. Include violations of designated regulations. If belt inspected is OK, so state. Indicate all corrections by action taken, date, and signature.

R. Ex. 2.

As noted, slope belt examination book entry at issue that Adams made for July 14, 2014 states that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1.

All of the slope belt exam notations for each shift from July 9 to July 13, 2014 (the five days and fifteen shifts preceding the issuance of Citation No. 8450924 on July 14) stated either "needs cleaned—work in progress" or "needs cleaned—cleaning in progress," except for the July 9 evening shift, which stated "none." *Id.* Some of the entries for other belts were more specific, such as the July 9 day shift entry for the east belt ("Need to clean under rollers from 3 to 8") or the July 10 day shift entry for the SM3 belt ("Need to clean 7A flowthrough"). These more specific entries were followed by the additional notation "done," and initials, presumably from the miner or supervisor, who took the corrective action. *Id*.

The slope belt exam book entry for the July 15 midnight shift (the first shift examination following the issuance of Citation No. 8450942) states: "Needs cleaned 100 foot inby tripper to tailpeace [sic] on back side tripper to travel road side 300 foot from tripper to top travel road

side." The July 15 day shift entry states: "Need to clean from 1800 to 2300 and 1000 to 1100 need to clean tail of take up." The July 15 evening shift entry reads: "Need to clean tail on backside and under tail roller, need to clean from 300 ft marker to tripper backside and from tripper to tail backside. Need to clean from tripper to tail travel road side. Need to clean take-up under belt." *Id*.

Reynolds testified that the accumulations that he observed on the morning of July 14, 2014 were too extensive for an examiner to miss. He found that the examination record simply stated "slope belt needs cleaned, work in progress." R. Ex. 1; Tr. 121-124. Reynolds described this as "non-specific, non-critical" language which did not mention "coal accumulation" or "washback." Tr. 116-17, 124. According to Reynolds, if the examiner had, in fact, noticed the extent of the accumulations on the slope belt, then the language "needs cleaned" failed to indicate the extent of the accumulations or that they needed to be removed immediately. Tr. 117-18.

Since the notation made by Adams did not reflect the conditions Reynolds observed in the mine just two hours after Adams' examination, Reynolds issued Citation No. 8450926 for an alleged violation of 30 C.F.R. § 75.363(b), which states in pertinent part:

> (b) A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found *and shall include the nature and location of the hazardous condition or violation and the corrective action taken.* This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found. (italics added)

The citation alleged:

> The mine examiner has not properly recorded hazardous conditions in the examination record as were found to exist along the slope belt. Six individual areas were observed which posted distinct safety hazards in that accumulations of combustible material in the form of loose coal was in contact with the moving belt and bottom belt rollers. The exam record for the last examination of this area, which was completed just prior to the MSHA inspection, only indicated that the slope belt "needs cleaned." This language does not indicate the hazard that was found to exist.

Ex. P-3. Reynolds designated the violation as significant and substantial, and determined that the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners, as a result of Respondent's high negligence,. *Id*. The Secretary proposed a penalty of $6,996.

Two weeks later, on July 28, 2014, MSHA inspector Brittain Belford issued Citation No. 8451307, alleging another violation of 30 C.F.R. § 75.400 based on slope belt accumulations "extend[ing] from the bottom of the slope to the top and rang[ing] from approximately 1 ft-4 ft in depth and 1 ft-3ft in width." P. Ex. 5. Inspector Belford also observed rollers touching the accumulations. *Id*. Respondent agreed to settle Citation No. 8451307, as issued, with no modifications or changes in penalty, as part of the partial settlement in this docket. ALJ Ex. 1.

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).

B. Gravity and Significant and Substantial (S&S)

The Mine Act describes a 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). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996).)). 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).

As the Commission has noted, the gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury… but rather on the effect of the hazard if it occurs"). Alternatively, a violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, 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.[12] *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984). The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). 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, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also 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); *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 (discussing the operative timeframe for violations in the context of S&S analyses).

The Commission has 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 presents a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug.1984) (internal citation omitted). "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 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 498, 500 (Apr. 1988). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*, 32 FMSHRC at 1281). 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." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

[12] 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 the 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).

In a decision issued on January 21, 2016, the Fourth Circuit shifted the focus of the traditional S&S analysis from the third to the second *Mathies* prong, restricting the consideration of the facts bearing on the reasonable likelihood of injury under the third prong. *See Knox Creek*, 811 F.3d at 162. 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.

Id. Under the Fourth Circuit's application of *Mathies*, the occurrence of the hazard must be assumed under the third prong of the test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong. Rather, the inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Id.* at 162. The Seventh Circuit has previously adopted a similar interpretation of the *Mathies* test, stating that the question in applying the third prong of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest*, 762 F.3d at 616.

For violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied 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 943; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). In particular, "the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area." *Excel Mining, LLC,* 37 FMSHRC 459, 465 (Mar. 2015).

The fourth *Mathies* factor requires the Secretary to show, by a preponderance of the evidence, a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. The Commission noted in *Mathies* itself that, "as a practical matter, the last two elements will often be combined in a single showing." *Id*. 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.[13]

C. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the

[13] Inspectors are trained not to designate a violation as S&S, unless item 10.A on the citation 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).

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, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations 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 at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but 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. *Brody*, 37 FMSHRC at 1701.

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), as noted, MSHA has defined 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.

30 C.F.R. § 100.3, Table X.

I note that the Commission generally gives deference to MSHA's regulations. *See Auer v. Robbins,* 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is controlling unless "erroneous or inconsistent with the regulation"); *cf. Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101-02 (Dec. 2014) (holding that the ALJ was not bound by the Secretary's definition of "high negligence" set forth in 30 C.F.R. § 100.3(d)). Under MSHA's standard, high negligence is properly designated when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. This analysis 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's negligence regulation further provides that mitigation is an affirmative action by the operator 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. *Id*.

D. Penalty Criteria

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*, 30 FMSHRC at 723.

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*, 37 FMSHRC at 1880 n.1 (Jordan, Chairman and Nakamura, Comm'r concurring); *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). The Secretary's assessment is not binding, but operates as a lodestar, since the 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 two citations at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Accumulation Violation, Citation No. 8450924

As discussed above, on July 14, 2014, Reynolds found that the accumulations which ran the length of the slope belt constituted a violation of 30 C.F.R. § 75.400, a mandatory safety standard. P. Ex. 2. Reynolds designated the violation as S&S, and reasonably likely to result in lost workdays or restricted duty for six miners. P. Ex. 1. He found that the violation was attributable to Respondent's high negligence.

The Secretary requests that I affirm the citation as written. Sec'y Br. 32. The Respondent requests reduction of the negligence designation, deletion of the S&S designation, and reduction of the number of persons affected. Resp't's Br. 3, 30. Although Respondent does not contest the fact of the violation, it argues that the Secretary has not met his burden to support the second, third, and fourth prongs of the *Mathies* test. Resp't's Br. 15. Respondent argues that the coal was wet and mixed with other material, that the accumulations were being shoveled, and that safety measures were in place to negate any risks of ignition or explosion. Accordingly, Respondent argues that ignition was unlikely, and even if an ignition were to occur, injuries would be minimal. Resp't's Br. 16.

1. Citation No. 8450924 was Appropriately Written as S&S.

I find that the large amount of coal accumulations in continuous contact with the belt rollers created the possibility of a belt fire, which constitutes a discrete safety hazard under the second element of the *Mathies* test. I find unpersuasive the Respondent's argument that the dampness of the accumulations and the absence of any ignition sources negate the existence of a hazard. *See* Resp't's Br.16. Although Reynolds conceded that he did not measure the heat of the belt parts that were in contact with the coal, and did not issue an imminent danger withdrawal order because he did not observe a visible flame or any smoldering or smoke, I do not find these facts fatal to the Secretary's assertions that the accumulations created a discrete safety hazard. Tr. 100-101, 178. The Commission has long held that "wet coal accumulations pose a significant danger in underground coal mines." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond*, 7 FMSHRC at 1120-21 (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion); *see also Continent Res. Inc*., 16 FMSHRC 1226, 1230-32 (June 1994) (affirming S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite").

I also find that the discrete safety hazard created by the accumulations was reasonably likely to cause harm, satisfying the second prong of the Fourth Circuit's application of *Mathies. Knox Creek*, 811 F.3d at 162. In other words, the accumulations were reasonably likely to ignite, and such an ignition would likely case cause harm. Respondent argues that the wetness of the coal and the 45% recovery rate reduce the likelihood of an ignition. Resp't's Br. 16. Reynolds' testimony, however, establishes that the frictional heat from the belt would dry the coal under continued normal mining conditions, and the accumulations touching the belt therefore constituted a potential ignition source. Tr. 70. In fact, Reynolds testified that three of the bottom roller brackets that he observed were hot from contact with the moving belt. Tr. 78. Phipps conceded that if heat is applied to wet material, the water would eventually evaporate, drying the material. Tr. 410.

Respondent also argues that the likelihood of ignition was reduced due to the smaller percentage of combustible material being transported by the belt. Resp't's Br.16-18. Phipps testified that 44 to 46 percent of what is mined by weight is coal, and the rest is rock or other rejected material. Tr. 390. Although Reynolds conceded the possibility that only 45 percent of the material transported by the belt was coal, this fact did not change his opinion that the accumulation constituted an S&S violation. Tr. 178, 179, 180, 200. Reynolds' determination is consistent with Commission precedent holding that "even wet coal accumulations are prohibited by section 75.400 because they can dry out in a mine fire and ignite." *Manalapan Mining Co., Inc.*, 32 FMSHRC 690, 698 (June 2010) (citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990) (internal citations omitted). Reynolds explained that if coal is present, it is combustible, and any ignition will spread through both the combustible and noncombustible material. Tr. 200. Therefore, due to the frictional heat sources present, I find that the coal accumulations presented an ignition hazard that would likely result in an injury under the Fourth Circuit's application of the *Mathies* test. *See Knox Creek*, 811 F.3d at 162 ("[F]or a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.").

Regarding the third *Mathies* factor, Respondent argues that the reasonable likelihood of an injury was so low that Reynolds allowed the belt to continue operating, and therefore the S&S

designation should be deleted. Resp't's Br. 12. Reynolds permitted the belt to continue operating because, after consultation with Webster, he determined that the accumulations could be cleaned up without immediate danger. Tr. 292. The Fourth Circuit and Seventh Circuit's *Mathies* application requires an assumption that the hazard occurred, and the third prong of the test focuses on whether the hazard is likely to result in a serious injury. *Knox Creek*, 811 F.3d at 162; *Peabody Midwest*, 762 F.3d at 616. Based on the extent of the accumulations and the presence of ignition sources, I credit Reynolds' testimony that if the accumulations were left unabated, then an ignition would likely result. Tr. 105. Circuit Court precedent indicates that equipment operating in coal accumulations constitutes an ignition source for S&S purposes, even absent any defects in the equipment. *See Buck Creek*, 52 F.3d at 135 (affirming S&S designation where the frictional heat from a roller turning in coal dust could easily cause a fire, despite no evidence that the roller was either hot or defective). Additionally, Commission judges have found accumulation violations to be S&S based solely on contact between accumulated coal dust and non-defective equipment that could constitute an ignition source. *See, e.g.*, *American Coal*, 36 FMSHRC 1311, 1343 (May 2014). High levels of methane may also increase the risk of ignition and are appropriately considered in a confluence-of-factors analysis. *Excel Mining, LLC,* 37 FMSHRC at 462. The mine was on a 5-day spot inspection because the mining process liberated an excessive amount of methane. Tr. 188. In short, the gassiness of the mine, coupled with the extent of accumulations touching hot rollers, created a dangerous combination that was reasonably likely to cause an ignition.

Regarding the fourth *Mathies* factor and the likelihood that any injury caused by the hazard would be of a reasonably serious nature, Respondent argues that the violation is not S&S because the CO detectors on the belt would alert miners to fire, and the slope's fire suppression equipment would prevent any serious injury. Resp't's Br. 18. Redundant safety measures do not constitute a defense to an S&S allegation. The Commission has held that extra precautions may reduce risks, but do not make a violation non-S&S. *Consolidation Coal Co.,* 35 FMSHRC at 2330. The Seventh Circuit has specifically rejected the contention that fire prevention and safety measures mitigate the S&S status of an accumulation violation. *Buck Creek*, 52 F.3d at 135; *see also Cumberland Coal Res., LP*, 33 FMSHRC at 2369 (treating redundant mandatory safety protections as a defense to S&S findings would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made)*, aff'd sub nom., Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Even Rorer testified that an extinguished fire would still generate smoke, which could be inhaled by a miner downwind. Tr. 354. In addition, Reynolds testified that in the event of an ignition, not only would miners in the immediate area be affected by flames, smoke inhalation, or carbon monoxide exposure, but miners downwind of the vent would also be exposed to smoke and carbon monoxide. Tr. 106. Furthermore, the slope is next one of two designated escapeways, potentially exposing miners to burns and smoke inhalation as they attempt to exit a mine during an emergency. Tr. 191. Smoke inhalation and burns constitute serious injuries for purposes of the *Mathies* analysis. *Amax Coal*, 19 FMSHRC 846, 847 (May 1997) (upholding judge's finding of S&S based on evidence of smoke inhalation and burns as serious injuries) . Accordingly, I reject the Respondent's argument that the presence of CO detectors or the fire suppression system justifies deleting the S&S designation.

In conclusion, I find that even if the accumulations were wet and the belt primarily transported non-combustible material, the reasonable likelihood of an ignition risk remained.

Frictional heat was likely to dry the coal accumulations, and high methane concentrations compounded the risk of ignition. Any injury from an ignition would likely result in smoke inhalation and burns, which constitute serious injuries likely to result in lost work days or restricted duty. In these circumstances, I find that the citation was properly designated as S&S.

2. Citation No. 8450924 was the Result of Respondent's High Negligence.

As noted above, 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 at 1910. Reynolds testified that, based on the extent of the accumulations observed, mine managers or examiners, who traveled the slope numerous times every day, should have recognized and dealt with the accumulations. Tr. 109. Accordingly, Reynolds designated Respondent's negligence as "high." P. Ex. 2.

Respondent argues that its actions regarding the accumulations were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances. Resp't's Br. 14. The Respondent argues that Mach's mitigation efforts weigh in favor of a lower negligence designation. Resp't's Br. 5-8. Respondent argues that the accumulations increased significantly between Adams' initial examination and Reynolds' inspection about two hours later. In light of that alleged rapid build-up, Respondent argues that the actions it took were sufficient to mitigate Reynolds' high negligence designation. Resp't 13.

Respondent also argues that while it awaited the arrival of the new dewatering system, conditions on the slope belt were being monitored and abated. As noted, the dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Webster testified that ten miners were shoveling the belt around the clock. Tr. 283, 304; Resp't's Br. 13. Phipps testified that additional miners were hired to shovel as needed, and company foremen patrolled the belt for rollers contacting accumulation. Tr. 383, 389, 399. I note, however, that only five to seven miners were shoveling at the time of the inspection, and they were located at the top of the slope belt where the accumulations were less significant.

While installing a dewatering system was a prudent long-term decision, Respondent's belated reaction to the recurring washback issue fails to mitigate its negligence. Rorer conceded that it would have been possible to shut the long wall down and install a dewatering system before mining the longwall panel, but Respondent declined to do so. Tr. 367. As indicated by the receipt of another accumulation citation just two weeks after the instant citation, Respondent's mitigation efforts were inadequate to address the accumulation hazards. P. Ex. 5.

Reynolds testified that the washback phenomenon was a predictable consequence of Respondent's decision to use the belt conveyor to transport water out of the mine, and opined that since the Respondent was using the belt conveyor to discharge water, its pumping system was inadequate to handle the amount of water encountered. Tr. 97-99. Although Respondent argues that the severity and timing of the washback was unpredictable, it also admits that the phenomenon itself was an inevitable consequence of using the slope belt to remove water. Tr. 385; Resp't's Br. 14. As the Secretary argues, the development of accumulations is therefore

directly attributable to Respondent's choice to expel water using the slope belt. Sec'y's Br. 19; *see also* Tr. 99, 199.

I find that despite the foreseeability of the washback accumulations and the assignment of miners to shovel the belt each shift, Respondent did not implement adequate measures to keep the belt clear of accumulations. In fact, Respondent was only able to keep the slope clear an estimated ten percent of the time in the month prior to the issuance of Citation No. 8450294. Tr. 403; R. Ex. 1; Sec'y's Br. 20. Given the high methane concentrations within the mine, Respondent should have been particularly attentive to recurring accumulations with possible ignition hazards present. Tr. 334.

Both the Secretary and Respondent have directed my attention to a prior case involving a section 75.400 citation issued to Respondent at Mach No. 1 Mine for slope belt accumulations. *See Mach Mining, LLC*, 33 FMSHRC 763 (March 2011) (ALJ). In that case, Judge Manning deleted the Secretary's S&S designation due to the wetness of the accumulations and the redundant fire-suppression safety measures. *Id*. at 773. The accumulations at issue in that case, however, were significantly less extensive than those at issue here. *Id*. at 770. Furthermore, as discussed above, precautionary safety measures do not make a violation non-S&S. *Consolidation Coal Co.,* 35 FMSHRC at 2330; *see also Buck Creek Coal, Inc.*, 52 F.3d at 135; *Cumberland Coal Res., LP*, 33 FMSHRC at 2369. Judge Manning's decision was not appealed and is not binding here. I find it particularly significant, however, because it indicates that Respondent was aware of the issues caused by the washback phenomenon for at least five years prior to the installation of the dewatering system.

In sum, I conclude that Respondent failed to address serious and largely self-imposed accumulation hazards that developed over the course of several shifts in a particularly gassy mine. I do not find persuasive Respondent's contention that its actions were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances, particularly since Respondent knew of the washback problem as early as 2011. Resp't's Br. 14. Furthermore, in the 15 months preceding Citation No. 8450294, Respondent received 58 citations for violating section 75.400. P. Ex. 2. Respondent was aware of the frequent and extensive accumulations caused by using the slope belt to transport water and the consequent washback accumulations. Respondent's failure to timely assign sufficient miners to correct the recurring problem demonstrated more than an ordinary lack of care. The totality of circumstances warrants a finding of high negligence.

B. Recordkeeping Violation, Citation No. 8540926

The Respondent requests that Citation No. 8540926 be vacated, the negligence designation be reduced, and the S&S designation be deleted. In support of its request to vacate, Respondent argues that the accumulations at the time of Adams' examination were not in contact with the slope belt, that Adams' notations satisfied 30 C.F.R. § 75.363(b), and that Respondent did not have fair notice that MSHA required more detail in recordkeeping notations. Resp't's Br. 20.

Adams testified that at the time of his shift examination two hours before Reynolds' inspection, Adams observed spillage on the belt due to washback, but did not observe

accumulations touching the belt. Tr. 228-29. Adams' testimony is corroborated by Webster, who stated that accumulations were not touching the belt at 6:00 a.m., and by Rorer, who passed by the belt at 7:15 a.m. Tr. 299; Tr. 342, 344.

While it is possible that the accumulations occurred rapidly as a result of the washback, considering all the circumstances of this case, I credit Reynolds' testimony that accumulations had existed for several shifts. Tr. 64. Adams conducted his slope belt examination as he drove out of the mine. Reynolds conducted his inspection on foot by walking the length of the belt from top to bottom. Tr. 56, 196, 239. Reynolds testified that the majority of the accumulations were on the back side of the belt, opposite the travel way, and partially obstructed from view by the steel I-beams and the belt itself. Tr. 56, 196-98. Reynolds opined that it would be difficult to conduct a thorough examination of the belt from a moving vehicle, as Adams had done, due to these obstructions. Tr. 197-98. Reynolds also testified that there were fewer accumulations on the side of the belt facing the road, and it appeared that those accumulations had been cleaned. Tr. 68.

In addition, at 650 feet down the slope, Reynolds observed that the slope belt had cut into the I-beam for approximately one-eighth of an inch. He estimated that this would have taken at least 24 hours for the rubber belt to cut into the steel I-beam. Tr. 78-79. Webster confirmed that it would have taken some time for the rubber belt to cut one-eighth of an inch into a three-eighths of an inch-thick, steel I-beam. Tr. 301-02. As noted above at note 10, I have credited the testimony of Reynolds and Webster that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours. As such, it should have been noted by Adams. The frictional damage to the I-beam undercuts Respondent's claim that it was actively monitoring belt conditions because Adams or other shift examiners should have noticed and documented such belt damage, and they did not. Based on the facts outlined above, I find that the Secretary proved by a preponderance of the evidence that the accumulations existed at the time of Adams' inspection and were in contact with the belt rollers.

1. Citation No. 8450926 was Properly Issued for Respondent's Failure to Record the Nature and Location of Hazardous Conditions as Required by 30 C.F.R. § 75.363(b).

Respondent argues that section 75.363(b) requires five elements:

> [1] A record shall be made of any hazardous condition and any violation of the mine mandatory health or safety standards found by the mine examiner. [2] This record shall be kept in a book maintained for this purpose on the surface of the mine. [3] The record shall be made by the completion of the shift on which the hazardous condition or violation of the mine mandatory health or safety standards is found and [4] shall include the nature and location of the hazardous condition of the violations and [5] the nature of the corrective action taken.

30 C.F.R. § 75.363(b); Resp't's Br. 23. Based on these elements, Respondent argues that Adams' notation of "slope belt needs cleaned—work in progress" satisfied the first four requirements, and was insufficient only in that it did not specifically refer to precise locations along the belt where accumulations had occurred. *Id*. The Secretary argues that the notation was

inadequate because it failed to identify the specific hazard of accumulations touching the running belt in six locations. Sec'y Br. 24; Tr. 113.

Although my research reveals that the Commission has not addressed section 75.363(b), the Secretary points out that prior Commission ALJ decisions have recognized three discrete elements pertaining to records kept under the requirements of section 75.363(b): the nature of the hazard, the location of the hazard, and the corrective action taken. *Drummond Company, Inc.*, 25 FMSHRC 644, 646 (Oct. 2003) (ALJ). The Secretary contends that Adam's notation is deficient in that it fails to document the extent of the accumulations and the locations where the rollers and the moving belt were in contact with the accumulations. Tr. 116-17; Sec'y's Br. 23. Respondent argues that Adams' notation regarding the accumulations was sufficient to meet the requirements of section 75.363(b) because the notation of "slope belt needs cleaned" would have been understood by a reasonable person familiar with the mining industry to mean that the entire belt needed cleaning from top to bottom. Resp't's Br. 9, 20, 22-23.

The purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). The adequacy of records is analyzed from the perspective of a miner reading the record for requisite information. *Twentymile Coal Co.*, 34 FMSHRC 2138, 2156 n. 22 (ALJ 2012).

Reynolds testified that the "slope belt needs cleaned—work in progress" notation was inadequate because slope belts generally need cleaning every shift. Tr. 117. While the notation may have been generally understood by a reasonable miner to indicate that the entire slope belt needed cleaning, the notation failed to give notice as to the specific hazards posed by the slope belt accumulations, as evidenced by the fact that six miners cleaning the belt during Reynolds' inspection were working at the top of the belt where there were fewer accumulations, rather than farther down the belt where there were greater accumulations near possible ignition sources. Tr. 126.

In addition, the nearly identical previous entries for the slope belt examinations and Respondent's long history of slope belt accumulation citations indicate that the entries were not sufficiently specific to serve the regulation's purpose of demonstrating to mine management whether its corrective actions were effective. I therefore find that Adams' "slope belt needs cleaned—cleaning in progress" notation did not identify the nature or location of the hazard, nor the nature of the corrective action, i.e. that the slope belt was actually cleaned at the locations of the numerous accumulation hazards.

2. Respondent had Fair Notice Regarding the Requirements of Section 75.363(b).

The Respondent also argues that it did not have fair notice that its recording practices violated 30 C.F.R. § 75.363(b). Resp't's Br. 7. Fair notice provides a defense when the standard at issue is "so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Ideal Cement Co.*, 4 FMSHRC 2128, 2129 (Dec. 1982). On the other hand, where a regulation is clear, "the terms of the provision must be enforced as they are written unless the regulator clearly intended the

words to have a different meaning or unless such a meaning would lead to absurd results." *Lode Star Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

Regulatory interpretation is a two-step analysis. *Walker Stone*, 19 FMSHRC 48, 51 (Jan 1997), *aff'd*, 156 F.3d 1076, 1081 (10th Cir. 1998). The first step is to determine whether the regulation is clear and unambiguous. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). The regulation must be applied as written where the regulatory language is clear and unambiguous. *Id*. If the regulation is ambiguous, the second step is to determine whether the agency's interpretation is reasonable. *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1192 (10th Cir. 2008) (citing *Auer v. Robbins*, 519 U.S. 451, 461 (1997)). An interpretation is reasonable unless it is plainly erroneous or inconsistent with the regulation. *Id*. In making this reasonableness determination, the Commission considers the regulatory language and history. *Twentymile Coal*, 36 FMSHRC 2009, 2012-13 (Aug. 2014).

Even absent actual notice, the Secretary may charge an 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 at 3500-01; *Ideal Cement Co.*, 12 FMSHRC at 2415-16; *Alabama By-Products Corp.*, 4 FMSHRC at 2129. The Secretary argues that the requirements of section 75.363(b) are explicit: the record of the hazard must contain the nature of the hazard, the location of the hazard, and the correction action taken. Sec'y's Br. 23. As discussed above, Respondent argues that the plain language of the statute contains five requirements: a record maintained in a book on the surface of the mine that identifies the nature and location of hazards during shift inspections and the corrective action taken to alleviate those hazards.

A review of the record book itself indicates that notations for other belt examinations contained the elements that the notations for the slope belt lacked. For example, the July 9 day shift entry for the east belt states: "Need to clean under rollers from 3 to 8." The July 10 day shift entry for the SM3 belt states: "Need to clean 7A flowthrough." Both of these entries were followed by the additional notation "done," and initials. R. Ex. 2. As demonstrated by these notations, Respondent recognized the essential elements of the regulation and properly recorded at least some of the hazards identified during its examinations prior to the issuance of Citation No. 8450962. Accordingly, I find that Respondent had fair notice regarding the plain language of the requirements of section 75.363(b). The regulation at issue is clear and unambiguous, and thus should be interpreted in accordance with its plain language.

Even assuming that the regulation is ambiguous, the Secretary's interpretation is reasonable and should be accorded deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). As noted above, the purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). I find that the Secretary's interpretation of the regulation is consistent with this purpose. To allow generalized notations like Adams made to satisfy this standard would nullify the regulation's requirements to identify the nature and location of the hazard, and the specific identification of the corrective action taken for such hazard, thereby undermining the purpose of the regulation.

Accordingly, I find that Adams' notation of "slope belt needs cleaned—cleaning in progress" does not satisfy the requirements of 30 C.F.R. § 75.363(b).

3. Citation No. 8540926 Was Appropriately Written as S&S.

Recording hazardous conditions discovered in a shift examination is crucial to the health and safety of miners. *See, e.g.*, *American Coal Co*., 34 FMSHRC 2058, 2082 (ALJ 2012). In the context of an S&S designation, the Commission must determine whether the failure to record contributed to a hazard that is reasonably likely to result in a serious injury. *Id*. Reynolds issued Citation No. 8540926 because, in his opinion, Adams' notation did not identify the nature and location of the accumulations hazards that were prevalent at numerous locations along the slope belt. As discussed above, accumulations touching the belt and rollers constituted an S&S violation that contributed to the discrete safety hazard of an ignition that was reasonably likely to result in a serious injury. Accordingly, I turn to the issue of whether the failure to properly record the nature and location of the slope belt accumulations contributed to the discrete safety hazard that management and miners would be unaware of the nature and location of the ignition hazards and any corrective actions taken, thereby enhancing the likelihood of reasonably serious injuries resulting in lost work days or restricted duty.

Reynolds designated Citation No. 8540926 as reasonably likely to result in a lost workdays or restricted duty injury because the location and nature of the accumulation hazards were not detailed in the examination report. Consequently, management and miners would not be able to immediately address the accumulations most likely to result in ignitions. Tr. 130. In fact, at the time of the inspection, miners were shoveling where ignition hazards were not present. Adams' poor and deficient documentation of the accumulation and ignition hazards present were reasonably likely to enhance an actual ignition during continued mining operations, and the ignition itself was reasonably likely to result in serious injuries of smoke inhalation and burns.

Respondent argues that Adams' notation "slope belt needs cleaned—work in progress" served the purpose of notifying miners and management of specific hazards in the mine because six workers were assigned to shovel the accumulations on the slope belt, potentially abating the discrete hazards that might arise from inadequate reporting. Tr. 242, 317; Resp't's Br. 29. I disagree. I reject this argument. The belt was running. No specific hazards were mentioned, nor was the specific location of such hazards mentioned. Further, as Adams testified, the six or so miners were shoveling at the top of the slope, rather than addressing those areas of the belt where the accumulations were touching the rollers or the belt itself. Tr. 126.

In addition, 27 miners were assigned to clean the belt after the issuance of Citation No. 8450924. Tr. 132. It took the 27 miners between two and three days to abate the hazards. P. Ex. 2. It is therefore unlikely that the six miners assigned to shovel the belt on the morning of July 14 had any significant effect on abating the hazards, even had they been shoveling in locations were the accumulations touched the belt and rollers. Without noting the specific location of the hazards observed, Adams' notation did little to enable miners or management to abate hazards within the mine, and thus rendered the examination reporting ineffective in carrying out the purpose of the regulation. Accordingly, I uphold the S&S designation and find that Adams' notations failed to properly record the location and nature of the accumulations,

thereby contributing to the reasonable likelihood of an ignition that would result in serious injuries.

4. Citation No. 8540926 Was Appropriately Written as High Negligence

Respondent argues that examiner Adams' notations accurately reflected slope conditions at the time of his inspection, and accordingly his recordkeeping was not negligent. Resp't's Br. 27. Although Reynolds conceded that Adams may have observed a "minimally less extensive" amount of accumulations during his examination, I have found that the Secretary established that the accumulations had accrued over more than one shift, and that Adams' examination from a moving vehicle precluded him from observing the accumulations and ignition sources on the far side of the belt. Tr. 139-141.

Respondent also argues that Adams' notation provided an opportunity for the examiner and the foreman to discuss accumulation issues. According to Adams, his July 14, 2014 entry was standard practice at the mine, and the mine foreman Rorer "would know what [his entry] meant." Tr. 264. Adams testified that when he spoke to Rorer after the examination at 7 a.m., Adams told Rorer that the entire belt needed to be cleaned. Tr. 262. Adams further testified that after his examinations, he usually would verbally convey to Rorer where shoveling was needed, rather than indicating such locations in the record book. Tr. 264, 357. However, miners going underground after the examination are entitled to review the examination book to determine the nature and location of hazardous conditions and violations found, and the corrective actions taken. Allowing verbal communications between examiners and supervisors to substitute for the written record required by section 75.363(b) would deprive miners of this right. The plain language of section 75.363(b) does not allow verbal communication to substitute for its written recording requirements. Furthermore, despite his discussion with Rorer, Adams' notation did not result in any significant action regarding the abatement or mitigation of the accumulations hazards until after the citation was issued. In addition, Respondent's belt examination book entries for July 9 and 10 indicate that Respondent attempted to at least comply with the standard's specific location requirements when it wanted to do so. In these circumstances, I find that Respondent's examiner was highly negligent in failing to properly document the nature and location of the numerous accumulation hazards, and the corrective action taken.

V. Civil Penalty

The Secretary initially proposed a penalty of $15,570 for Citation No. 8450924 and a penalty of $6,996 for Citation No. 8450926. In his post-hearing brief, the Secretary requested that the proposed penalty be increased to a total of $45,000 for both citations, but provided no supporting rationale. Pet'r's Br. 32. At trial, the Secretary did not move to amend its Petition for the Assessment of Civil Penalty to increase the proposed penalty.

The parties stipulated that in 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal. The parties also stipulated that the penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business, and that Mach demonstrated good faith in abating the violations. Respondent was cited 58 times for violations of section 75.400 in the fifteen months prior to the issuance of Citation No. 8450924. Given this history of violations, my confirmation of inspector Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement

of the violation, I assess a penalty of $15,570 for Citation No. 8450924 under the penalty criteria set forth in Section 110(i) of the Act.

Citation No. 8450926 was the first time Respondent was cited under 30 C.F.R. § 75.363(b). Given the absence of any history of violations, my confirmation of Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement of the violation, I assess a penalty of $6,996 for Citation No. 8450926 under the penalty criteria set forth in Section 110(i) of the Act.

VI. Approval of Partial Settlement

On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, and proposed a reduction in penalties from $34,317 to $25,461. The Solicitor states that Citation No. 8439597 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g.*, *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Solicitor also requests that:

> Citation No. 8439593 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439594 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439599 be modified to reduce the level of negligence from "high" to "moderate;" and
>
> Citation No. 8451307 be modified to reduce the number of persons affected from "ten persons" to "five persons."

The remaining citations and penalties are unchanged.

Pursuant to 29 C.F.R. § 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraph four from the Secretary's Motion to Approve Settlement as immaterial and impertinent to the issues legitimately before the Commission. The paragraph incorrectly cites and interprets the case law and misrepresents the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the 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 Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
8439592	$334	$334
8450925	$745	$745
8439593	$2,282	$2,282
8439594	$1,944	$1,944

8451302	$108	$108
8439595	$460	$460
8451306	$11,306	$11,306
8439598	$2,282	$2,282
8439599	$5,503	$2,000
8451307	$8,893	$4,000
TOTAL	$33,857	$25,461

VII. ORDER

Citation Nos. 8450924 and 8450926 are **AFFIRMED, AS WRITTEN**.

It is **ORDERED** that Citation No. 8439593 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439594 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439599 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8451307 be **MODIFIED** to reduce the number of persons affected from "ten persons" to "five persons."

To the extent it has not already done so, Mach Mining is **ORDERED** to pay a total civil penalty of $48,027 for the litigated and settled citations within thirty (30) days of the date of this Decision and Order.[14]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

[14] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution: (Certified Mail)

Daniel McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Christopher D. Pence, Esq., Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548, Charleston, WV 25329

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

August 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EUREKA STONE QUARRY, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2015-12-M A.C. No. 36-05527-363760 Docket No. PENN 2015-176-M A.C. No. 36-05527-375186 Mine: Eureka Stone Quarry, Inc.

DECISION AND ORDER

Appearances: Matthew R. Epstein, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner

Stephen B. Harris, Esq., Eureka Stone Quarry, Inc., Warrington, Pennsylvania, for Respondent

Before: Judge John Kent Lewis

Statement of the Case

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, et seq., ("Mine Act"). On August 12, 2014, an MSHA inspector issued a §103(j) order, and on August 14, 2014, the inspector issued a § 104(d)(1) citation, and two § 104(d)(1) orders to the Respondent arising out of a non-fatal accident that took place at Respondent's quarry.

A hearing was held in Scranton, Pennsylvania on April 19, 2016. After careful review of the parties' post-hearing briefs and reply briefs, the Court issues the following decision.

Stipulations

At hearing, the parties stipulated to the following facts:

1. Respondent was an "operator" as defined in Section 3(d) of the Act, 30 U.S.C §802(d) at the Eureka Stone Quarry, MSHA Mine I.D. No. 36-05527 (hereinafter the "mine") at which the citation and orders in this matter were issued.

2. The operations of the Respondent at the mine are subject to the Act.

3. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its assigned Administrative Law Judge, pursuant to Sections 105 and 113 of the Act.

4. The citation and orders in this matter were served by a duly authorized representative of the Secretary upon an agent of the Respondent at the date, time, and place stated therein as required by the Act.

5. True copies of the citation and orders in this matter were served on the Respondent and/or its agents as required by the Act.

6. The citation and orders contained in "Exhibit A," attached to the Secretary's Petition in the cases docketed as PENN 2015-0012 and PENN 2015-0176 are authentic copies of the subject citation and orders.

7. Robert Carr was superintendent of the mine on August 12, 2014.

8. Robert Carr was the person responsible for blasting at the mine on August 12, 2014.

9. Robert Carr was at the mine and supervising work on August 12, 2014.

10. There was a blockage in the impact crusher at the mine on August 12, 2014.

11. Robert Carr was supervising work to clear the impact crusher on August 12, 2014.

12. As part of the work to clear the impact crusher, blasting was conducted.

13. As part of the work to clear the impact crusher, Robert Carr went inside the impact crusher.

14. At approximately 3:40 p.m., on August 12, 2014, Robert Carr was injured when rocks fell from above him inside the impact crusher.

Resp't's Br., 2-3.

In addition the parties have stipulated that the proposed penalties in this matter will not affect the Respondent's ability to remain in business. Tr. 7.

LAW AND REGULATIONS

Burden of Proof and Standard of Proof

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Resources Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).[1]

[1] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence*. This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick On Evid. §339 (7th ed.), emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." HOMER, THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

Assessment of Credibility

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case's outcome, or lack thereof, consistencies or inconsistencies in each witness's testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Court's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Statutory Construction

The first inquiry in statutory construction is, "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261*, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. Chevron, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997).

Turning to the first inquiry, "in ascertaining the plain meaning of the statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

Significant and Substantial Violations

A violation is S&S if, based upon 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., Nat'l Gypsum Co.,* 3 FMSHRC

822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC at 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 Resources, 37 FMSHRC at 2691-92 (citing *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995)); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria.))

The *Mathies* test has long been accepted 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*, 890 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Austin Power, Inc., v. Sec'y of Labor,* 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

A recent decision by my esteemed colleague Judge McCarthy summarizes recent developments in S&S case law aptly:

> 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 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 165-6 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-8 (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. 1998).
>
> 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). 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").[2]

Mach Mining, Inc., LAKE 2014-0077, LAKE 2014-0132, 2016 WL 3226147 (May 2016) (ALJ McCarthy).

Following established precedent Commission judges have generally evaluated the reasonable likelihood of injury at the third *Mathies* prong rather than at the second *Mathies* prong. "There is no requirement of 'reasonable likelihood'" encompassed in this [second prong] element. *Musser Engineering, Inc*., 32 FMSHRC 1257, 1280 (Sept. 2010). 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 Mining Co.*, 6 FMSHRC 1834, 1836.[3]

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[2] Commission precedent has established 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, 1027-8 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

Mach Mining, Inc., LAKE 2014-0077, LAKE 2014-0132, 2016 WL 3226147(May 2016) (ALJ McCarthy).

[3] See, however, the recent holding in *Knox Creek Coal Corp v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), in which 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." See also the recent and perceptive decisions of my esteemed colleagues, ALJs McCarthy and Moran, discussing a possible shift of focus from the third to second element of Mathies in determining the likelihood of injury. *Northshore Mining Company*, No. LAKE 2015-0340-M, slip op at 1 (April 11, 2016) (ALJ McCarthy); *Oak Grove Resources*, LLC, SE 2009-261-R (April 2016) (ALJ Moran) at 4.

Negligence

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator's negligence as one of the criteria the Commission is required to consider in assessing a penalty. To start the process, MSHA proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. §815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. §100.3. With regards to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from "no" negligence to "reckless disregard," based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation. 30 C.F.R. §100.3 (d); *see generally Hidden Splendor Res., Inc.,* 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm'r Cohen, concurring.)[4]

The Commission has recently explained that 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[5] rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 804 F.3d 1259, 1263-4 (D.C. Cir. 2016).

Moreover, the Commission in *Brody* held that judges in making their negligence determinations were not to be limited to an evaluation of potential mitigating circumstances but should instead consider "the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702.

In determining the existence and degree of negligence associated with an alleged violation, a Commission judge must consider the duty of care accompanying the mandatory standard at issue.

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[4] *See also* §100.3, Table X- Negligence, which provides for 0 penalty points where there is "no negligence" (the operator exercised diligence and could not have known of the violative condition or practice); 10 penalty points for "low negligence" (the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances); 20 penalty points for "moderate negligence," (the operator knew or should have known of the violative condition or practice but there are mitigating circumstances); 35 penalty points for "high negligence" (the operator knew or should have known of the violative condition or practice and there are no mitigating circumstances); 50 points for "reckless disregard" (the operator displayed conduct which exhibits the absence of the slightest degree of care).

[5] Under a traditional negligence analysis the operator is negligent if it fails to meet the requisite standard of care – a standard of care that is *high* under the Mine Act. *Brody*, at 1702.

Negligence is not defined in the Mine Act. The Commission has, however held:

> "[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).
>
> > *JWR,* 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (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.)

Brody, 37 FMSHRC at 1702.

Unwarrantable Failure

In *Sec'y of Labor v. Manalapan Mining Co*., 35 FMSHRC 289 (Feb. 2013), 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 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.

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous"). The Commission has specifically noted that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining*, 35 FMSHRC at 294.

While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co., Inc*., 31 FMSHRC 1346, 1351 (Dec. 2009).

Penalty

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).

SUMMARY OF TESTIMONY

Ralph Bennett

At hearing, MSHA Inspector Ralph Bennett testified on behalf of the Secretary.[6] Bennett had been an accident investigator for 5 to 6 years, having received formal training for such at the National Mine Academy. Tr. 19. He had worked with jaw crushers/impact crushers. His job duties included operation, maintenance, blockage, clearance, and rebuilding. Tr. 19-20. Bennett had used dynamite to clear blockages, noting that dynamiting was an accepted practice but a "last resort" to clear blockages. Tr. 20.

Bennett described the operation of an impact crusher. Material is fed into the crusher from the top and "gravity fall[s] into any number of rollers."[7] Tr. 20. In the instant case, there was a pair of rollers running in opposite directions. The material would fall between the rollers, with the smaller chunks falling through the gap between the rollers. Tr. 20-1. A jam would occur in the crusher when material was too large to actually fall down and get gripped by the crusher teeth so as to be pulled into the system to be ground. The chunks that were too large would bridge above the rollers and jam the crusher. Tr. 21.

On August 12, 2014, Bennett's supervisor, Gary Merwine, had phoned Bennett, advising him that a miner was trapped at Eureka Stone and to proceed to the scene. Merwine subsequently called Bennett to notify him that the miner had been rescued and that Merwine had issued a 103(j) Order.[8] Tr. 23. Upon arriving at the mine site, Bennett changed the 103(j) Order to a 103(k) Order.[9] Tr. 23; *see also* Government Exhibit S-1.

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[6] Bennett had worked as an MSHA inspector since October 2006. He had previously worked in mining operations, both surface and underground, metal and non-metal, for 33 years. Tr. 17. His past positions included common laborer, shovel cleaning under conveyor belts and licensed blaster, blasting for nearly ten years. Tr. 18. As an MSHA Inspector Bennett had taken courses at the National Mine Academy. He had served an apprenticeship for 2 years, working with senior veteran inspectors, and had attained his MSHA inspector certification. Tr. 19.

[7] "Gravity fall," meaning the material rolls down the crusher chute before free-falling into rollers, its descent made possible by the "natural law" of gravity.

[8] Section 103(j) provides, in pertinent part, that in the event of an accident the operator must notify the Secretary and take appropriate measures to prevent the destruction of evidence: "In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative . . . shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine." 30 U.S.C. §813(j).

[9] Section 103(k) provides, in pertinent part, that in the event of an accident an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the mine: "In the event of an accident . . . an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine[.]" 30 U.S.C. §813(k).

Bennett opined that the Respondent had done a "very good job" of preserving the accident scene. Tr. 25. Bennett met with James Furey, the Respondent's Environmental Safety Director, and advised Furey of the modification of the (j) order to a (k) order. Tr. 25-6. The victim of the accident was Robert Carr, who was also the superintendent of Eureka Stone Quarry. Tr. 26.

Bennett went to the crusher accident site and had taken photographs of the scene, sending the pictures to MSHA's nearby district office. Tr. 27. Bennett ensured that the crusher had been locked out and that the integrity of the accident site had been preserved. Tr. 27. The crusher had been locked out to prevent inadvertent starting and further injury. Tr. 27-8.

Locking out the crusher only controlled the crusher's rollers. Although nothing could be started mechanically, boulders already in the hopper could still fall because of gravitational energy. Tr. 28. Boulders on the edge of the feeders could fall at any time. Tr. 29. If someone wanted to stop the material from falling, he would need to clean the feeder of excess rock and pull the stones from the edge so that material could not fall down to something below. Tr. 29.

The Respondent's crusher was located immediately at the end of the feeder with a connecting chute. Tr. 29. Anything coming off the feeder would fall down the chute and drop into the crusher. Tr. 29. It was not possible to run the crusher without operating the feeder; both were interconnected to work as one complete system. Tr. 29-30.

The photograph in Government Exhibit S-6 depicted the side entrance to the impact crusher. Tr. 30; S-6[10]. The impact crusher was totally enclosed inside the structure. Tr. 30. On the left hand side at the top of the crusher was an opening for the material to come off the feeder, slide down the chute and drop five or six feet down into the impact rolls. The side and feeder openings were the only openings into (and out of) the crusher. Tr. 30.

Government Exhibit S-7 depicted the flow chart of how material came off the feeder, slid down the chute, dropped into the crusher, and was processed between two crusher rolls, the smaller pieces dropping between the rollers, going out the discharge, and ultimately going for further processing or storage. Tr. 30-1.

The photograph in Government Exhibit S-8 depicted a photograph of the feeder hopper taken on August 13, 2014, the center of the photograph showing the discharge end of the conveyor feeder where material dropped into the chute and into the impact crusher. Tr. 31. Multiple stones could be seen at the very edge of the feeder. Tr. 31. The size of the stones observed in the feeder hopper could be estimated by comparing them to the two miners standing on the catwalk. Tr. 32. Bennett estimated the boulders' sizes to be between 2 ½ feet to 3 feet wide and 3 feet long with unknown thickness. Tr. 33. Given that limestone weighs roughly about 150 lbs. per cubic foot, the stones probably weighed more than several hundred pounds. Tr. 33.

[10] The identifying exhibits in this case will be referred to, in evidence proffered by the Secretary, as S-X, by the Respondent, R-X, and by the Court, C-X, respectively.

The photograph in Government Exhibit S-9 depicted a view taken by Bennett from the walkway directly above the chute where the two miners in Government Exhibit S-8 were standing. Tr. 33. The photograph showed rocks piled, not just at the edge, but heaped up to a height of several feet above the edge. Tr. 33. Once any of these rocks fell, they would go down the sloped chute (which was 8 feet long) and drop 5 feet vertically into the impact crusher. Tr. 34.

Bennett opined that it would be "absolutely" unsafe to work inside the crusher while rocks were lodged in the hopper as depicted in the photographs. Tr. 34. Given that the stones could fall at any time, were several hundred pounds in weight, and would gain gravitational momentum coming down the chute, dropping vertically for five feet, an individual, even with a hard hat, couldn't "take a couple of hundred pounds of rock on [his] head." Tr. 34.

After various discussions between Bennett and Respondent's employees as to how to make the crusher safe for access, it was ultimately decided that an on-site excavator would be utilized. Tr. 36. The excavator would clean materials from the edge and place it in such a way so as to block the hopper, preventing any materials from inadvertently falling or being pushed downward. Tr. 36-7. Because the excavator could both clean the hopper out and block the chute, allowing for the safe removal of rocks and tools, the violation was terminated. Tr. 37-8.

The photograph in Government Exhibit S-10 depicted the actual throat of the impact crusher, showing the boulders that had trapped Mr. Carr still in place. Tr. 35.

The photograph in Government Exhibit S-11 depicted where Mr. Carr had been seated inside the crusher at the time of the accident. Tr. 37.

Bennett had learned from miners' testimony that blockages would occur "several times a month." Tr. 40. Depending upon where the "feed stock" came from, materials broke in different ways, sometimes not falling into the crusher rollers, but bridging instead.[11] Tr. 40. According to miners' and management statements, the instant blockage was the worst they had ever seen. Tr. 40. There was a new operator on the day of the accident who failed to recognize that a blockage was going to happen until it was too late. Tr. 40. Routinely when blockages occur – "a couple of times a month" – one or two blasts could dislodge the obstructed materials before they could build up "so full." Tr. 41.

On the date of the accident the crusher operator, after recognizing how severe the blockage had become, shut down the crusher and notified Carr of such. Carr, along with other employees of the Respondent, determined they should attempt a "mud cap": putting an explosive charge on top of the rock to try to shatter it and shake the pile loose so that material could fall down onto the rollers and be crushed. Tr. 42. Before detonating the first shot, miners unlock the crusher and start it. This activates the crusher's rollers. Tr. 43. The intention is that the initial blast will shake or break material up enough to unclog the blockage and that the crusher will clear itself. Tr. 43.

[11] Bridging occurs when materials discharge into the crusher do not fall into the rollers, but accumulate on top of such.

However, the initial blast did not work; material fell and the rollers "jammed tight" with rock. Tr. 43. The miners realized that they would need to blast and dig their way down to the bottom, continuing to blast and then clear. Tr. 44. Miners went into the crusher, handpicked material, and handed it out the window. Tr. 44. 16 blasts were necessary to finally get through the buildup. Tr. 44. After a blast, miners would go into the crusher and hand pick materials to hand out. Tr. 44. Because the crusher was jammed, miners had to clear their way in, all the way through the crusher, clear the crusher rolls and then start up again. Tr. 44-5.

The rocks were being handed out through the 22" by 29" side door. A miner inside the crusher would hand out the rocks to miners on the deck and pass the rocks via a human chain. Tr. 44. Bennett was unsure if miners went in every time after a blast, but several miners had related that they themselves had gone into the crusher multiple times. Tr. 44-5. One to three miners were inside the crusher at any given time. Tr. 45.

The trapping and injuring of Mr. Carr had taken place at around 10:00 A.M., after the miners had been blasting and cleaning all day long. Tr. 46. Carr announced that he would perform the final clean out. Tr. 46.

Carr advised Bennett that, once inside the crusher, he could hear rocks coming but did not have time to do anything to protect himself. The rocks knocked him down. Fortunately, they did not hit his head, but trapped, and pinned his legs. Tr. 46.

Alerted by Carr's screams, miners jumped into the crusher to help him. Medical assistance was called for. Tr. 46. Pursuant to Carr's instructions, miners obtained a "porta-power," a handheld hydraulics kit, and hoist, to free his legs from the two boulders that had come down. One of the boulders weighed approximately 400 pounds and the other weighed approximately 1,000 pounds. Tr. 47.

Other than looking upward through the chute, the miners did not conduct any post-blast examination. Tr. 48. Unless a miner enters the crusher at either end, he cannot see into the hopper. Tr. 48. A miner would need to walk around on the elevated walkway and look down the throat or go to the main dump station where the excavator had been eventually placed and look over into the hopper. Tr. 49.

Bennett visited Carr at the hospital on August 14, 2014. Carr was lucid, but sedated, having sustained 19 fractures in his lower legs. Tr. 50. Carr related that the crusher had been blasted 16 times. He heard the rocks tumbling, but did not have time to react. Tr. 51.

Based upon his observations and investigation, Bennett determined there were three violations. Tr. 52.

Citation No. 8801650 was issued based upon Respondent's failure to ensure that the flow of materials had stopped at the crusher throat prior to entering the unit for cleaning. Tr. 52, *see also* Government Exhibit S-2. Before miners entered the crusher and were exposed to rock falls, they should have ensured that the boulders (depicted in Government Exhibit S-9) sitting on the edge of the feeder had not been loosened or dislodged by the blasts. Tr. 52. If the Respondent

had cleaned the rock back ten feet with push rods so that any dislodged material near the edge could not have fallen down the chute, the citation would not have been issued. Tr. 53. Considering that the violation involved hundred-pound rocks falling five feet onto miners below, the violation was evaluated as reasonably likely to result in a fatal injury and graded to be Significant and Substantial (S&S) in nature. Tr. 53-4. Given that there were two other people inside the crusher in addition to Carr, the number of people affected was actually three and not one individual as initially designated. Tr. 53, *see also* Government Exhibit S-2 at Section 10 D. Because Carr, who was a member of management, performed the unsafe operation and had actual knowledge of such, the level of negligence was rated as high. Tr. 55.

The violative conduct was found to constitute an unwarrantable failure: the hazardous condition was extensive and existed on a recurring basis during the 16 blasts; a member of management, a licensed blaster, had knowledge of the unsafe operation and hazardous condition; miners had been exposed to possible fatal injuries multiple times; rocks could have come down after any one of the 16 blasts. Tr. 56-8.

Order No. 8801651 alleged a violation of §56.16002(a)(1) based upon the Respondent's failure to ensure there was a mechanical means or device in place to protect miners below in the event that the lock was pulled out and the feeder started. Tr. 58; *see also* Government Exhibit S-3. Bennett testified that locking and tagging out the controller would have decreased the likelihood of restarting the feeder – although it would not alone have prevented additional material from falling. Tr. 58-9. The violation actually occurred in the hopper; anything that came out of the hopper must go through the crusher. Tr. 58. Respondent should have installed a gate or used a bucket to block materials from falling into the crusher so that no miner would be exposed to the hazard. Tr. 59. Even if the hopper had been cleaned back so as not to violate section 56.16002(c), there would still have been a violation of section 56.16002(a)(1). Someone could still go in and start up the crusher operator causing movement of material still present in the hopper. Tr. 60. The mechanical device would have to be placed somewhere between the material that was in the hopper and where it would discharge from the hopper so that nobody could be exposed to a falling rock hazard. Tr. 60.

The section 56.16002(a)(1) violation was assessed similar to the section 56.16002(c) violation for the same reasons described previously. Tr. 61. The same miners and management personnel were involved during the same time period, engaging in the same unsafe activities. The violations arose out of the same event.

Bennett opined that the cleaning out of crushers constituted "normal operations" within the framework of section 56.16002(a)(1). Tr. 61-2. According to Respondent's history such rock jamming conditions as occurred in the instant case had occurred "numerous times" before. Tr. 62. The fact that the Respondent may not have been cited previously would not affect Bennett's judgment: there may have been different circumstances involving past crusher jams including the number of blasts and methods of detonation. Tr. 62.

Order No. 8801652 was issued based upon the Respondent's failure to conduct "post-blasting" examinations after each of the secondary blasts inside the crusher in violation of section 56.6306(g). . Tr. 63, *see also* Government Exhibit S-4. Somebody down in the crusher

could not observe what was going on in the hopper. Tr. 63. According to their own statements, the miners and victim had not gone up to the feeder to assess whether there had been any change in conditions due to the blasts. Tr. 63-4. During a post-blast examination, Respondent should have gone to the top of the crusher to ensure that material hadn't become loose and that the roof wasn't going to fall on those entering the crusher. Tr. 64. After a blast, one would not know what might have been changed, damaged, repositioned, or what may have been structurally "sacrificed." Tr. 64.

Although there is no set check list for post blast examinations, an individual who has passed the blaster's examination and who has the knowledge to assess the surroundings must go out and check the post-blast surroundings. Tr. 63-4.

This violation was also assessed as reasonably likely to be fatal in nature for the same reasons discussed previously.[12] Tr. 66. Given the high degree of care imposed upon a person directing the workforce, who was both a superintendent and licensed blaster, and the high degree of risk to miners who were repeatedly exposed to hazards during the three and one half hour blast time period, high negligence and unwarrantable failure were also found. Tr. 66-7.

On cross-examination, Bennett confirmed that when the feeder is shut off, the supply of materials to the crusher is shut off. Tr. 70. When he had arrived at the mine site, the system had been locked out. Tr. 70.

Carr had advised Bennett that his post blast examination consisted of looking up the chute – which Bennett found to be inadequate. Tr. 71.

Nobody had suggested to Carr that, of the blockages which occurred "every month or two," any had been like this instant blockage. Tr. 71. Bennett denied that Carr had stated that the crusher had filled with material blockage only three or four times in the past. Tr. 71.

The violation of 30 C.F.R. §56.16002(a)(1) had become apparent to Bennett after discussions with the District office. Tr. 73. Respondent could have violated section 56.16002(a)(1) without having violated section 56.16002(c). One citation involved material still laying on the top of the feeder at the edge where the material could free fall at any time; the other citation required that something be done to ensure that, if the feeder were cleaned half way back, somebody could not start the crusher and run material through the rear. Tr. 74-5.

[12] Bennett again erred in finding one individual affected rather than three individuals being affected.

Robert Carr

At the hearing Robert Carr appeared on behalf of the Respondent.[13] On the date of the accident, Carr had been called by the feeder operator and told that the crusher had been "blocked all the way up." Tr. 78. Carr characterized the blockage as not being "normal," or "routine," stating that it had happened only 3 or 4 times since he has become quarry superintendent. Tr. 78.

Carr disagreed with the inspector's assertion that blockages happened a couple of times a month. While one single rock might go across the "impellers" or get jammed inside, blockages would not fill up all the way as here. Tr. 79. When such more routine blockages occurred where a rock would bridge the impeller, Carr would customarily shut everything down, shut the impellers and feeder off, lock them out, open the crusher door, reach in, set the blast, get everybody out of the way, start everything back up and blast the rock. Tr. 79. Generally, this would clear the blockage. Tr. 79.

On the date in question, Carr went to the site and saw that stone was blocked all the way up the chute. Tr. 79. Everything was locked out.[14] The levers in the electric rooms were padlocked so that nobody could turn them on. Tr. 79-80. Both the feeder and crusher were locked out. Carr went back to the crusher and started to blast the bigger stones so miners could reach in and start a chain to empty the crusher out. Tr. 80. Prior to starting to remove rock, Carr concluded a full inspection of the area, including looking at the hopper from above. Tr. 81. During the first six to eight blasts, nobody would climb into the crusher because the stone was still flowing slowly down the chute. Tr. 81. Miners would just reach in and take all the stones out that they could handle. Tr. 81. After a blast, miners would wait "a couple of minutes" before entering the crusher to allow gas from the blast(s) to ventilate.[15] Tr. 82.

Before miners entered the crusher after a blast, someone would look up the chute to ensure it was empty: one could look through the chute to the "throat of the hopper" to see if there were any stones likely to fall into the crusher. Tr. 83. This process was repeated 16 times. Tr. 83.

After the 16th blast, the door of the crusher was opened to allow gases to escape. Carr looked inside the feeder and then looked upward through the chute. Tr. 84. Carr reported that "it seemed like nothing had moved."Tr. 84. Carr also made an inspection from above, looking through the feeder before he entered after the 16th blast.[16] Tr. 84.

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[13] Carr had been employed by the Respondent for 31 years. Tr. 76. He started out a laborer and in 1999 became foreman of Chalfont Quarry. Tr. 76. He became a licensed blaster after taking a three day course through the Commonwealth of Pennsylvania and having passed testing. (Tr. 77.)

[14] The feeder could run even if the motors go off. The feeder and two impeller motors were locked out. Tr. 79.

[15] Carr later amended the waiting period to 3 to 4 minutes. Tr. 82.

[16] Carr testified that he had gone above to have a Gatorade. Tr. 84.

Because miners had been working all day removing rocks from the crusher, Carr volunteered to go into the crusher to remove the last rock. Tr. 84. Two rocks were remaining, which Carr handed out. He then requested poles to clean out between the walls, as well as the impellers themselves, which were jammed with small material. Tr. 84.

Carr heard something in the feeder "lurch forward," and he tried to jump out of the way. Tr. 85. A rock hit the chute, coming down and catching his left leg. Tr. 85. Another rock came down and crushed his right leg. Tr. 85.

Carr instructed his miners to call 9-1-1. First responders and Mr. Furey arrived shortly thereafter. Tr. 85. After assessing the situation, Carr sent for a "porta-power" and "come-alongs" with slings. The rocks were removed and first responders transported Carr to the hospital. Tr. 86.

Carr denied that he had thought it unsafe to enter the crusher – either for himself or for other employees. Tr. 86.

There was a previous blockage during which an MSHA inspector was on site and that inspector did question the safety of the procedures used to remove stone from the crusher. Tr. 85.

When Carr looked down the hopper before going into the crusher after 16th blast, the rocks did not appear to have been as close to the edge as they are depicted in Government Exhibits S-8 and S-9. Tr. 87.

Although the excavator used to block the feeder had been on site, a narrower bucket had to be brought in the next day to fit into the feeder. Tr. 87-8.

Carr had returned to his foreman position at Chalfont Quarry last fall. Tr. 88.

On cross examination, Carr testified there were blockages in the past, but only three or four that had been from the impellors to the feeder itself. Tr. 88. It was not an uncommon occurrence for rocks not to fit into the mouth of the crusher or to bridge across the impellors. Tr. 89. Since the accident, rocks had bridged across probably two or three times. Tr. 89. Miners are very routinely sent into the crusher to weld. Tr. 89. It is necessary to ensure the hopper and crusher are empty before the welding work was performed. Tr. 90.

The crusher chamber was approximately four feet across. Tr. 90.

Carr testified that he had checked the hopper from above after *each blast* because he had to go up to the trailer to secure dynamite. Tr. 93. He was, however, shown a statement from a prior deposition in which he reportedly stated that he "didn't go up every time . . . but *every other* time because we (he) had to go to the trailer to get more dynamite." Tr. 93, emphasis mine.

After the last blast, Carr did not go up for more dynamite but he went to get a Gatorade while the crusher was ventilating. Tr. 95.

James Furey

At the hearing James Furey appeared on behalf of the Respondent. Furey had been employed by Eureka Stone Quarry for 16 years and was its environmental safety director. Tr. 95-6.

On the day of the accident, Furey was called by a labor foreman who indicated that Carr had an accident in the crusher. Tr. 96. Furey – who was also a volunteer firefighter – immediately contacted MSHA and was advised that a (j) order would be issued. Tr. 97. When Furey arrived at the site, Carr was still trapped. Tr. 98. Carr's rescue instructions were in the process of being carried out. Tr. 98. Once Carr was evacuated, the site was secured pursuant to MSHA directives. Tr. 99.

Furey did not consider the site as depicted in Government Exhibit S-9 to be safe to work underneath. Tr. 101.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8801650

I. Contentions of the Parties

Given that miners had entered the crusher chamber before the discharge of materials from the hopper had completely ceased and given that two rocks actually fell onto Carr on August 12, 2014, the Secretary contends that this standard had been clearly violated. Sec'y's Reply Br., at 3.

Respondent, however, maintains that the feeder and crusher had been locked out and that, "although two rocks subsequently fell into the crusher . . . supply and discharge had ceased." Resp't's Br., at 9. Further, the Respondent maintains that because an MSHA inspector had observed "the very same conduct previously and did not state it was unsafe," no citations for a violation should have been issued. *Id*. Respondent finally argues that no *Chevron II* analysis is necessary, given the clear statutory language. Resp't's Br., at 9, n. 1.

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.16002(c)

30 C.F.R. §56.16002 provides as follows:

> (c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes, ladders, platforms, or staging shall be provided. No person shall enter the facility until *the supply and discharge of materials have ceased* and the supply and discharge equipment is locked out. Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed

near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

30 C.F.R. §56.16002(c), emphasis added.

This Court is constrained to reject the Respondent's arguments on multiple grounds.

The plain language of the regulation provides that "no person shall enter the facility until the supply and discharge of materials have ceased." 30 C.F.R. §56.16002(c). It is undisputed that moments after Carr entered the crusher chamber, large rocks came tumbling down the hopper chute, almost killing him. Obviously, the discharge of materials into the crusher had not ceased.

In ascertaining the plain meaning of a statute, the Court must look at the particular statutory language at issue as well as the language and design of the statute as a whole.[17] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The Administrative Law Judge finds that the "specific clear and unambiguous language" of §56.16002(c) prohibits entry into a 'facility' (crusher chamber) until the supply and discharge of 'materials' (rock) has ceased. Although the crushing apparatus and feed conveyor had been locked and had been tagged out of service at the main control panel, there was indisputably an ongoing supply and discharge of materials in the crusher chamber as starkly evidenced by the fall of boulders into the chamber.

Neither party has cited specific Commission case precedent as to the proper interpretation of §56.16002(c). Further, as noted by the Respondent, neither party initially contended that a *Chevron II* analysis would be necessary in the case *sub judice*. Resp't's Br., at 9, n. 1.

[17] The Commission has observed in the past that "[i]t is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions." *Morton International, Inc., Morton Salt,* 18 FMSHRC 533 at 536 (Apr. 1996). In *Morton Salt* the Commission quoted approvingly the Supreme Court's language in *Smith v. United States*, 508 U.S. 223, that "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute.'" *Morton Salt*, 18 FMSHRC 533 at 537, citing *Smith v. United States*, 508 U.S. 223, 233 (1993).

The Commission has consistently held that a mandatory safety standard should be interpreted with an eye toward the plain meaning of the standard, "unless such a meaning would lead to absurd results." *Wolf Run Mining Co.,* 32 FMSHRC 1669, at 1679 (Dec. 2010.); *see also Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998), *aff'd*, 170 F.3d 148, 161 (2d Cir. 1999).

To the extent that the regulatory language is deemed to be ambiguous, this Court finds that the Secretary's interpretation of such is reasonable and should be afforded *Auer* deference.[18] Sec'y's Reply Br., at 2.

The Administrate Law Judge also must observe that throughout its brief the Respondent appears to misapprehend the strict liability nature of the regulations.[19] When a near fatal accident as within takes place, the Mine Act imposes strict liability on mine operators regardless of whether they acted in good faith or had actual knowledge of the hazards.[20] This Court has no

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[18] This Court notes the Supreme Court ruling in *Christen v. Harris County*, 529 U.S. 576, 588 (2000) in which the Court refused to give deference to an agency's interpretation of an "unambiguous regulation," observing that to defer in such a case would allow the agency to "create *de facto* a new regulation." *Id.* In this case, however, it is the Respondent who is attempting to create *de facto* a new regulatory meaning for the unambiguous phrase "until . . . discharge of materials has ceased." The self-serving Humpty-Dumpty nature of such construction is apparent:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

Lewis Carroll, Through the Looking Glass, 205 (1872).

[19] *See* Respondent's argument: "It's easy for the Secretary to say after the fact that someone was injured, therefore, there must have been a violation." Resp't's Br., at 9.

[20] *See Stillwater Mining Co v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998): "Knowledge and culpability, however, are not relevant to the determination of whether there was a violation."

To illustrate this point another way, consider the case of *Musser Engineering, Inc.*, concerning the failure of the operator of the Quecreek No. 1 Mine to discover the precise layout of the nearby abandoned Harrison No. 2 Mine – a mine that the operator had no real opportunity to survey. *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1259 (Oct. 2010).

The Harrison No.2 Mine closed in 1963 and flooded sometime after it was sealed, thus rendering the mine too hazardous for survey. *Id.* The Pennsylvania Department of Environmental Protection had misplaced the final mine map for Harrison No. 2, making it nigh-impossible for the operator to know with any certainty the architecture of the abandoned mine. *Id*. An exhaustive multi-year search by the operator required visits to numerous state and federal offices before an undated Department of the Interior (DOI) map was discovered in Greentree, Pennsylvania. *Id.,* at 1260. Ultimately Consol Energy, Inc., provided the current operator with an undated and uncertified map that was deemed more recent that the DOI map. *Id.*

(continued…)

doubt that Carr had a good faith belief that the discharge of materials had ceased before he entered the crusher chamber.

However, §56.16002(c) does not provide that a miner may enter a facility if he has a good faith or reasonable belief that the supply and discharge of material has ceased or no actual or constructive knowledge of an existent hazard involving the supply and discharge of materials. It simply prohibits the entry into a facility until the supply and discharge of materials has ceased – a safety standard that Carr violated to his clear detriment.

The Administrative Law Judge is also compelled to reject another supporting argument advanced by the Respondent in its brief: "given the fact that an MSHA inspector watched the very same conduct and did not state that it was unsafe or that it was a violation of any regulation and did not issue any citations for violations of the mining regulations, a citation should not have been issued this time." Resp't's Br., at 9. This argument ignores clear Commission precedent that MSHA's lack of prior enforcement of safety standards at a mine does not demonstrate an absence of violations or hazardous conditions. *See Austin Power Co.*, 29 FMSHRC 909, 920

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[20] (…continued)

Despite this wealth of effort, miners at the Quecreek No. 1 Mine accidentally broke into the flooded ruins of the Harrison No. 2 Mine on July 24, 2002. *Id.,* at 1258. Nine endured a harrowing escape while another nine trapped below ground wrote letters to loved ones and prepared to drown as the water rose around them. *Id,* at 1259. Eventually the nine miners trapped below were rescued and survived. *Id.*

In judging the operator's conduct in that case, the Commission reasoned:

> In any event, PBS's argument that the citation in this case required it to do the 'impossible' because the precise location of the Harrison No. 2 Mine workings was unknown ignores the precept that 'operators may be held liable for violations of mandatory safety [standards] under the Mine Act even if they did not have knowledge of facts giving rise to the violation.' S. Br. at 20, citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2nd Cir. 1999); *see also Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1183-84 (9th Cir. 1998). As noted by the Second Circuit, this is consistent with the purpose of the Mine Act because it encourages 'greater vigilance' and avoids creating an incentive for operators 'to avoid gaining knowledge.' *Rock of Ages,* 170 F.3d at 155.

Musser Engineering, Inc., and PBS Coals, Inc., 32 FMSHRC at 1272 (Oct. 2010).

(Nov. 2007) (a past, inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding to apply the correct interpretation of a standard.)[21]

In assessing the Secretary's photographic evidence, Respondent argues that there may have been post-accident shifting of rocks in the crusher prior to the Secretary's photographs being taken and that therefore the Secretary's photographs "are not reliable evidence of the situation as it existed at the time of the accident." Resp't's Reply Br., at 3, *see also* Government's Exhibit S-9.

This Court disagrees.

The Secretary need only prove the existence of a fact by the preponderance of the evidence. There may have been some post-accident shifting of materials. However, this Court is persuaded that it was "more likely than not" that the accident site pre- and post-accident was essentially the same as depicted in the Secretary's photographs. In reaching this finding the Administrative Law Judge again observes that large boulders, weighing hundreds of pounds, fell upon Carr.[22] These rocks did not magically move. Either they were perilously close to the chute opening, as shown in the Secretary's photographs, or lodged inside the chute (which would contradict Carr's testimony as to what he observed looking upward from the crusher chamber).

Given the total circumstances and plain meaning of the statutory language, §56.16002(c) was clearly violated.

III. The violation of 30 C.F.R. § 56.16002(c) was reasonably likely to result in fatal injury and was significant and substantial in nature

A violation is significant and substantial (S&S) if "based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Given that Mr. Carr was nearly killed by large rocks falling downward through a chute, one need not go through an exhaustive *Mathies* analysis to determine that the instant violation was S&S in nature.

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[21] When he was a young and callow attorney, the undersigned had a case which illustrates the meritlessness of the Respondent's argument as to the issue of violation. My client had been cited by a code enforcement officer for driving his overweight truck over a municipal bridge. An even larger truck had passed over the bridge just before my client's truck, but had not been cited. I passionately argued how "unfair" it was for my client to have been cited and not the previous offender. The magistrate crankily but properly pointed out: "Counsel, just what does that have to do with your case? The code enforcement officer may have been daydreaming earlier. The issue is whether or not your client's truck exceeded the weight limit."

[22] This Court heard testimony that Carr suffered 19 individual fractures in his lower legs following the accident. Tr. 50.

A violation is significant and substantial (S&S) if "based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Though the occurrence or non-occurrence of accidents or injuries is not dispositive of the S&S analysis, it should be noted that in this instance Carr was nearly killed by large rocks falling downward through a chute.

The first element of the Mathies test has been met, as there was a clear violation of 30 C.F.R. §56.16002(c). Second, as was persuasively argued by the Secretary, this violation contributed to a discrete safety hazard: the danger that unimpeded materials would fall from the hopper onto miners working in the crusher below. *See also* Sec'y's Br., 15-6, 20-1, as to hazards presented by the Respondent's violations of §56.16002(a)(1) and §56.16002(c).

Even if no accident had in fact taken place, the surrounding circumstances almost guaranteed that an injury would inevitably occur. One need not engage in sophisticated Pascalian risk analysis to determine such: there was a lack of a mechanical device or means to prevent the fall of materials; there was a large volume of materials, including huge rocks in the hopper; there were numerous blasts and vibrations from quarry operations and quarry traffic that could dislodge materials in the hopper and chute; there was a crusher which was designed so as to enable gravitational forces to pull materials downward from the hopper through the chute into the crusher chamber; there was a lack of speedy or safe egress for exposed miners attempting to flee materials that might fall into the enclosed crusher chamber. Arguably the grim reality of Carr's accident itself is an example of the reasonable likelihood that the hazard contributed to would result in an injury, satisfying *Mathies*' third element.

Materials, including large boulders weighing hundreds of pounds, falling in on a miner, inarguably create a reasonable likelihood of serious, if not fatal, injury. And the terrible injuries sustained by Mr. Carr, while not establishing *Mathies*' fourth element in and of themselves, support the Court's finding that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Order No. 8801651

I. Contentions of the Parties

The Respondent does not dispute that there was not a mechanical device or other effective means in place on August 12, 2014. Rather, Respondent contends that at the time of the accident, the quarry was not engaged in "normal operations." Resp't's Br. at 10, Resp't's Reply Br., at 4-6. *Inter alia,* the Respondent argues that the crusher had been taken out of operation when the impeller jammed. *Id*. Because the crusher and feeder were locked out and could not be restarted, neither could be "put in normal operation." *Id*. at 10-11. The Respondent further argues that the blockage which filled up the crusher on August 12, 2014 was not routine or "normal." *Id.* at 11. Unlike blockages that could be cleared with one or two blasts without requiring miners to enter the crusher chamber to clear it before resuming operations, the blockage at issue necessitated 16 blasts, required miners to enter the crusher chamber, and was in fact the worst blockage in the quarry's history. Resp't's Br. at 11.

The Secretary contends that the miners on August 12, 2014 were in fact engaged in "normal operations" when they entered the crusher chamber to clean and clear the severe rock jam. Sec'y's Br. 14. Further, the Secretary contends that the term "normal operations" is not ambiguous. Sec'y's Reply Br., 5. The fact that the blockage was far worse than usual did not remove the acts of cleaning and clearing from the rubric of "normal operations."

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.16002(a)(1)

§56.16002 provides, in pertinent part, the following:

> **(a)** Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be—
>
> **(1)** Equipped with mechanical devices or other effective means of handling materials so that *during normal operations* persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials;

30 C.F.R. §56.16002(a)(1).

When Carr and other miners entered the crusher chamber on August 12, 2014, they were engaged in "normal operations" of cleaning and clearing a blockage. The phrase "normal operations" does not appear to be explicitly defined in the Act or regulations. As discussed *infra*, this Court finds that the plain meaning of "normal operations" would encompass the Respondent's violative conduct. To the extent that this phrase is ambiguous, *Auer* deference should be given to the Secretary's interpretation of §56.16002(a)(1) so that the operator's cleaning and clearing of the occasional blockages, including the instant blockage, would be considered part of "normal operations."[23]

The ALJ observes that the Respondent has muddled the within statutory interpretation controversy by conflating and confusing the essential issue of whether the *clearing of blockages* is part of "normal" operations at the quarry with the questions of whether blockages are "normal" occurrences at the quarry, and whether the instant blockage was "abnormal" in severity.

The Respondent has offered no case law that supports its contentions. The Secretary, however, has cited pertinent precedent in support of his position. Sec'y's Br., at 14. In *Secretary v. LaFarge Construction Materials*, 20 FMSHRC 1140, 1144 (1998) the Commission held that the mine operator's failure to remove loose materials before allowing a miner to enter a bin violated §56.16002(a)(1), that the violation was S&S and that the violation was the result of an

[23] *See Auer v. Robinson*, 519 U.S. 452 (1997) wherein the Supreme Court reaffirmed that deference should be afforded to an agency's interpretation of ambiguous regulatory language pursuant to its earlier holding in *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945).

unwarrantable failure. In *LaFarge*, a miner climbed inside a "surge bin" to weld a metal patch. During his repair, rocks began falling down on the miner, entrapping him in the bin. The Commission specifically rejected the operator's argument that the standard was inapplicable because the acts of patching a hole in the surge bin did not constitute "normal operations." *LaFarge*, 20 FMSHRC at 1144, *see also W.S. Frey v. Secretary* 57 F.3d 1068, 1995 WL 356494 at *3 (4th Cir. 1995) (approving the Commission's finding that clearing blockages is part of normal operations).

The Secretary argues that if the provision in question is ambiguous, he is entitled to interpretive deference under *Auer*. And the Secretary observes, "[i]t is well established that a standard must be interpreted in a manner that furthers the purposes of the standard and the underlying statute, not in a manner that thwarts those purposes. *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)." Sec'y's Reply Br., at 2, *further citations omitted*.

While there is some controversy in the record as to how often blockages occurred, it is evident that blockages did occur throughout the work year.[24] Certainly it was reasonably foreseeable that, during the course of business through the year, miners would be required to clean out blockages.

Inter alia, the Respondent argues that because the blockage in question was uncommonly severe in nature, its clearing should not have been considered "normal operations." This argument is patently specious. The statutory purpose of §56.16002(a)(1) is to protect miners in situations – whether common or not – where "unconsolidated materials" might cave in or slide upon them.[25] Even conceding that the blockage at issue was the worst in the quarry's history, the cleaning and clearing of blockages was part of the quarry's "normal operations" during a business year. The meaning of this term is plainly unambiguous. Removing blasted rock from a crusher is within the ambit of "normal operations."

The Respondent's arguments are painfully reminiscent of the sophistic defenses raised by responsible parties at the time of the Katrina disaster.[26] Government authorities were charged with maintaining levees in New Orleans in a safe condition as part of "normal [flood control]

[24] *See, e.g.*, Tr. 40, 41, 78-9, 88.

[25] Indeed, the primary purpose of the Mine Act is to protect miners from unsafe conditions and practices which – hopefully due to the enlightened passage of health and safety regulations and vigorous enforcement of such – have become an increasingly uncommon phenomenon.

[26] To further extend this analogy, hurricanes, like blockages do not have a set schedule.

operations." Because Katrina was one of the worst hurricanes in the City's history, authorities shamefully claimed they bore no responsibility for the levee's failures.[27]

To accept the Respondent's arguments would lead to the absurd result of allowing miners to be placed in harm's way every time there is a blockage and an operator fails to have a mechanical device or effective means to prevent entrapment. This the Undersigned will not do.

Therefore – notwithstanding the infrequent and irregular nature of blockages and the uncommon severity of the blockage in question – the Respondent plainly violated §56.16002(a)(1).

III. The violation of 30 C.F.R. §56.16002(a)(1) was significant and substantial in nature, reasonably likely to result in a fatal injury, was the result of high negligence on the part of the operator and was the result of an unwarrantable failure.

As noted in *Consolidation Coal Co.*, *supra*, the "likelihood of injury" is the key consideration in determining whether a violation is S&S. Addressing the above *Mathies* criteria *seriatim*, there was a clear violation of the mandatory safety standard. *Mathies*'s second step is also patently met: there was a discrete safety hazard contributed to by the operator's violation of §56.16002(a)(1). "Loose, unconsolidated material" could fall from the hopper onto a miner entering the crusher chamber with no mechanical device or other effective means to prevent such. The ALJ notes that the Commission has held that the Secretary "need not prove a reasonable likelihood that the violation itself will cause injury" and that "the absence of an injury producing-event when a cited practice has occurred does not preclude a determination of S&S." *Cumberland Coal Resources*, *LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). The fact that an accident occurred in this case does not therefore prove that an accident was made more likely. However, given the within accident, the existence of a reasonable likelihood that the hazard contributed to would result in injury – *Mathies*'s third step – is supported by the actual events in this case. Two large dislodged boulders in fact *fell* upon Carr. The actual injuries sustained by Carr, including 19 fractures, may establish that the fourth step of *Mathies* is satisfied on their own, but this Court finds that an injury contemplated in this case is likely to be reasonably serious. That the injuries could have easily been fatal in nature is beyond dispute: only good fortune saved Carr from having his skull crushed in.

IV. The Respondent was highly negligent in its violation of §56.16002(a)(1).

The Respondent's conduct in this case rose to the aggravated level of high negligence when it violated §56.16002(a)(1). The operator knew or should have known that blasting rocks in the hopper/crusher might loosen dislodged materials which, if unimpeded, could slide on or cave in on miners who entered the chamber below. Only after Carr was nearly killed did the mine operator put an excavator and bucket in place to ensure that rocks dislodged by blasting would

[27] This Court is reminded of the old theologically bankrupt "Act of God" defenses raised by mine operators and coal company insurers any time there was a catastrophe caused by blatant safety violations.

not fall down upon miners entering the crusher. §100.3(d) expressly provides that a mine operator is held to a *high standard of care*: he must be alert for conditions and practices that might affect miners' safety and must "take steps necessary" to prevent hazardous conditions.

Using the formulaic approach utilized by MSHA in assessing the degree of negligence displayed by the Respondent, the Administrative Law Judge can find no mitigating circumstance to vitiate a finding of high negligence.[28]

In also considering "the totality of the circumstances holistically" under *Brody*, this Court finds that the Respondent violated the high statutory standard of care demanded.

V. The Respondent's failure to have a mechanical device in place or other effective means of handling materials was unwarrantable in nature.

This Court also finds the Respondent's failure to have a mechanical device in place or other effective means of handling materials was unwarrantable in nature. Considering the totality of the circumstances and specifically taking into account the *Manalapan* factors cited *supra*, the Respondent's failure to comply with §56.16002(a)(1) was aggravated conduct constituting an unwarrantable failure.

A. Length of time

The violation of not having a mechanical device in place or other effective means of handling materials had existed at least throughout the four hour period during which 16 blasts were shot. Given the inherent dangers associated with blasting, including the obvious danger posed by possibly dislodged large rocks, the violation lasted for clearly an unreasonable length of time. *See also* the Secretary's arguments in Sec'y's Br., at 16-7, with which this Court concurs.

B. Extent of violation

The violation extended throughout the hopper/crusher which operated as one unit. As noted by the Secretary, "the hazardous condition that resulted from the lack of a device was large, dangerous, and extensive." Sec'y's Br., at 18.

C. The violation was obvious

It is undisputed that a mechanical device or other effective means of handling materials was not in place when the boulders fell upon Carr. Without engaging in *flagellum equus mortus*, this Court finds that the obviousness of the violation was and should have been readily apparent.

[28] 30 C.F.R. §100.3(d), Table X, provides there is high negligence when the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances."

D. The operator knew or should have known of the existence of the violation

Regardless of an MSHA inspector's alleged prior failure, to have cited the Respondent in a similar situation, this Court agrees with the Secretary's contentions that Respondent and its agent had notice of the hazard. Sec'y's Br., at 18. As pointed out by the Secretary, the Respondent's own safety director, Furey, who arrived on the scene after the accident, admitted that miners should not have worked in such an unsafe environment. *See also* Sec'y's Br., at 18.

One need not be an expert in Newtonian or Einsteinian gravitational physics to recognize that large objects, possibly dislodged by explosives, will, unless somehow impeded, fall downward. A reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the safety hazard posed in entering a crusher chamber post-blasting with no effective means in place to prevent dislodged materials from falling onto miners below.

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

The operator eventually abated the violative condition after the accident by putting an excavator with proper sized bucket in place. However, as the Secretary properly points out, the Respondent had made no attempt to comply with the standard during the entire pre-accident time period: miners worked repeatedly underneath an unimpeded load in the hopper without any device in place to protect them from rocks caving or sliding upon them. *See also* Sec'y's Br., at 18-9.

F. Whether the operator had been placed on notice that greater effects were necessary for compliance

As discussed *infra* the fact that MSHA did not enforce this safety standard in the past does not vitiate a finding of violation. Notwithstanding such, even if technically the operator had not been placed upon notice that greater efforts were necessary, this factor, standing alone, does not lessen the aggravated nature of the Respondent's conduct under the total circumstances.

G. The violation posed a high degree of danger

As noted *supra*, the Commission has specifically held that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure. This Court can envision few situations posing a higher degree of danger to miners than the instant violation: boulders looming overhead, possibly dislodged by dynamiting, and no device or means to prevent their sudden fall onto miners below. Based upon this factor alone, this Court could be persuaded that a finding of unwarrantable failure is justified.

Citations No. 8801650 and Order No. 8801651 Are Not Duplicative

This Court essentially concurs with the arguments of the Secretary that Citation No. 8801650 and Order No. 8801651 are not duplicative. Sec'y's Br., at 22-3.

The Commission has recently reviewed the test for determining whether citations or orders are duplicative:

> The Commission has held that citations or orders are not duplicative as long as the standards allegedly violated impose separate and distinct duties. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003, (June 1997); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1301 (11th Cir. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 716 (Aug. 2008); *Cyprus Tonopah Mining Corp*., 15 FMSHRC 367, 378 (Mar. 1993) (violations are not duplicative merely because they emanate from the same events); *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 40 (Jan. 1981) (hole in fence around electrical power transformer and leaving fence grate unlocked constituted separate offenses). In reviewing whether standards impose separate duties, the Commission does not view standards in a vacuum. Rather, because the question is whether citations are duplicative, the standards are examined as they are being applied to the operator through the citations in question. *See Western Fuels-Utah*, 19 FMSHRC at 1004 & n. 12.

Kentucky Fuel Corporation, 38 FMSHRC ____, slip op. at 3, Nos. KENT 2011-1557, KENT 2011-1558 (July 2016).

The duty imposed by §56.16002(a)(1), as cited in Order No. 8801651, is to require operators, where loose unconsolidated material is present, to have mechanical devices or other effective means of handling materials in place so that miners are not exposed to entrapment. This duty is clearly separate and distinct from the duty imposed by §56.16002(c), as referenced in Citation No. 8801650, that requires operators to disallow entry into a facility until the supply and discharge of materials have ceased.

Order No. 8801652

I. Contentions of the Parties

The Secretary contends the Respondent violated 30 C.F.R. §56.6306(g) because post-blast inspections were not conducted before work resumed in the blast area on August 12, 2014. Sec'y's Br., 23. The Secretary further contends that the violation was S&S and reasonably likely to cause a fatality to one miner and was the result of high negligence on the part of the operator. *Id*. at 24. The Secretary finally asserts this violation constituted an unwarrantable failure of a mandatory safety standard, as Carr was a blaster and member of management on scene. *Id.* at 25.

The Respondent contends that the Secretary failed to prove that Eureka Stone had violated 30 C.F.R. §56.6306(g) by allowing work to resume in a blast area before a post-blast examination addressing potential blast related hazards had been conducted. Resp't's Br., at 13. The Respondent argues also that, as Mr. Carr had no reason to believe that any materials would fall into the crusher, his actions were entirely reasonable. Resp't's Br., at 16.

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.6306(g)

30 C.F.R. §56.6306(g) provides that:

> (g) Work shall not resume 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.

There is some controversy in the record as to whether a post-blast examination was conducted after *each* of the 16 blasts at the accident site. At hearing, Inspector Bennett testified that "by their own statements, the miners and the victim stated that they did not go up to the feeder to see what had changed, to see what else may or may not have occurred as a result of their blasting." Tr. 63. However, at hearing, Carr testified that "after each blast . . . I would go up the steps, walk by the feeder, look in, get another stick of dynamite." Tr. 62. Carr further testified that in addition to walking above the crusher and looking down in, he also looked up through the chute to the opening, the throat of the hopper and he conducted his examination thusly every time anybody went into the crusher. Tr. 83.

Carr however, was confronted at hearing with prior conflicting depositional testimony in which under oath he testified that "I didn't go up *every time* but I went up, like, every other time because *we* had to go to the trailer to get more dynamite." Tr. 92-3.

The Administrative Law Judge is uncertain as to which of Carr's hearing or depositional recollections was the more accurate. Obviously, a failure to have conducted a post-blast examination after *each* of the 16 dynamitings, would have been a *per se* violation of §56.6306. However, even accepting that there was in fact an inspection conducted after *each* blast, the Administrative Law Judge finds, as the Secretary argues, that the inspections were inadequate.

That an accident had, in fact, taken place following the 16th blast in itself raises questions as to whether the Respondent's inspection addressed all potential blast-related hazards.

There is no dispute that the integrity of the accident scene had been preserved by the Respondent prior to Inspector Bennett's arrival. Both his observations and the Secretary's photographs of the crusher convincingly establish that there was a build-up of large rocks perilously close to the edge of the hopper chute – which posed a clear and present danger to any miner entering the crusher below. Tr. 30-4, Government Exhibits S-8, S-9.

Carr's testimony that the rocks did not appear close to the edge when he looked down to the hopper before going into the crusher after the 16th blast was not convincing to this Court. *See also* Tr. 86-7.

Applying the reasonably prudent person test in light of this case's factual circumstances, this Court finds that a reasonably prudent blaster would not enter the crusher until a proper post-blast examination had been conducted. The Court finds that the Respondent violated 30 C.F.R. §56.6306(g).

III. Respondent's post-blast examinations were as a matter of fact and law demonstrably "inadequate"

In a recent decision, the Commission has essentially held that there is an implied "adequacy" requirement in safety standards involving work place examinations.

In *Sunbelt Rentals, Inc*., falling material had knocked a miner unconscious while he was working in a preheat tower. *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC ____, slip op. at 2, Nos. VA 2013-275-M, VA 2013-276-, VA 2013-291-M (July 2016). In inspecting the accident site, an MSHA inspector observed a build-up of materials which could have fallen through a six-foot long hole between the 6th and 7th levels *above* where the injured miner was working. *Id.* The inspector found that the Respondent had violated §56.18002(a) due to its failure to "adequately" inspect the area above where employees where working. [29]

The Administrative Law Judge dismissed the proceedings based, *inter alia*, upon findings that a competent and qualified person had in fact examined the work place and that there was no specific statutory language or notice that work place examinations were required to be adequate. 35 FMSHRC 3208, 3214-15 (Sept. 2013) (ALJ McCarthy).

Upon review, the Commission remanded the ALJ's decision, disagreeing that an "operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all." *Sunbelt, slip op*., at 7. The Commission further held that a proper construction of §56.18002 should be consistent with Commission case law construing regulations to further the protective policy of the Act and to avoid an absurd result. *Id.,* at 7, n. 16.

The Commission accordingly held that a proper construction of §56.18002(a) requires that a workplace examination "be adequate in the sense that it identify conditions which may adversely affect health and safety that a reasonably prudent competent examiner would recognize." *Sunbelt*, at 9.

[29] 30 C.F.R. §56.18002(a) provides 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 actions."

In determining "adequacy"[30] in instances where there is a "broadly worded" standard (such as here) the Commission observed that the reasonably prudent person test is consistently applied:

> The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard. *Spartan Mining Co., Inc.,* 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

Sunbelt, at 8.

The fact pattern and issues presented in *Sunbelt* are remarkably similar to the case *sub judice*. There are mandatory examinations which in fact had been performed at the mine sites by qualified personnel. There were build-ups of materials overhead that posed direct dangers to miners working below. The build-ups were either not detected or not recognized as potential hazards. The material build-ups actually led to accidents. The Respondent contested the correct statutory construction of the safety standards in question.

In reaching its within conclusion, this Court is guided by the Commission's admonitions in *Sunbelt* that mandatory safety standards should be construed in such a way as to promote miner's health and safety and avoid absurdist interpretation. Given such and considering the totality of the circumstances, this Court is constrained to find that Carr's post blast examinations were demonstrably inadequate.

In reaching this conclusion, this Court emphasizes that it found Carr to have been a competent, qualified, and experienced examiner who was indeed courageous, albeit reckless, in entering the crusher chamber. The Court further finds that, based upon his post-blast examinations, Carr had no doubt entered the crusher chamber *with a good faith belief* that there was no existent hazards overhead.

However, a good faith belief, standing alone, does not transmutate a deficient examination into an adequate one.

This Court well recognizes that there must be a mixed *subjective/objective analysis* in assessing the conduct of parties. *See Robinette v. United Coal Co.*, 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 circumstances*); *see also*

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[30] The Commission has noted that the requirement of "adequacy" is "not a novel theory of regulatory interpretation" but a consistent concept in Commission case law "repeatedly applied to broadly worded mandatory safety standards." *Sunbelt*, at 8 n. 17.

Newmont USA, Ltd.,, 37 FMSHRC 499 (Mar. 2015) (wherein this Court's decision was remanded precisely because it had failed to determine whether, under the total circumstances, the operator's good faith belief that it was in compliance with the regulations was also *objectively reasonable*).

This Court finds that prior to the within accident there was a large buildup of materials in the hopper with large rocks bordering on the chute's edge. This Court found Bennett's testimony credible that he had observed such at the accident scene – a scene whose integrity had been preserved after the accident. The Secretary's photographic exhibit 9 corroborates Bennett's testimony on this point and in part contradicts Carr's testimony. Further, that an accident had in fact taken place confirms the existence of hazardous materials overhead which were unimpeded by any mechanical device or means.

Given such and given the clear dangers of dislodgement or sudden movement of unimpeded materials due to blasting, surrounding vibrations, and gravitational forces – this Court concludes that Carr conducted post blast examinations that were manifestly inadequate. Pursuant to the Commission's above cited holdings in *Newmont* and *Sunbelt*, Carr's good faith belief that no post blast conditions existed which could "adversely affect safety and health" was *objectively unreasonable*. Carr's post-blast examinations as a matter of fact and law failed to identify hazards that a reasonably prudent competent examiner would have recognized.

IV. The violation of 30 C.F.R. §56.6306 was significant and substantial in nature, reasonably likely to result in a fatal injury and was the result of high negligence on the part of the operator and was the result of unwarrantable failure.

Much of the above analysis regarding the gravity assessment of §§56.16002(c) and 56.16002(a)(1) is applicable to the instant violation and is hereby adopted without full recitation thereof. The failure to conduct adequate post-blast examinations created a discrete safety hazard: miners could be exposed to uncontrolled rocks which, in the instant matter, could tumble down an 8 foot chute and then fall 5 feet vertically directly upon them or as here, indirectly, after bouncing off the crusher chamber walls. Tr. 33-4.

Given the accident that occurred and the injuries sustained by Carr, the reasonable likelihood of serious and fatal injury is clearly proven.

V. The Respondent was highly negligent and its failure to comply with the standard was unwarrantable.

Given that Carr was both a licensed blaster and quarry superintendent he violated his high duty of care in conducting inadequate post blast examinations. *Brody*, at 1702.

The very high degree of danger posed by the violation of §56.6306 instantly in and of itself arguably justifies a finding of unwarrantable failure. Given *inter alia* the extent and obviousness of the violative condition discussed *supra*, the Respondent's failure to conduct adequate post-blast inspections was aggravated in the extreme. Even if the factor of

dangerousness does not by itself establish unwarrantable failure, the other *Manalapan* factors in combination certainly establish such.

A. Length of time

The violation of not resuming work until a post-blast examination had been conducted existed at least for the period wherein Carr entered the crusher before conducting an adequate post-blasting examination. It is possible, however, the violation had existed for the entire four hour blasting period. As stated *supra*, given the inherent dangers associated with blasting, including the obvious danger of dislodged large rocks, the violation clearly lasted for an unreasonable length of time.

B. Extent of violation

The violation extended throughout the hopper/crusher which operated as one unit, as mentioned *supra*.

C. The violation was obvious

Given, *inter alia*, the size and volume of materials in the hopper, the danger of sudden shifting or dislodgement due to 16 blasts, the fact that an accident had in fact happened, Carr's failure to conduct an adequate post-blast examination was obvious. The testimonial and photographic evidence presented by the Secretary outweigh the Respondent's protestations to the contrary. Patently, potential post-blast hazards had not been detected by Carr so as to ensure the safety of the crusher chamber.

D. The operator knew or should have known of the existence of the violation

The victim of the accident was a certified blaster and a senior member of management. With his years of experience in the field, as well as the safety of the miners under his authority to consider, Carr knew, or should have known, that the post-blast accident site in question required more adequate examination than that which was performed.

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

The operator did not abate this violation until after the accident took place. I therefore find this factor weighs against the operator.

F. Whether the operator had been placed on notice that greater effects were necessary for compliance

In his discussion of the *Manalapan* factors supportive of a finding of unwarrantable failure, the Secretary did not present evidence that the Respondent had been cited for the same or similar violations in the past. *See also* Government Exhibit S-15. This factor however standing alone does not vitiate a finding of unwarrantable failure.

G. The violation posed a high degree of danger

The degree of danger in this case was unquestionably high. Judging from either the severe injuries actually inflicted on Carr or the potential fatal injures he could have endured, the danger here is likely death. As noted *supra*, the Commission has specifically held that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure. This was neither a trivial nor technical violation. A miner was nearly killed as a result of the failure to conduct adequate post-blast examinations. The violation posed an unwarrantably high degree of danger.

Penalty

In reference to the special and regular assessments proposed by the Secretary for each of the within violations, the Administrative Law Judge can find no reason for any substantial divergence therefrom. The Secretary correctly calculated and properly took into account the Section 110(i) criteria in assessing the proposed penalties.[31] *Inter alia*, the Respondent has stipulated that the proposed penalties would not affect its ability to remain in business. It is also worth noting the Respondent's representations that "if it is determined that the Citations were properly issued and that Eureka violated the regulations cited, Eureka does not contest the reasonableness of the proposed civil penalties assessed for Citations No. 8801650 and 8801652." Resp't's Br., at 2. Instead, the Respondent challenges the "proposed civil penalty assessed pursuant to Citation No. 8801651," contending it is "not fair and equitable and should be reduced." *Id*.

The Secretary's penalty regulations and assessment formula, though not binding, serve as useful reference points in helping this Court navigate to its own independent decision regarding proper, just, and fair penalty amounts.

In *Brody Mining, LLC*, the Commission has reiterated that:

> the 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. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties … we

[31] The six statutory factors the Commission must take into account in assessing a penalty are (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(i).

find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.")

Brody, at 1701-2.

Given the totality of the circumstances, including the high degree of danger posed by the violations, the high negligence of the operator, and the operator's unwarrantable failure to observe mandatory safety standards at the quarry, the Administrative Law Judge finds that the proposed penalties of the Secretary were proper, fair, and just.

The Administrative Law Judge agrees with the Secretary's arguments that he reasonably exercised his discretion to specially assess penalties in this case because the conditions warranted such pursuant to 30 C.F.R. §100.5. *See also* Sec'y's Br., at 25-9.

The Administrative Law Judge specifically rejects the Respondent's argument that the specially assessed penalty for Order No. 8801657, alleging a violation of §56.16002(a)(1), was "neither fair nor equitable." Resp't's Br., at 17-8. Having a backhoe with its bucket in place was a simple means to prevent the caving and sliding of rocks which could entrap, injure, or kill miners. Government Exhibit S-12. The Respondent's failure to provide such was akin to playing Russian Roulette with miners' lives. That no prior accidents had occurred is not a mitigating factor but just "dumb luck" that there was no bullet in the chamber when the trigger was pulled previously.

Given, *inter alia*, essentially the same gravity and negligence assessments associated with all three violations, the Respondent also argues there was no rational basis for the Secretary to propose a civil penalty of $2,000 for two of the violations and $52,500 on the third violation. *See* Sec'y's Br., at 18. This argument is of course a double-edged sword, as it could just as easily be argued that the same $52,500 special assessment should be applied on all 3 violations. That the Secretary declined to do so is supportive of a fair and equitable penalty assessment.

ORDER

Order No. 8801651 is affirmed as issued. Citation No. 8801650 is affirmed as issued. Order No. 8801652 is affirmed as issued.

Accordingly, it is hereby **ORDERED** that the operator pay a penalty of $56,500.00 within 30 days of the issuance of this order.[32]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Matthew R. Epstein, Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 South Independence Mall West, Philadelphia, PA 19106

Stephen B. Harris, Esq., Attorney for Eureka Stone Quarry, Inc., 1760 Bristol Road, P.O. Box 160, Warrington, PA 18976

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

August 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. SAIIA CONSTRUCTION, LLC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. SE 2011-127-M A.C. No. 01-02985-235903 IKJ Mine: Omya Alabama Plant
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DARRELL RAGLAND, employed by SAIIA CONSTRUCTION, LLC, Respondent	Docket No. SE 2012-206-M A.C. No. 01-02985-276234 A Mine: Omya Alabama Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. FREDERICK LOONEY, employed by SAIIA CONSTRUCTION, LLC, Respondent	Docket No. SE 2012-207-M A.C. No. 01-02985-276235 A Mine: Omya Alabama Plant

CORRECTED DECISION

Appearances: Jeremy K. Fisher, Esq., U.S. Dept. of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

John W. Hargrove, Esq., Bradley Arant Boult Cummings, LLP, Birmingham, Alabama, for Respondent.

Before: Judge Bulluck

This Decision **CORRECTS** typographical errors in the case caption and body, and adds a footnote regarding penalty payment.

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against Saiia Construction, LLC ("Saiia"), Darrell Ragland, and Frederick Looney, pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §§ 815(d) and 820(c). The Secretary seeks a civil penalty of $42,600.00 against Saiia for a violation of his mandatory safety standard found at 30 C.F.R. § 56.6311(b); a civil penalty of $3,000.00 against Darrell Ragland, individually; and a civil penalty of $3,300.00 against Frederick Looney, individually, for knowingly authorizing, ordering, or carrying out the violation.

A hearing was held in Birmingham, Alabama. The following issues are before me: (1) whether Saiia violated the standard; (2) whether the violation was significant and substantial; (3) whether the violation was an unwarrantable failure to comply with the Secretary's mandatory safety standard; (4) whether Darrell Ragland is individually liable for the violation; (5) whether Frederick Looney is individually liable for the violation and, if so; (6) the appropriate penalty for each violation. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the Order, as issued, and assess penalties against Respondents Saiia, Ragland, and Looney.

I. Stipulations

The parties stipulated as follows:

1. Respondent, Saiia Construction, LLC, is engaged in a business which affects commerce.

2. Respondent, Saiia Construction, LLC, is subject to the Federal Mine Safety and Health Act of 1977, as amended.

3. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this case pursuant to section 105 of the Act of 1977.

4. MSHA Inspector Mitchell Smallwood was acting in his official capacity when he issued Respondent Order No. 6517482 on May 19, 2010.

5. True copies of the Order referenced in the previous stipulation, together with all appropriate modifications and abatements, were served on Respondent or its authorized agents, as required by the Act.

6. Copies of the subject Order and notes of alleged violation at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their

issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.

7. The Administrative Law Judge has the authority to assess the appropriate civil penalty under section 110(i) of the Act, if she also finds that the Order at issue states a violation of the Act and the Regulations.

8. The proposed civil penalties related to the MSHA enforcement action at issue in this proceeding would not adversely affect Respondent Saiia Construction, LLC's ability to remain in business.

9. Respondents Darrell Ragland and Frederick Looney were at all relevant times agents of Saiia within the meaning of section 110(c) of the Act.

Sec'y Br. at 2; Tr. 16-18.

II. Factual Background

Omya, Incorporated, Alabama Division ("Omya"), owns the Omya Alabama Plant, a surface marble mine in Sylacauga, Alabama. At all times relevant to this case, Saiia, an independent contractor, conducted all mining operations at the Brown and Omya quarries, both located within the Plant. Another contractor, Apache Construction ("Apache"), performed and oversaw all blasting activities at the quarries. Resp't Br. at 2; Sec'y Br. at 3; Tr. 52-53, 235. The blasting operations involved separate, but interrelated, activities on the part of Saiia and Apache employees. Saiia was responsible for blocking and guarding the quarry entrances and, after blasting was completed, Apache would give the "all clear" signal. Tr. 236. The stripping crew, Saiia employees, would then haul away the blasted material. Tr. 53-55, 153. Quality overburden, usually marble, was transported to a stockpile, while other material of little value, such as dirt, mud and dolomite, was hauled to an area called "the dump." Tr. 54-55. Lead operator Darrell Ragland supervised the day-to-day activities at the Brown quarry, and superintendent Frederick Looney supervised the Omya quarry, had oversight responsibility for both quarries, and was Ragland's supervisor. Tr. 56, 233-34, 260, 262-64.

On Friday, April 9, 2010, Apache conducted a blast at the Brown quarry at 11:28 a.m.[1] Ex. P-7 at 1. According to Saiia's time sheets, the following employees, among others, were working at the Brown quarry that day: Looney; Ragland; excavator operator Steve Harbin; truck driver Rayford Cheatham; truck driver Ricky Cheatham; truck driver Derrick Miller; truck driver Steve Littleton; truck driver Jeromy Watkins; Michael Bradberry; Tommy Smith; Matt Honeycutt; Philip Gardner; Thomas Catchings; and Chris Vaughn. Ex. R-10; Tr. 240-41. At some point after the blast, Harbin discovered a misfire. Resp't Br. at 3, 7; Sec'y Br. at 16. While the parties agree that the blast occurred on Friday, the Secretary contends that the misfire was discovered on the same day, and Respondents argue that Harbin found it on the following Monday. Sec'y Br. at 13; Resp't Br. at 3; Ex. R-26.

[1] Despite some erroneous references to the Omya quarry during the course of the hearing, the events at issue in this case took place at the Brown quarry.

On Monday, April 12, Harbin notified Omya's quarry manager, Oscar Crawley, of the misfire, although, like the date that the misfire was discovered, the time of Harbin's conversation with Crawley is unclear. Tr. 222-23. Crawley ordered Harbin to berm-off the area, and informed Apache employee Robert Barton of the misfire. Tr. 222-24; Ex. P-1 at 5, 9, 12. According to Saiia's time sheets, the following employees, among others, were working at the Brown quarry that Monday: Looney; Harbin; Bradberry; Rayford Cheatham; Ricky Cheatham; Watkins; Smith; Littleton; Miller; Honeycutt; Gardner; Vaughn; and Catchings. Ex. R-11; Tr. 240-41. Ragland had a medical appointment that day, and was listed as being on vacation. Ex. R-11; Tr. 241.

The next day, on Tuesday, April 13, Apache tied the misfire into its regularly scheduled blast between 11:45 a.m. and 12:40 p.m. Exs. P-1 at 4, 5, 9-10, R-7 at 5; Tr. 243, 265. Thereafter, Harbin discovered a second misfire from Friday's blast. Ex. P-1 at 5, 10; Tr. 78, 254-55. Barton later disposed of the misfire by tying it into a blast occurring the following week on Monday, April 19. Ex. P-1 at 5, 6. The following Saiia employees were working at the Brown quarry on that Tuesday: Looney; Ragland; Harbin; Bradberry; Littleton; Watkins; Honeycutt; Smith; Gardner; Vaughn; Catchings; and others. Ex. R-12; Tr. 240-41. According to the Daily Log for April 13, Rayford Cheatham, Ricky Cheatham, and Miller were absent that day. Ex. R-7 at 5; Tr. 244-45.

On Wednesday, April 14, Crawley held a contractors' meeting with Looney and Ragland, and Apache employees Mark Ray and blasting manager Glenn Barton, and discussed safe blasting procedures. Exs. P-1 at 12, R-29 at 3; Tr. 226, 229.

Monday, April 19, Steve Harbin terminated his employment with Saiia, and returned to Illinois to work for a former employer. Ex. P-1 at 4, 10; Tr. 79-80, 82, 84-85.

A. The Smallwood Investigation

Almost a month later, on May 11, MSHA's Birmingham field office received an anonymous hazard complaint, alleging that employees at the Omya Alabama Plant were not following safe blasting procedures. Tr. 182. MSHA Inspector Michael Smallwood conducted an on-site investigation on May 12, 13, and 18, interviewing Omya, Saiia, Apache, and contractor Dixie Drilling ("Dixie") employees. Tr. 183-84; Ex. P-1; Sec'y Br. at 3.

Smallwood first met with management-level Omya employees, supervisory-level Saiia employees, then lower-level Saiia, Apache and Dixie employees. Tr. 184-89; Ex. P-1 at 1-6. He found no physical evidence of any recent blasting violations, and several interviewees told him that they were unaware or had no direct knowledge of problems or unsafe practices at the quarry. Ex. P-1 at 3 (Daniel Massey-Dixie); P-1 at 6 (Donald Churchwell-Apache); P-1 at 8 (Thomas Catchings-Saiia); P-1 at 8 (Chris Vaughn-Saiia); P-1 at 16 (Matt Honeycutt-Saiia); P-1 at 17 (Phillip Gardner-Saiia). Ragland was the only supervisory employee who told Smallwood that he was not aware of any problems or misfires at the quarry. P-1 at 2; Tr. 188. Several others, however, including Crawley and Looney, specifically mentioned that there had been a misfire earlier in April. Tr. 184-89; Ex. P-1 at 2, 4, 5-7, 9, 13-16.

In an initial and follow-up interview on May 18, Oscar Crawley stated that, as a result of observing an unfired shot brought to his attention by Harbin on Monday, April 12, he had instructed Harbin to berm-off the area, and he reported the misfire to Apache blaster Robert Barton, who arranged to have it reshot during the blast scheduled for the following morning.[2] Crawley also stated that he had discussed his concerns and reviewed blasting procedures with, among others, Looney and Glenn Barton at the next regularly scheduled Wednesday contractors' meeting on April 14, and that the blasting crew was retrained on safe blasting procedures the following week. Ex. P-1 at 2, 12; Tr. 196-97.

Frederick Looney told Smallwood that, on Monday, April 12, as a result of Harbin discovering and reporting to Darrell Ragland an unfired hole from the Friday, April 9 blast, the area was barricaded and personnel were removed from the site. By his account, Apache was informed of the misfire on Monday, and the hole was reshot the next day. Looney also stated that Harbin resigned from Saiia on April 19, and took an out-of-state job. Ex. P-1 at 4; Tr. 189.

Apache employee Robert Alex Barton told Smallwood that he had conducted a clean post-blast examination on Friday, April 9, but that an unfired shot was found on Monday, April 12 that Apache tied into its blast and reshot on Tuesday, April 13. He noted that another unfired shot was discovered an hour later, and that it "was placed in the magazine and destroyed by placing [it] in a shot hole on April 19th ." Ex. P-1 at 5-6. Barton also told Smallwood, during the follow-up interview on May 18, that Apache employees were retrained on all phases of blasting a week after the misfire events, with special emphasis on post-blast examinations. Ex. P-1 at 13.

Saiia employee Tommy Smith told Smallwood that he heard the excavator operator notify Ragland that he had uncovered a misfire, and that Ragland told him to "keep on loading." Ex. P-1 at 6; see Tr. 190-91.

Saiia employee Steve Littleton told Smallwood that on Friday or Saturday, he, himself, saw the evidence of the misfire that the excavator operator had discovered, i.e., blasting wires and ANFO. Ex. P-1 at 6. According to Littleton, he heard Harbin report the misfire to site supervisor Ragland over the CB radio, and Ragland responded that "sometimes they looked like that and to just keep on digging." Ex. P-1 at 6-7; see Tr. 191-92. He stated that he did not believe that Ragland ever came to the site to investigate the misfire when it was reported to him, and that on Monday, Omya superintendent Oscar Crawley barricaded the area and removed all personnel from the site. Ex. P-1 at 7; see Tr. 192.

Saiia employee Derrick Miller told Smallwood that sometime in early April, while he was driving a haul truck, after observing the exposed wiring and ANFO of a misfire in the area being mined, he had volunteered to move to another location and operate another piece of equipment. He stated that mining in the area had continued for about an hour after the misfire was discovered, and that he had no knowledge of it being reported to management. He also stated that he noticed that the area had been barricaded at the end of the shift. Ex. P-1 at 7-8.

[2] Apache blaster Robert Barton is also referred to in the record by his middle name, Alex. See Ex. R-3. Smallwood's interviews of May 13 and 18 are both presumed to be of Robert Barton, rather than Apache blasting manager, Richard Barton. See Ex. P-1 at 5, 13, 18-19.

After interviewing several hourly Saiia employees, Smallwood interviewed Steve Harbin by telephone. Harbin told the inspector that upon discovering a misfire on Friday, April 9 after a blast earlier that day, and reporting it to Darrell Ragland over the CB radio, Ragland told him to "keep on digging." Harbin stated that he moved away from the misfire and continued working at a different location. According to him, on the following Monday, when Omya supervisor Oscar Crawley had come on-site, he showed him the misfire, and Crawley had him berm-off the area. He said that the blasters tied the misfire into the blast that was conducted the next day and that, after the blast when he began loading, he found another misfire. This time, he stated, he reported the unfired shot to both Ragland and Looney. Harbin alleged that he was told that "if he found a booster, to send it to the dump and not stop digging," although he did not specify who had given this order. At the conclusion of the interview, Harbin told Smallwood that he had resigned on the following Monday, April 19, and informed his co-workers that he was resigning because Saiia did not address his safety concerns when he encountered misfires, and because of the follow-up instructions that he was given to send boosters to the dump if he encountered them. Ex. P-1 at 9-10.

Smallwood also interviewed several Saiia employees on May 18. Haul truck driver Michael Bradberry expressed uncertainty of the misfire discovery date, but stated that he heard Steve Harbin report a misfire to Darrell Ragland over the CB radio, and that Ragland replied that "this happens all the time . . . keep on digging." Ex. P-1 at 13.

He also interviewed the Cheatham brothers, both Saiia haul truck drivers. Ex. P-1 at 14-15. Rayford Cheatham stated that Harbin reported a misfire to Ragland, and that he witnessed Harbin show it to Ragland on-site. According to Cheatham, he heard Ragland tell Harbin that it was "ok and go back to work." He also stated that Crawley had Harbin barricade the area after he found out about the misfire. He asserted that the area was mined after the blasters gave the "all clear" signal. Cheatham did not know the circumstances under which the blasters removed the misfire, and he did not specify when any of these events had occurred. Ex. P-1 at 14.

Ricky Cheatham told Smallwood that he heard Harbin report to Ragland over the CB radio that he had found a misfire, and that Ragland's reply was that "the shot had already been fired and . . . keep digging." He also stated that Harbin found a second misfire and, again, reported it to Ragland over the CB radio. According to Cheatham, Harbin asked Ragland to contact someone else about the misfire, but Cheatham did not identify to whom he was referring. Cheatham also stated that Harbin talked to Oscar Crawley on-site later in the shift, and that Crawley had Harbin barricade the area against entry. Ex. P-1 at 15.

Saiia haul truck driver Jeromy Watkins stated that he heard Harbin tell Ragland over the CB radio that he had found a misfire, and that Ragland told him to "keep on digging." Ex. P-1 at 16.

Smallwood returned to the mine and had a close-out meeting with management representatives of the companies on May 19. Ex P-1 at 18-19. Based on his investigation, Smallwood issued 104(d)(1) Order No. 6517482 to Darrell Ragland the same day. Ex. P-1 at 18-19; Ex. P-2.

B. The Saiia Investigation

Following issuance of the Order, in late May Saiia also took statements from several employees concerning their knowledge of the handling of the misfires. Some of the latter statements were essentially consistent with the statements given during Smallwood's investigation. Exs. R-13 (Robert Alex Barton); R-18 (Bradberry); R-20 (Gardner). Others provided additional information. Jeromy Watkins added that on Tuesday, after the blast and Harbin's discovery of another misfire, Harbin called Looney, who told him to "load the trucks and take everything to the dump." Ex. R-21. Rayford Cheatham remembered both misfires discovered by Harbin to have occurred on Monday. Ex. R-19. Some accounts of events, however, changed. For example, Steve Littleton stated that he did not think that there was any problem on April 9, and that he did not recall hearing Ragland direct Harbin over the CB radio to keep working. Ex. R-14. Derrick Miller placed Harbin's discovery of the misfire on Friday, and the tie-in reblast on Monday. Ex. R-16.

Darrell Ragland provided considerably more information than he had given Smallwood. He noted that he was off from work on Monday, April 12 due to a doctor's appointment, that he was told on Tuesday of a misfire being found on Monday and Crawley clearing the area of workers and equipment. On Tuesday, he stated, after the "all-clear" was given and stripping resumed after the blast, Harbin discovered another misfire and moved his excavator from the immediate area. Then, according to him, Alex Barton removed the misfire from the area as a result of a call from Looney. Ragland also maintained that he told Harbin, "if you find another booster, call me." Ex. R-5.

C. The Daniels Investigation

In late January and early February of 2011, MSHA Special Investigator Don Daniels conducted a 110(c) special investigation to determine whether Ragland and Looney should be charged with individual liability in connection with the misfire violation. Sec'y Br. at 4; Tr. 205-07. He interviewed Ragland, Looney, Littleton, Miller, and Smith in the Omya conference room, in the presence of Saiia's attorney; Crawley in the Omya conference room, alone; and Harbin by telephone. See Exs. R-6 (Ragland); R-8 (Looney); R-15 (Littleton); R-17 (Miller); R-22 (Smith); R-23 (Harbin); R-29 (Crawley). It was during Daniels' interview that Harbin specifically stated that it was Looney who had told him to take misfires to the dump. Ex. R-23 at 2. On the other hand, Smith told Daniels that Harbin spoke to Looney about the first misfire, and that Looney told him to stop working so that he, Looney, could investigate. Ex. R-22 at 3. Looney told Daniels that he had "never seen a danger" in "digging and loading material in an area where a misfire has occurred." Ex. R-8 at 4. He also stated that he had no knowledge of a second misfire. Ex. R-8 at 4. Thereafter, based on Daniels' findings, MSHA filed 110(c) charges against both Ragland and Looney. Sec'y Br. at 4; 205-07.

III. Findings of Fact and Conclusions of Law

A. Saiia

1. Fact of Violation

Inspector Smallwood issued 104(d)(1) Order No. 6517482 on May 19, 2010, alleging a "significant and substantial" violation of section 56.6311(b) that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by Saiia's "reckless disregard" and unwarrantable failure to comply with the standard.[3] The "Condition or Practice" is described as follows:

> A misfire was detected during the mining process in the area that was shot on April 9th 2010 and was reported to Darrell Ragland/ site supervisor. Mr. Ragland failed to ensure that only work necessary to remove the misfire and to protect the safety of the miners was performed. The area was not barricaded against entry. Mr. Ragland engaged in aggravated conduct constituting more than ordinary negligence in that when he was notified of this condition he instructed the excavator operator to continue mining operations. This violation is an unwarrantable failure to comply with the standard.

Ex. R-1. The Order had been terminated prior to Smallwood's investigation when Apache tied the misfire into the regularly scheduled blast on Tuesday, April 13, 2010.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.,* 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary asserts that the misfire triggering the violation was found and reported by Harbin to Ragland on Friday, April 9. Sec'y Br. at 13. It is further contended that Ragland ordered the miners to work in the face of the misfire, which continued until Monday, April 12, when the hazard was reported to Crawley, who, consequently, cleared the area and had it barricaded. Sec'y Br. at 19. The Secretary also contends that when Harbin discovered and reported the second misfire, Looney told him to dispose of it improperly and continue working. Sec'y Br. at 13.

Respondents characterize the Secretary's investigations as products of misunderstanding, mistake, or exaggeration. Resp't Br. at 9. They argue that Harbin discovered the first misfired

[3] 30 C.F.R. § 56.6311(b) provides that "[o]nly work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner."

shot on Monday. That day, they contend, Harbin could not have informed either supervisor of the misfire because Ragland had a doctor's appointment and was not at work, and Looney was working at the Omya quarry. Resp't Br. at 3, 6-7. According to Respondents, Crawley was informed of the misfire in the afternoon that Monday, he had the area barricaded, and Apache called in to recheck it. Resp't Br. 3, 7. They also posit that Looney was only at the Brown quarry on Tuesday after Harbin had discovered the second misfire and, therefore, that he could not have told Harbin to take misfires to the dump. Resp't Br. at 9. Furthermore, Respondents contend that no work had been performed between Crawley's intervention and the Tuesday blast, and they theorize that what Harbin and others actually heard over the CB radio was Ragland's "return to work" order after Apache's "all clear" signal. Alternatively, they contend that someone other than Ragland or Looney told Harbin to keep digging when he found the misfire. Resp't Br. at 8-9.

a. Testimony

Steve Harbin's overall testimony was credible and consistent with his statement given to Smallwood. He stated that his experience with blasting has taught him that if a blast produced a misfire, it likely produced others, and that he found two misfires in the same area as a result of the Friday blast. Tr. 77-78. Harbin did acknowledge that when the equipment is operating at the quarry, it can be difficult to hear who is speaking and what is being said over the CB radio. Tr. 74, 95-6. However, he maintained that he could clearly hear that it was Ragland to whom he was speaking because the equipment was not operating while they were talking. Tr. 93-94. He stated that, in an effort to distance themselves from the hazard, he moved the excavator 75 yards away from the area where he had been digging, and the truck drivers moved "a couple hundred yards" away, where they all continued working. Tr. 70-71. Harbin also testified that he confronted both Ragland and Looney, in person, after he discovered the second misfire. Tr. 78. According to him, Looney "[l]ooked [him] square in the eyes," and said, "we can't get no production this way if you keep digging these up." Tr. 78. He was so incensed by this order, he contended, that he made up his mind to quit his job. Tr. 79-90.

Derrick Miller drove a 50-ton rock truck for Saiia from February 2010 until February 2012. Tr. 112-13. He testified that he was aware of the misfire in early April, although he was unsure of the date on which it was discovered. Tr. 115-16. Initially, he stated that he had heard someone report the misfire over the CB radio and someone instruct the miner to haul it to the dump, then explained that the CB radio "didn't work that good in that truck at the time," and that he was unable to hear beyond 200 yards. Tr. 116-19. However, upon further questioning, Miller stated that he did not actually hear the exchange over the CB radio, but that Ricky Cheatham had told him that Steve Harbin had reported the misfire and was told to haul it to the dump. Tr. 120-21, 124. He addressed the contradictions in his testimony by noting that "it's been three years . . . . I can't recall. I don't know what happened yesterday." Tr. 125. Miller reviewed his statement to Smallwood, and confirmed that mining had continued for an hour after the misfire was found, and that the area was barricaded. Tr. 129-30.

Steve Littleton began working for Saiia as a rock truck driver in March of 2010, and was a current employee of the company when he testified. Tr. 132-33. Contrary to his earlier detailed account of events surrounding the April 2010 misfires, Littleton testified that he did not

remember much about the subject, nor what he had said during his interview with Smallwood. Tr. 135-36; see Tr. 137-42, 144-45. In addressing his drastic departure from his earlier statements, Littleton suggested the possibility that, at the time Smallwood conducted his interviews, a discussion with "Steve or somebody, you know, on the ground, parking lot, whatever," may have occurred and influenced his statement. Tr. 140-41. When reminded that Harbin was not in the state of Alabama when Smallwood conducted his interviews, Littleton switched gears, stating that the parking lot exchange possibly occurred "immediately after the incident, before he quit." Tr. 143. When asked a question on direct-examination designed to highlight his sudden lapse of memory, Littleton responded that "[t]hat was then. This is now. I mean, I don't hardly remember what happened last week, if you want to know the honest truth." Tr. 145.

Ricky Cheatham was employed by Saiia as a haul truck driver from June 2005 until August 2010; in April 2010, he was either stockpiling marble in the Brown quarry or hauling dirt to the dump. Tr. 152-54. He recalled Harbin calling in a misfire over the CB radio, and Looney telling him to "go down and pick it up and haul it to the dump." Tr. 155-56. According to him, the other supervisor, Ragland, told the stripping crew to go back to work over the CB radio, and these events occurred on Tuesday or Wednesday. Tr. 156-57. Cheatham also stated that "Steve [Harbin] told everybody, no, we're not going back down there and loading none of that rock until they come down there and do something about it." Tr. 157-58. That same day, he testified, Crawley flagged the area and removed the workers, and he recalled only one misfire. Tr. 158, 159-60.

Rayford Cheatham, Ricky's brother, also worked five years for Saiia until 2010, and was driving a haul truck in the Brown quarry in April of 2010. Tr. 163. He testified that the stripping crew was given the "all clear" signal by Apache after the shot, that Harbin was digging in the highwall and came across a misfire, and that everyone in the pit that day also saw the "pink stuff running out of the highwall . . . . all over the rocks." Tr. 164, 168. According to him, Harbin reported it over the CB radio, and "they came down there and looked, and Fred Looney told him to go ahead and load it, take it to the dump and hide it," over the CB radio. Tr. 164-65, 168. Cheatham averred that he heard Looney make the statement, and that "everybody joked about it. Every time - - they came over the radio to say something like that and knowing that [Omya] monitored the radio." Tr. 167-69. By his account, Harbin refused to keep digging and moved the crew to another spot, after which Crawley was made aware of the situation, had the area barricaded, and moved the crew out of the area. Tr. 166, 178-79. On cross-examination, Cheatham placed Ragland at the quarry on the day of the misfire discovery, blocking traffic on the road to prevent entry or exit until Apache had completed the blast. Tr. 176-78. Finally, he had no recollection of Harbin showing Ragland the misfire, and stated that all events about which he testified had occurred on the same day, although he could not pinpoint which day. Tr. 178-79.

Mitchell Smallwood, an MSHA inspector of almost six years with 23 years of mining experience, including certification as a mine foreman and an underground shot blaster, testified largely based on his interview notes, verifying the statements made to him during the hazard complaint investigation. Tr. 180-81. He stated that the non-management employees were sequestered for questioning. Tr. 189-90. Steve Harbin was not the first person to bring up the CB

radio conversation in which Harbin allegedly reported the misfire to Ragland and was told to keep digging; it was, in fact, the first non-management employees interviewed, Tommy Smith and Steve Littleton. Tr. 190-92. Smallwood explained why, based on the interviews, he determined that Saiia had permitted its miners to continue working in the area after a misfire had been discovered, that the hazard was reasonably likely to result in a fatality, and that management had directly ordered its miners to work in the face of grave danger. Tr. 200-04.

Quarry manager Oscar Crawley had worked for Omya just shy of eight years when he testified for Saiia. Tr. 221. Crawley stated that during his drive through the Brown quarry on the afternoon of Monday, April 12, he was summoned by Harbin, who advised him of a misfire; he had the area barricaded with rocks, and notified the blaster and Saiia's mining manager of the misfire. Tr. 222-23. He testified that he had not been present at the Brown quarry the previous Friday, and that he did not recall talking to Looney or Ragland about his handling of the misfire. Tr. 225. Crawley verified his earlier statement that Harbin had told him that he had reported the misfire to his supervisor over the CB radio, but had not specified the day on which that had occurred. Tr. 228-29. Finally, he stated that retraining blasters was recommended to Apache during the April 14 contractors meeting, as an extra safety precaution to remind them of the proper procedures. Tr. 229-30.

Darrell Ragland, employed by Saiia for over 15 years at the time of hearing, had been lead operator overseeing the daily mining operations at the Brown quarry since the project had begun in late February or early April of 2010. Tr. 233-34. He testified that in April of 2010, Saiia's practice was to guard entrances to the quarry and monitor CB radio communications from Apache during blasting, and Apache was responsible for post-blast examinations and relaying the "all clear" signal for Saiia workers to begin excavation. Tr. 235-36. Ragland remembered Friday, April 9 as uneventful and, according to the daily log, he drove the water truck that day. Tr. 237-38; Ex. R-7 at 1. He also stated that he took a vacation day the following Monday for a doctor's appointment. Tr. 239; Ex. 7 at 2, 11. Ragland testified that on Tuesday, the miners informed him that a misfire had been found on Monday, that Crawley had already barricaded the area, and that the misfire was reshot that Tuesday. Tr. 242-43; Ex. R-7 at 5. He denied ever sending anyone into a blasting area before receiving an "all clear" signal, as well as directing anyone over the CB radio to keep digging in the face of a misfire. Tr. 245-46; see Tr. 256-258. Ragland stated that he did not remember having any conversation with Harbin on Friday or Tuesday, nor since the misfire incident. Tr. 247. When given the opportunity on cross-examination to review his statement given during Saiia's internal investigation, Ragland acknowledged that Harbin had found a second misfire and removed the excavator from the area, and that Looney had Alex Barton remove the misfire; he also admitted that he had spoken to Harbin after he had found the second misfire, telling him "if you find another booster, call me." Tr. 254-55. Ragland also testified that he was replaced as quarry supervisor after the April misfires by a person with "more experience with just the overall mining plan and [who would] help Omya get the work going in the direction they needed to." Tr. 258.

Frederick Looney had worked for Saiia for over 25 years, had operated equipment for 10 years, and had been quarry superintendent for five or six years. Tr. 259-60. Looney testified that both quarries were operating on Friday, April 9, that he was at the Omya quarry most of the day, and that he remembered nothing unusual about blasting activities. Tr. 261-62. He stated that the

following Monday evening, when he arrived at the Brown quarry, Crawley was closing down and had earlier barricaded the area of the misfire. Tr. 262-63. Looney acknowledged moving back and forth between Omya and Brown during the course of the day and, after initially testifying that he had not gone to the Brown quarry on Tuesday, he stated that he had, in fact, visited the quarry in the evening. Tr. 265-67. However, upon further questioning, he stated that he did not remember whether he was at Brown in the morning or evening, or whether the blast had already taken place; then he supposed that it "might have been mid-morning, maybe somewhere right around 12:00, 11:30, 12:00, something like that." Tr. 267-68. He did state that the barricade had been taken down and the quarry was operating normally. Tr. 268-69. Looney denied having a conversation with Harbin, or a conversation over the CB radio on Friday or Tuesday; he also denied ordering anyone to work around a misfire or in a blast area before an "all clear" signal was given, or ordering anyone to haul a misfire to the dump. Tr. 269-70, 272-73. In reference to his interview with Daniels, in which he appeared to minimize the danger of working in an area around a misfire, Looney asserted that he would not put someone in that position, but then added that he had never seen a danger in it. Tr. 275-77.

b. Analysis

Resolution of the issues in this case is entirely fact-based and requires credibility determinations and reconciliation of inconsistent statements and testimony. As a preliminary matter, I find the miners' statements taken during Smallwood's investigation in May to be the most credible source of evidence in determining the course of events that triggered the hazard complaint. These statements were made closest in time to the incidents in question and even then, memories had already begun to fade as to exact dates and times; this is especially true given that there had been two separate, but interrelated, misfires, and discrete details of the first were often commingled with the second and vice-versa. Furthermore, unlike the statements taken later in May during Saiia's internal investigation, statements to Smallwood were made without the involvement of any management personnel. While it is abundantly clear that with each subsequent investigation, the passage of time progressively eroded the miners' ability to compartmentalize the two incidents, to make matters worse, the reliability of Daniels' investigation the following November was further compromised by the presence of Saiia's attorney in the Omya conference room when the miners' statements were being taken. The hearing was held almost two years after that. Most discrepancies in the witnesses' accounts were, understandably, products of the passage of time. This is evident by the fact that witnesses, such as the Cheatham brothers, testified to events that, by most other accounts, occurred on days during which they were absent from work. The most noteworthy lapse of memory and extreme about-face in testimony came from a miner still employed by Saiia, who obviously had concerns about jeopardizing his job. However, despite the passage of time and the tedious task of making the investigation statements jibe, then squaring them with the testimony at hearing, common threads of evidence emerge that weave the probable tapestry of events. Moreover, any allegations that Harbin called in the hazard complaint to MSHA, had an axe to grind with Saiia, or influenced any witnesses' statements or testimony is without support in the record. See Resp't Br. at 7-8. As will be explained, I fully credit Harbin's testimony as to the days on which he discovered the misfires, to whom he reported them, and what instructions he was given as a result. I also find his reason for ending his employment at Saiia, that he was required to work

around live, undetonated explosives, in line with his overall testimony, supported by the record, and wholly credible.

Smallwood's visit to the mine was unannounced and the miners were sequestered. Smith (Ex. P-1 at 6) and Littleton (Ex. P-1 at 6-7) were the first two of five hourly miners to tell Smallwood that they heard Harbin call in a misfire to Ragland over the CB radio, and Littleton thought that it had happened on Friday or Saturday. Bradberry (Ex. P-1 at 13), Ricky Cheatham (Ex. P-1 at 15), and Watkins (Ex. P-1 at 16), likewise, gave strikingly similar statements. Rayford Cheatham's statement, while similar, was lacking in detail that the report was made over the CB radio. Ex. P-1 at 14. Even before their statements, Looney had told Smallwood that Harbin had notified Ragland of the misfire. Ex. P-1 at 4. Smith, Bradberry, Ricky Cheatham and Watkins told Smallwood that they heard Ragland tell Harbin to "keep digging" or "keep loading." Littleton said that Ragland told Harbin that "sometimes they looked like that and to just keep digging." Rayford Cheatham said that Ragland told Harbin that "it was ok and go back to work." Steve Harbin, then, whose statement was taken later by phone, corroborated the on-site hourly employees' accounts of his report of the misfire to Ragland, rather than the other way around, and his rendition of Ragland's response, "sometimes they [look] like that and to keep on digging," was nearly the same as Littleton's, verbatim. Ex. P-1 at 9.

For Ragland to have directed Harbin to keep working in the face of an unfired shot, that incident would have had to have occurred on Friday, April 9, as the Secretary contends, since Ragland was not at the quarry the following Monday. Fortuitously, Crawley provides the key to establishing when the misfire was discovered. Crawley, clearly referring to the first misfire, told Daniels that "Harbin said he reported the misfire to his supervisor over the radio." Ex. R-29 at 2; see Tr. 228-29. Clearly, Harbin summoned Crawley to the site of the unfired shot to get something done about it -- something that he had not been able to accomplish by reporting it to his supervisor three days earlier.

Harbin also told Smallwood that after the Tuesday blast, he found another unfired shot near the first misfire and reported it to Ragland and Looney, who were both at the quarry; he was told that if he found a booster to send it to the dump and not stop digging. Ex. P-1 at 10. Harbin's subsequent statement to Daniels was consistent with that statement. Ex. R-23 at 2. Watkins stated during Saiia's investigation that Harbin called Looney on Tuesday when he found the second misfire, and Looney told Harbin to take everything to the dump. Ex. R-21. Although Looney told Daniels that he had not been at the Brown quarry when the first misfire was found and that he had no knowledge of the second misfire (Ex. R-8 at 5), Ragland told Daniels that he and Looney were notified of the misfire at the same time on Tuesday. Ex. R-6 at 4-5. During Saiia's investigation, Ragland stated that it was Looney who had called Alex Barton to have the misfire removed from the area. Ex. R-5. Barton, on the other hand, told Saiia that Ragland had called him to report that another unfired booster had been found. Ex. R-13. Smith, recanting his earlier statements to Smallwood in the presence of Saiia's attorney, told Daniels that he heard Harbin reporting a misfire to Looney, and that Looney directed him to "cease work and he would investigate it." Ex. R-22 at 3.

In addition to Harbin, too many workers reported Looney to have directed Harbin to dig up the misfire and dispose of it in the dump to be disbelieved. Additionally, Looney's blanket

denial of ever ordering work to continue following discovery of a misfire is belied by his lack of appreciation of the seriousness of the hazard. When asked by Daniels whether it is dangerous to dig and load in an area where a misfire has occurred, his response was "I have never seen a danger in it." Ex. R-8 at 4. His opportunity at hearing to soften the negative import of his statement missed the mark, as his testimony essentially reiterated his position that in all his years of experience, he had never seen an unfired booster actually explode. See Tr. 276-77.

Although the hourly workers' accounts of the two misfires arising out of the Friday blast vary in many respects, they place Ragland at the Brown quarry on Friday, Ragland and Looney both at the quarry on Tuesday, and have both supervisors verbally responding to one or the other of Harbin's reports of the misfires. The overwhelming weight of the evidence establishes that Harbin discovered the first misfire on Friday, April 9, that he reported it to Ragland over the CB radio, that Ragland instructed him to keep operating despite the obvious danger, and that mining continued until Crawley intervened the following Monday. Likewise, the record also establishes that on Tuesday, April 13, Harbin discovered the second misfire in the vicinity of the first, that he reported it to Looney and, perhaps, Ragland, that Looney directed him to haul it to the dump to hide it, and that mining continued before it was removed by Apache. It is equally clear that Harbin's motivation in quitting his job and securing employment out of state, away from his family, was squarely rooted in his desire to remove himself from the hazardous work environment. Because work was permitted, in addition to that which was necessary for safe removal and disposal of the misfires from the affected area, I find that section 56.6311(b) was violated.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 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) (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Company*, 7 FMSHRC 1125, 1129, (Aug. 1985), the Commission provided additional guidance:

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

Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of '"continued normal mining operations.'" *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Commission clarified that "[t]he Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The underlying violation has been established. The second criterion of the *Mathies* test has been met, in that allowing mining to continue in an area where there are live boosters heightened the risk of exposing miners to an unintended, unexpected detonation. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard contributed to was reasonably likely to result in an injury, and whether the injury would be serious. Smallwood testified that working around an unfired shot endangered the lives of the excavator operator and truck drivers, whose only protection was the windshields in their equipment, that the unfired shot was located near material that had been "broken" from a prior shot, and that there would be "nothing there to prevent that material from traveling in any direction." Tr. 202-03. Harbin, also experienced in mining around explosives, testified that the explosives were powerful enough to have killed two or three truck drivers in the immediate area, and that even workers hundreds of yards away would be endangered by flying rocks. Tr. 62-64, 71. Even Ragland acknowledged that a booster could go off and "possibly ignite any other explosives" nearby. Tr. 249. Clearly, excavating and loading in an area containing a misfire is reasonably likely to result in the shot detonating, and can reasonably be expected to result in very serious, if not fatal, injuries. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," indifference," or a "serious lack of reasonable care." *Id*. at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1993 (Aug. 2014) (citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether

mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal*, 22 FMSHRC at 353). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC at 1351).

The Secretary charges that Saiia's conduct was a reckless disregard of the dangers posed by permitting mining to continue in the face of misfires, that constituted an unwarrantable failure to comply with the standard. The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) (citations omitted). The parties have stipulated to Ragland's and Looney's status as agents of Saiia. Stip. 9. Ragland's very public order to Harbin to "keep on digging," where one misfire had been found, and Looney's equally public order that Harbin haul any unearthed misfires to the dump under circumstances where, indeed, not one but two unfired shots had been discovered as a result of the Friday blast, demonstrated a pattern of aggravated conduct that rose to the level of indicia of unwarrantable failure - - intentional misconduct, indifference, and a serious lack of reasonable care. Crawley's handling of the first misfire put Saiia on notice that greater efforts for compliance were necessary when the second misfire was encountered. The violation was obvious, significant, and extensive, affecting several miners within a broad radius of where they were working. The message was loud and clear: production over human life. Furthermore, after the Friday blast, the miners worked unprotected in the hazardous environment until Monday; likewise, they worked unprotected near the second misfire until Apache removed it some 30 minutes later. No credible accounts of the circumstances surrounding the April 9 blast attribute any timely precautionary behavior on the part of Saiia and, therefore, I find no mitigating factors. Indeed, Omya's intervention on Monday was a godsend and, given the reckless conduct of Saiia's supervisory personnel running the quarries, it is not surprising that Harbin chose to seek employment elsewhere. Therefore, I impute Ragland's and Looney's reckless disregard of the violative condition to Saiia, and find that the Secretary has met his burden of establishing a serious lack of reasonable care by the operator that constituted an unwarrantable failure to comply with the standard.

B. Ragland and Looney

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). In determining liability under section 110(c), the proper legal inquiry is whether the corporate agent knew or had reason to know of a violative condition. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998) (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997)). To establish section 110(c) liability, the Secretary need only prove that an individual acted knowingly, not that the individual knowingly violated the law. *Id*. (citing *Warren Steen Constr. Inc*., 14 FMSHRC 1125, 1131 (July 1992)). An individual acts knowingly where he is "'in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of the violative condition.'" *Id*. (quoting *Kenny Richardson*, 3 FMSHRC at 16). The Commission has explained that a person has reason

to know '"when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence."' *Id*. at 1149 (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *Id.* at 1148 (citing *BethEneregy Mines, Inc*., 14 FMSHRC 1232, 1245 (Aug. 1992)).

The overwhelming weight of the evidence establishes that Ragland, in his supervisory position over the Brown quarry, and Looney, his superior, were responsible for protecting the safety of Saiia employees who were removing and hauling material after the Friday, April 9 blast. On two separate occasions post-blast, in the face of one, then a second reported misfire, Ragland, then Looney, in earshot of several miners, knowingly ordered work to continue, despite the obvious hazard. Even more egregious was Looney's instruction to Harbin that he dispose of the misfire in an unsafe manner. To say that their collective behavior was callous fails to decry the environment in which they obviously deemed their conduct to have been acceptable. In light of the fatal consequences of working around live explosives, the agents' failure to take immediate corrective measures to eliminate the hazards amounted to an aggravated lack of care far exceeding ordinary negligence. Therefore, I find both Ragland and Looney, individually, liable under section 110(c) of the Act.

IV. Penalty

While the Secretary has proposed a civil penalty of $42,600.00 against Saiia, $3,000.00 against Ragland, and $3,300.00 against Looney, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). The penalty criteria are: the operator's history of previous violations; the appropriateness of the penalty to the size of the operator's business; whether the operator was negligent; the effect of the penalty on the operator's ability to continue in business; the gravity of the violation; and the demonstrated good faith efforts in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

The Secretary's arguments address the *Sellersburg* penalty criteria respecting Saiia, but are limited to only the gravity, negligence and good faith abatement criteria respecting Ragland and Looney. Saiia focused its arguments solely on the fact of violation, and failed to address the *Sellersburg* penalty criteria respecting any Respondent. Furthermore, the Secretary presented no evidence of Ragland's and Looney's income and net worth, and Ragland and Looney produced no evidence of their income, net worth and family support obligations, which bear upon the criteria upon which individual penalties are set.

A. Saiia

Applying the penalty criteria, I find that Saiia is a small- to medium-sized operator, with no history of similar violations and an overall record that is not an aggravating factor in assessing an appropriate penalty. As stipulated by the parties, the proposed penalty will not affect Saiia's ability to continue in business. Stip. 8. I also find Saiia's demonstration of good faith in

achieving rapid compliance totally lacking, given its failure to timely address discovery of the two misfires in any reasonable manner.

The remaining criteria involve consideration of the gravity of the violation and Saiia's negligence in causing it. I find subjecting workers to the adverse consequences of working around unfired boosters for any amount of time to constitute a very serious violation. I also find the conduct of its agents to be so highly negligent as to be indefensible.

Therefore, having considered Saiia's small to medium size, its insignificant history of violations, the seriousness of the violation, its high degree of negligence in committing the violation, its lack of good faith compliance, and lack of any mitigating factors, I find that a penalty of $42,600.00, as proposed by the Secretary, is appropriate.

B. Darrell Ragland

'"[J]udges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to *individuals*."' *Wayne R. Steen*, 20 FMSHRC 381, 382 (Apr. 1998) (quoting *Sunny Ridge Mining Co*., 19 FMSHRC 254, 272 (Feb. 1997)). Gravity and good faith abatement may be assessed by using "the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability." *Sunny Ridge*, 19 FMSHRC at 272. On the other hand, judges must assess the size and effect criteria by way of analogy by considering an individual's income, family support obligations, the appropriateness of the penalty in light of the individual's job responsibility, and ability to pay. *Id*. In 110(c) cases, penalties must be appropriate "in light of an individual's income and net worth." *Ambrosia Coal & Constr. Co*., 19 FMSHRC 819, 824 (May 1997). The proper inquiry for the effect of a penalty on an individual is "whether the penalty will affect the individual's ability to meet his financial obligations." *Id.*

It is presumed, based on Saiia's clear record, that Ragland has no history of previous violations. It is also presumed, based on the Secretary's failure to present evidence regarding Ragland's income and net worth, that Ragland's net worth is small. On the other hand, since Ragland has produced no evidence of his income, net worth, and family support obligations, it is presumed that the penalty will not affect his ability to meet his financial obligations. See *Sellersburg*, 5 FMSHRC at 294 (stating that, absent proof that the imposition of penalties would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur). The seriousness of the violation has been fully discussed, as has Ragland's rank and reckless disregard of the hazard in committing it, and his failure to abate the violation in good faith. Therefore, I find that a penalty of $3,000.00, as proposed by the Secretary, is appropriate.

C. Frederick Looney

Based on the same lack of evidence, I find, by presumption, that Looney has no history of previous violations, that his net worth is small, and that the penalty will not affect his ability to meet his financial obligations. The violation was very serious, Looney supervised both quarries and displayed a reckless disregard of the hazard in committing it, and failed to abate the violation

in good faith. Therefore, I find that a penalty of $3,300.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Order No. 6517482 is **AFFIRMED**, as issued, and that Saiia Construction, LLC, **PAY** a civil penalty of $42,600.00 within thirty (30) days of the date of this Decision.

Further it is **ORDERED** that Respondent Darrell Ragland **PAY** a civil penalty of $3,000.00 within thirty (30) days of the date of this Decision.

Further, it is **ORDERED** that Respondent Frederick Looney **PAY** a civil penalty of $3,300.00 within thirty (30) days of the date of this Decision.[4]

ACCORDINGLY, these cases are **DISMISSED.**

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Jeremy K. Fisher, U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

John W. Hargrove, Esq., Bradley Arant Boult Cummings, LLP, One Federal Place, 1819 Fifth Avenue North, Birmingham, AL 35203

[4] 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. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

August 30, 2016

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

DECISION ON REMAND

Appearances: Evan B. Smith, Esq., Wes Addington, Esq., Appalachian Citizens' Law Center, Whitesburg, Kentucky, on behalf of the Complainant,
Tony Oppegard, Esq., Lexington, Kentucky, on behalf of the Complainant,
David J. Hardy, Esq., Wm. Scott Wickline, Esq., Hardy Pence, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). The Commission has awarded McGlothlin $88,975.48 in attorney fees. *McGlothlin v. Dominion Coal Corp.*, 38 FMSHRC 401 (Mar. 2016). McGlothlin now seeks reimbursement for additional attorney fees in the amount of $41,525.00. The Commission has remanded this matter for my consideration of McGlothlin's request for reimbursement of the additional fees. 38 FMSHRC __, slip op. at 2 (July 15, 2016).

I. Background

In order to evaluate McGlothlin's current claim for $41,525.00 in additional attorney fees, it is helpful to review the chronology of events in this proceeding. A June 11, 2015, Decision on Liability resolved the liability at issue without the need for an evidentiary hearing. 37 FMSHRC 1256 (June 2015) (ALJ). The summary decision on liability, based on an undisputed chronology of events, held that Dominion violated the anti-discrimination provisions of section 105(c) by interfering with McGlothlin's right to pay protection under 30 C.F.R. Part 90 when Dominion reduced McGlothlin's pay after McGlothlin sought a determination concerning his eligibility for Part 90 protection.[1] *Id.* at 1264-1266.

[1] Under 30 C.F.R. Part 90, a miner determined to have evidence of the development of pneumoconiosis must be given the opportunity to work in a less dusty area of a mine without a reduction in pay.

Consistent with longstanding Commission procedure, the Decision on Liability ordered the parties to file either individual or joint petitions for relief. 37 FMSHRC at 1265-66. Despite my order, on September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's complaint based on the parties' proposed settlement. The parties' Joint Motion to Dismiss was predicated upon McGlothlin's agreement that "the parties jointly move the Court to dismiss all claims in this action with prejudice" in exchange for Dominion's agreement to pay the relief sought by McGlothlin, including his request for reimbursement of $88,975.48 in attorney fees. *Jt. Mot. to Dismiss*, at 2 (Sept. 2, 2015).

The propriety of the proposed $88,975.48 in attorney fees in the parties' Joint Motion to Dismiss was problematical as it was based on a mutual agreement to vitiate the previously-issued Decision on Liability through a proposed agreement that would have both insulated Dominion from the adverse history of its 105(c) violation, and released Dominion from the resultant civil penalty liability that was to be imposed by the Secretary as a consequence of its violation.[2] *See* 37 FMSHRC at 1266; 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). In other words, I was concerned that the proposed attorney fees may have been inflated in exchange for the parties' attempt to unilaterally absolve Dominion of a Commission finding of liability.[3] 37 FMSHRC 2511, 2513 (Oct. 2015) (ALJ). Consequently, the parties' Joint Motion to Dismiss was denied, as it goes without saying that Commission decisions on liability cannot be undone in exchange for preferable settlement terms. *Id.*

The parties submitted a revised Joint Motion to Approve Settlement on November 11, 2015. In an attempt to rectify the rejection of their September 2, 2015, Joint Motion to Dismiss, the parties replaced the term concerning the absolution of Dominion's liability with a term reflecting that "Dominion[] waive[s] its right to appeal this Court's Decision on Liability." *Jt. Mot. to Approve Settlement*, at 2 (Nov. 11, 2015) (hereinafter "November 11 Proposed Settlement"). The parties' November 11 Proposed Settlement retained the claim for reimbursement for $88,975.48 in attorney fees. *Confidential Settlement Agmt.*, at 2 (Nov. 11, 2015).

Granting the proposed settlement terms regarding attorney fees in the November 11 Proposed Settlement would have, in effect, credited the terms of the parties' previously

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[2] Dominion has now paid a civil penalty of $12,500.00 based on an approved settlement agreement with the Secretary in satisfaction of its discriminatory conduct against McGlothlin. 38 FMSHRC 1256 (May 2016) (ALJ).

[3] The fact that attorney agreements with respect to fees should be scrutinized in instances where they may be motivated by an agreement to contravene the purpose of the litigation is not a matter of first impression. Such agreements between opposing counsel in fee shifting cases are known as "sweetheart settlements." Sweetheart agreements involve defendants "buying out" plaintiff's lawyers by agreeing to pay them unusually high legal fees in an effort to defeat the deterrent effect of the illegal activity that gave rise to the lawsuit. *See* Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW AND CONTEMPORARY PROBLEMS 293, 301 (1984).

discredited Joint Motion to Dismiss. Consequently, on February 8, 2016, I issued a Decision on Relief awarding the full $45,942.61 in monetary relief sought by McGlothlin, but reduced the attorney fees claimed by McGlothlin's counsel from $88,975.48 to $57,229.82, based on a finding that the total attorney fees sought were excessive, in that they were duplicative, unnecessary, and/or unreasonable, and thus not awardable under section 105(c)(3).[4] 38 FMSHRC 255, 268 (Feb. 2016) (ALJ).

On March 10, 2016, McGlothlin filed a petition for discretionary review ("PDR") with the Commission, challenging only the reduction in attorney fees. Dominion did not oppose McGlothlin's PDR. On March 30, 2016, the Commission issued a decision that did not disturb the Decision on Liability or the monetary relief awarded to McGlothlin. 38 FMSHRC 401 (Mar. 2016). However, the Commission vacated the reduction of attorney fees awarded to McGlothlin and approved the parties' November 11 Proposed Settlement "based upon the agreed upon amount of attorneys' fees." *Id.* at 402. The Commission's Decision did not reach the question of attorney fees incurred after submission of the revised settlement agreement. *Id.* at 403 n.2.

Thereafter, on June 20, 2016, McGlothlin filed a motion seeking an award of $41,525.00 in additional attorney fees for reported legal services rendered during the period July 1, 2015, through June 20, 2016. This period represents work performed by McGlothlin's counsel to recover the total $88,975.48 in attorney fees sought in the November 11 Proposed Settlement. This case now has been remanded "for a determination of any further award of attorneys' fees." 38 FMSHRC __, slip op. at 2 (July 15, 2016).

II. Analysis

a. Reported Settlement Agreement

As stated by McGlothlin:

> [t]he threshold question in this fee petition is whether Mr. McGlothlin's counsel are entitled to additional fees for the necessary time incurred to get the parties' settlement approved and to get Dominion Coal to actually pay *the agreed upon amounts*.

Mot. for Award of Attorneys' Fees, at 10 (June 20, 2016) (emphasis added). However, the rub is that it is now apparent, based on the parties' representations, that McGlothlin's current claim for

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[4] Section 105(c)(3) provides:

> . . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . a sum equal to the aggregate amount of all costs and expenses *(including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner*. . . .

30 U.S.C. § 815(c)(3) (emphasis added).

additional attorney fees is borne out of a conflict between the parties that arose following the issuance of the Decision on Relief. Specifically, despite the $57,229.82 in attorney fees awarded in the February 8, 2016, Decision on Relief, the following day, on February 9, McGlothlin's counsel requested of Dominion via email:

> I want to minimize the impact this [decision] has on both of our clients though and propose that Dominion go ahead and cut checks as contemplated in the settlement. If Dominion will do that, then we won't pursue any further fees against Dominion and our clients could consider their roles in this to be over.

Id. at 7.[5] Dominion declined this offer, insisting on paying only the $57,229.82 in attorney fees awarded in the Decision on Relief. *Id.* at 7-8; *Dominion Resp.*, at 3.

Thus, while Dominion did not oppose McGlothlin's PDR, it now appears that, as of the February 8, 2016, Decision on Relief, Dominion was no longer inclined to unilaterally pay McGlothlin $88,975.48 in attorney fees. Ultimately, Dominion paid the additional $31,745.66 following the Commission's March 30 decision approving the parties' November 11 Proposed Settlement. *Mot. for Award of Attorneys' Fees*, at 9. Nevertheless, as discussed below, Dominion now asserts that the $88,975.48 in attorney fees awarded to McGlothlin's counsel by the Commission was excessive and, as such, $31,745.66 should be applied to offset the additional attorney fees currently sought. *Dominion Reply*, at 3 (July 29, 2016).

b. Parties' Positions

As a threshold matter, McGlothlin asserts that Dominion was required to abide by the terms of the November 11 Proposed Settlement. Thus, McGlothlin argues that the additional $41,525.00 in fees now sought could have been avoided if Dominion had paid the $88,975.48 in legal fees without the need for Commission approval. *Mot. for Award of Attorneys' Fees*, at 12-13. In this regard, McGlothlin seeks to justify the additional fees currently sought based on the

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[5] In fact, McGlothlin had attempted to elicit payment of the full $88,975.48 in attorney fees prior to the issuance of the Decision on Relief, thus attempting to circumvent the Commission's processes. In this regard, Dominion states:

> During the three-month interim between the submission of the [November 11 Proposed Settlement] and the [February 8, 2016, Decision on Relief], the parties both were concerned about potential adverse rulings, primarily because of the Court's unexpected rejection of their initial settlement proposal. The parties held multiple discussions on how to insulate their agreement against a potentially adverse ruling (to either party) by the Court. . . . [T]he parties discussed the possibility of a side-agreement that would hold the parties to the settlement terms, regardless of the Court's ruling.

Dominion Resp., at 3 (June 30, 2016).

fact that Dominion "went back on its word" when it refused to pay the full $88,975.48 without a Commission decision requiring it to do so. *Id.* at 16. Accordingly, McGlothlin argues that Dominion is "directly responsible" for the accrual of the additional $41,525.00 in fees now being sought. *Id.* at 12.

McGlothlin's assertion that Dominion's refusal to abide by the proposed settlement terms is material is based on a fundamental misconception. Proposed terms are just that—proposed terms. It is axiomatic that proposed settlement terms in Commission proceedings are not binding on the parties until approved by the Commission. Notwithstanding the immateriality of unapproved proposed terms, reimbursement of attorney fees under section 105(c)(3) does not depend upon blameworthiness. Rather, it is dependent upon whether the legal fees were "reasonably incurred."

Dominion contends that McGlothlin is precluded from recovering additional attorney fees based on three paragraphs (Paragraphs 5.1, 5.2, and 8.6) of the November 11 Proposed Settlement that insulate Dominion from liability for additional attorney fees upon its payment of the total $88,975.48 originally sought. *Dominion Resp.*, at 8-9. Consequently, Dominion argues that its payment of the $88,975.48 in fees following the Commission's March 30 Decision relieves it from any liability for additional attorney fees. *Id.*

However, Paragraphs 5.1, 5.2, and 8.6 are proposed settlement terms that were not adopted by the Commission. Specifically, the Commission's March 30 Decision held that "the Judge erred in rejecting the settlement based upon the [$88,975.48] *agreed upon* amount of attorneys' fees." 38 FMSHRC at 402 (emphasis added).

It is clear that the Commission's approval was limited to the "agreed upon amount of attorneys' fees" and was not an adoption of any other provision in the November 11 Proposed Settlement. *Id.* Thus, the Commission's holding only binds the parties in this discrimination matter with respect to the approval of the reimbursement of $88,975.48. The enforceability of any other terms of the November 11 Proposed Settlement not approved by the Commission goes beyond the scope of this proceeding. As such, the November 11 Proposed Settlement does not preclude McGlothlin from seeking additional attorney fees.

Having determined that the terms of the November 11 Proposed Settlement do not preclude reimbursement, the focus shifts to whether the additional attorney fees now sought were reasonably incurred by McGlothlin's counsel.[6] Consequently, consistent with the Commission's remand, the parties were requested to file additional briefs addressing the reasonableness issue. 38 FMSRHC __, slip op. at 2 (July 19, 2016).

[6] Dominion's procedural argument that McGlothlin's request for additional attorney fees was untimely was, in essence, rejected by the Commission by virtue of their remand directing further analysis. 38 FMSHRC __, slip op. at 2 (July 15, 2016).

Dominion addressed the reasonableness issue on July 29, 2016. As previously noted, Dominion did not oppose McGlothlin's March 10 PDR. However, in its current July 29 response, Dominion now argues, albeit belatedly, that "[t]he [ALJ's] prior reasonableness analysis still applies to the request for attorney fees." For example, Dominion asserts:

> In its *Decision on Relief and Final Order*, this Court conducted a thorough reasonableness evaluation of Respondent's attorney fees sought in the proposed settlement. The Court concluded that the requested fees were "demonstrably duplicative and excessive" and reduced the requested fees by $31,745.66. *Decision on Relief and Final Order* at 2. In granting the Respondent relief on appeal, the Commission did not reject this Court's reasonableness analysis, and did not vacate the entirety of the *Decision on Relief and Final Order*. Instead, the Commission carefully limited its ruling to "vacate those portions of the Judge's decision rejecting the revised settlement agreement as to attorneys' fees, and [approving] the settlement agreement as to those provisions." *Decision* entered March 30, 2016, at 3. In other words, while the Commission found that the Court erred in applying its reasonableness analysis in the presence of stipulated attorney fees, the Commission did not find substantive error in the Court's reasonableness analysis.

Dominion Br. in Opp., at 2 (July 29, 2016) (emphasis in original). In view of Dominion's current posture that the $88,975.48 was "demonstrably duplicative and excessive," Dominion now pleads that for "any additional fee . . . considered by the Court, the requested hourly rate should be reduced, [and] the billing entries should be assessed for duplication, and any award should be offset by the $31,745.66 that Respondent's counsel received *under the guise of a settlement*, in excess of this Court's reasonableness assessment."[7] *Id.* at 2, 4-5 (emphasis added).

On August 5, 2016, McGlothlin replied to Dominion's assertion that the attorney fees currently sought are duplicative and excessive because they are based on the identical dual representation that was rejected in the Decision on Relief. McGlothlin reiterates his arguments previously made in this proceeding in support of the reasonableness and necessity of the legal fees sought. *McGlothlin Reply*, at 2-6 (Aug. 5, 2016). In so doing, McGlothlin asserts that my previous fee analysis, which rejected the November 11 Proposed Settlement, is inextricably intertwined with the Commission's approval of the proposed settlement terms. *Id.* at 5 n.1.

[7] In his March 10, 2016, PDR, McGlothlin urged the Commission to approve the parties' November 11 Proposed Settlement. McGlothlin now represents that Dominion backed out of the agreement regarding attorney fees as of February 9, 2016, following the issuance of the Decision on Relief. *Mot. for Award of Attorneys' Fees*, at 7, 16. As a consequence of Dominion's failure to oppose McGlothlin's PDR, the Commission was unaware of Dominion's decision to no longer be bound by the entirety of the proposed settlement. While it is clear that the Commission was misinformed, McGlothlin had no affirmative duty to convey to the Commission Dominion's disinclination to adhere to the November 11 Proposed Settlement.

Simply put, McGlothlin argues, in essence, that the reasonableness of its dual representation and fee structure are no longer in issue, having previously been approved by the Commission.

c. Discussion and Evaluation

As previously noted, McGlothlin is seeking attorney fees for services rendered between July 1, 2015, through June 20, 2016. As a threshold matter, it cannot be said that the current request for attorney fees associated with the PDR is frivolous, as McGlothlin prevailed on appeal. In such circumstances, I find that fees-on-fees are compensable. *See, e.g.*, *Contractor's Sand and Gravel, Inc.*, 18 FMSHRC 1820, 1832-33 (Oct. 1996) (ALJ) (holding that fees-on-fees are compensable in a Commission Equal Access to Justice proceeding); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985) (holding that "[h]ours devoted to a request for fees are compensable" under a federal trademark fee-shifting statute).

I do, however, find it regrettable that, in an attempt to circumvent the Commission's oversight,[8] a significant portion of the fees currently requested were accrued by McGlothlin's counsel despite my repeated orders, consistent with long-standing Commission practice, that the parties file petitions for relief, rather than motions for approval of settlement.[9] 38 FMSHRC at 257 (citing to the procedural history of Commission decisions bifurcating the liability and relief phases of discrimination proceedings). However, as discussed below, I am constrained to award attorney fees for such endeavors given the Commission's rejection of my rejection of the parties' motions to approve settlement. Consequently, additional attorney fees now sought by McGlothlin are compensable.

Having determined that reimbursement is permissible, the focus shifts to the reasonableness and necessity of the fees sought. Dominion asserts that the Commission's approval of the November 11 Proposed Settlement did not constitute a finding that the attorney

[8] Despite the Commission's holding in Leeco, Inc. that "oversight of proposed settlements in discrimination cases is committed to the Commission's sound discretion," McGlothlin's counsel have previously opined: "We believe the Commission lacks the authority to review the attorneys' fees portion of the settlement." 38 FMSHRC at 259; Sec'y of Labor o/b/o Maxey v. Leeco, Inc., 20 FMSHRC 707, 707 (July 1998); see also Am. Coal Co., et al., 38 FMSHRC __, slip op. at 5 (Aug. 25, 2016) (affirming that Commission approval of settlement terms requires a finding that they are "fair, reasonable, [and] appropriate under the facts"). "Sweetheart agreements" in fee shifting cases are not immune from judicial scrutiny.

[9] There is a substantive difference between petitions for relief and motions to approve settlement in discrimination matters. 38 FMSHRC at 258.

fees sought by McGlothlin were reasonable. Rather, Dominion relies on the rationale in the Decision on Relief that the fees currently sought are duplicative and excessive.[10]

However, the Commission's approval of the settlement does not—and could not—constitute an approval of the stipulated attorney fees without a determination, as required by the Mine Act, that the approved fees were reasonably incurred. *See supra* note 4. Consequently, implicit in the Commission's decision is that reimbursement of multiple legal fees for the reported collaborative efforts of two attorneys, each of whom specializes in Commission discrimination cases, is neither duplicative nor unreasonably excessive. It is similar collaborative legal services for which McGlothlin now seeks additional reimbursement. In the final analysis, the Commission's approval of the parties' November 11 Proposed Settlement is, *a fortiori*, a controlling appellate determination that the additional total $41,525.00 sought for the services reportedly provided by both of McGlothlin's counsel is reasonable.

ORDER

In view of the above, **IT IS ORDERED** that Dominion Coal Corporation pay, **within 45 days of this Decision**, Scott D. McGlothlin's attorneys, Appalachian Citizens' Law Center, Inc. and Tony Oppegard, **a total of $41,525.00 as reimbursement for attorney fees**.[11]

IT IS FURTHER ORDERED that upon timely payment, the captioned discrimination proceeding in Docket No. VA 2014-233 **IS DISMISSED.**

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[10] Succinctly put, the Decision on Relief held that the legal fees sought by two attorneys each eminently qualified to represent 105(c)(3) complainants before this Commission, based in significant part on their claimed collaborative efforts billed at a combined rate of $750.00 per hour, were duplicative and excessive. 38 FMSHRC at 263-268. In addition, the Decision on Relief noted that the dispositive issue in this matter was not complex in that it was undisputed that Dominion interfered with McGlothlin's right to seek medical evaluation by lowering his pay during the pendency of his evaluation for Part 90 status. *Id.* at 264; *see* 30 U.S.C. § 815(c)(1).

[11] As a result of this Decision, McGlothlin will have been awarded reimbursement of a total of $130,500.48 for representation in this proceeding, the disposition of which was resolved via summary decision.

Distribution:

Evan B. Smith, Esq., Wes Addington, Esq., Appalachian Citizens Law Center, Inc., 317 Main Street, Whiteburg, KY 41858

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522

David Hardy, Esq., Scott Wickline, Esq., Hardy Pence PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548, Charleston, WV 25329

/acp

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

August 30, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JACOB HAMILTON, Complainant v. AMERICAN MINING AND TUNNELING, LLC Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2016-326-DM MSHA No. WE MD 2016-04 Fire Creek Mine Mine ID 26-02691 A4880

DECISION

Appearances: Jessica M. Flores, Esq., and Joseph Lake, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California, for Complainant; Donna V. Pryor, Esq., and Erik M. Dullea, Esq., Husch Blackwell LLP, Denver, Colorado, for Respondent.[1]

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Jacob Hamilton under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the "Mine Act") and on an amended complaint seeking the assessment of a civil penalty filed by the Secretary against American Mining and Tunneling, LLC ("AMT") pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing in the case was held in Elko, Nevada. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. STATEMENT OF THE CASE

On January 4, 2016, Hamilton filed a complaint of discrimination under section 105(c) of the Mine Act. The Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an investigation and, following that investigation, the Secretary filed a complaint before the Commission on Hamilton's behalf. This case was assigned to me on March 23, 2016, after AMT filed an answer to the complaint.

On February 5, 2016, the Secretary filed an application for temporary reinstatement on Hamilton's behalf pursuant to section 105(c)(2) of the Mine Act. On March 1, 2016, I granted the parties' joint motion to approve the settlement in that case and ordered AMT to provide

[1] At the time of the hearing, Ms. Pryor and Mr. Dullea were with the Denver office of Jackson Lewis P.C.

temporary economic reinstatement in Docket No. WEST 2016-259-DM. As of this date, my order of temporary reinstatement is still in effect.

Hamilton alleges that AMT discriminated against him on November 4, 2015, when he was terminated from his employment at the Fire Creek Mine after he engaged in protected activity by "reporting unsafe conditions at the Mine including missed holes in Spiral #2, attempting to correct unsafe conditions including bolting to secure the roof to safely reignite the missed holes, objecting to supervisor Darrin Quimby's instruction to work under unsupported roof, and objecting to supervisor Darrin Quimby's instruction to use a mucker bucket to load explosives." Discrimination Complaint at 3. AMT denies that Hamilton engaged in protected activity and, in any event, Hamilton's termination was motivated by his unprotected activity and it would have taken this adverse action for the unprotected activity alone.

For the reasons below, I find that AMT did not discriminate against Hamilton under the section 105(c) of the Mine Act when it terminated his employment and, as a consequence, the discrimination complaint is dismissed.

II. DISCUSSION OF EVIDENCE WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

At the start of the hearing, counsel for Complainant read the following stipulations into the record, which were admitted into evidence.

1. Pursuant to Section 113 of the Mine Safety and Health Act, 30 USC 823, which we will refer to as the Act, the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. American Mining & Tunneling, LLC hereinafter Respondent, a Nevada limited liability company, has a place of business located in or near Crescent Valley, Nevada, and has a principal place of business in Spokane, Washington.

3. Respondent at all relevant times had a contract with Klondex Gold and Silver Mining Company, whereby Respondent performed services at Fire Creek Mine, hereinafter the Mine, in Crescent Valley, Nevada.

4. At all relevant times, Respondent had an MSHA contract I.D. number and was an operator at the mine as this term is defined by Section 3(d) of the Act, 30 USC 802(d), because it was an independent contractor performing work or construction at the mine.

5. The products of the Fire Creek Mine enter commerce or the operations or products thereof affect commerce.

6. At all relevant times Respondent has been a covered entity subject to the jurisdiction of the Act.

7. Jacob Hamilton was employed by Respondent as an underground miner. Hamilton was a miner as the term is defined in Section 3 (g) of the Act, 30 USC 802 (g).

8. Hamilton was hired by Respondent on or about April 26, 2015.

9. Hamilton began working for Respondent at Fire Creek Mine on or about October 19, 2015.

10. On or about January 4th, 2016, Hamilton filed a complaint with the Secretary charging discrimination pursuant to Section 105(c) of the Act.

Tr. 8-9.

The Fire Creek Mine is an active, underground gold and silver mine operated by Klondex Gold and Silver Mining Company ("Klondex") in Lander County, Nevada. AMT was a contractor at the mine and Hamilton's crew was working in Spiral #2 on November 3, 2015. The miners on Hamilton's shift were supervised by Darrin Quimby, who was a leadman for AMT.

The mine uses a traditional mining cycle. At the start of each shift, miners muck out rock that was blasted at the end of the previous shift. This rock is either hauled out of the mine or temporarily stored in a muck bay to be transported out later. A mucker (load, haul, dump equipment) is used for this purpose. Next, rock bolts are installed with a plate to place mesh panels on the roof as support. A roof bolting machine is used to install the roof support. Sometimes, miners must scale the roof as they add roof support to remove any loose rock or uneven surfaces.[2] Next, the crew will drill blast holes into the face using the jumbo drill after the pattern to be used is designated. After the holes have been drilled, they will be loaded with explosives. Typically, "sausage powder" is used along with a blasting cap. Tr. 22. The explosives are detonated at the end of the shift. Frequently, the crew is unable to complete all these steps in a single shift.

Hamilton began his nightshift on November 3, 2015 in Spiral #2. He began mucking out the blasted rock. At some point, he observed three un-shot holes along the rib. Tr. 47. The blast performed at the end of the previous shift did not completely detonate all the explosives. If, while mucking, a miner sees holes that were drilled for purposes of blasting, he should assume that they are misfires and contain undetonated explosives. Tr. 155, 270. Hamilton recognized that he had to do something to remove or detonate any explosives that were present.

AMT's stated reason for terminating Hamilton's employment is because of the manner in which he attempted to remove undetonated explosives during that shift. Rather than re-shooting the holes to clear out any undetonated explosives, Hamilton chose to use his roof bolting

[2] Hamilton used the term "moiling" to describe the work that he performed. He defined moiling as "hammering, scaling rock off, any loose rock or uneven corners, edges." Tr. 19. He used the drill steel on the roof bolter to provide "sheer percussion to hammer it out or … drilling holes and breaking that rock out." Tr. 20. He testified that the difference between scaling and moiling is that with moiling "you actually drill, you cut holes this way, cut holes [that] way, cut hole this way, break the rock out." Tr. 75.

equipment to drill into the rock to dislodge the explosives from the rib. By drilling in and around the un-shot holes, the undetonated explosives were revealed. After the explosive material was clearly visible, Hamilton continued to use drill steel to drill around and very close to these holes in an attempt to remove more rock. Tr. 53-56. Hamilton admitted that he drilled numerous holes in the area. Tr. 79. When he was unable to remove sufficient rock to cause the explosive material to fall out, he began using his roof bolting machine to install additional ground support so he could reshoot the holes. Tr. 251-52. The leadman on the crew, Darrin Quimby, was becoming impatient with Hamilton and ordered him to re-shoot the holes. Tr. 255. Because Hamilton's drill steel broke, he was not able to install additional roof support or blast out the misfires by the end of the shift. Tr. 64-65. His shift ended early because of a planned power outage.

At the end of the shift, Quimby called his supervisor, AMT Superintendent Heinz Woelki, to tell him that Hamilton had used drill steel to drill close to and perhaps into holes that contained undetonated explosives. Tr. 269. Woelki was not at the mine at that time but was on the way to AMT's Nevada office in Winnemucca, Nevada. When he arrived in Winnemucca, Woelki discussed this matter with AMT Operations Manager Mark Carlson. Arrangements were made to have miners on the next shift take photographs around the misfired holes before any work was done. These photos were emailed to Carlson. Upon review of the photos, both Woelki and Carlson agreed that "the incident was a serious safety infraction and violation of MSHA regulations, which posed a grave risk to safety and well-being of the miners." AMT Br. 3-4; Tr. 435-36, 386-87. They concluded that Hamilton should be terminated and they advised Cassandra Elloway, AMT's chief financial officer, who agreed with the decision. Tr. 393. Hamilton was terminated later that day.

The Secretary[3] contends that AMT's proffered reason for Hamilton's termination is pretext. The Secretary presented evidence to show that Hamilton engaged in protected activity during this same shift and that his termination was a direct result of the protected activity.[4]

B. <u>Alleged Protected Activity</u>

The Secretary presented evidence of Hamilton's protected activity in the context of what he considered to be AMT's shoddy operations at the Fire Creek Mine. AMT entered into a contract to provide underground development mining services to Klondex at the Fire Creek Mine. On or about October 19, 2015, Hamilton and other miners started working at Fire Creek at the start of this new contract. Woelki was designated as the superintendent at the outset, but it is

[3] I use the terms "Secretary" and "Complainant" interchangeably in this decision. The Secretary presented evidence at the hearing on behalf of Hamilton, the complainant.

[4] I have not discussed all the evidence presented by the parties in this decision. Some of this evidence was introduced to raise questions concerning the credibility of opposing witnesses and to show inconsistencies in the case of the opposing side. Nevertheless, I considered the record as a whole in reaching my findings and conclusions. Evidence that is inconsistent with my findings and conclusions is hereby rejected.

not clear that he would remain in this position beyond the initial startup. Hamilton's crew, included Carl Roeller and Schuyler McCune, was supervised by leadman Quimby.

Hamilton, Roeller, and McCune testified that conditions at the mine were hectic and disorganized. The equipment they had to use was described as "garbage." Tr. 150-51. Hamilton testified that AMT had not yet mobilized the proper "tools, gear, or equipment" at the mine for the crew to efficiently perform their work. Tr. 34. The equipment that was present broke down frequently. Tr. 167-68. As a consequence, the crew often was unable to blast at the end of their shift, which slowed down development of the mine. Hamilton testified that Woelki put pressure on the crew to increase production and he threatened to fire them if production did not pick up. Hamilton testified that Quimby repeatedly directed the crew to take unsafe shortcuts, such as asking them not to bolt the roof to standard, so they could blast a round at the end of the shift. Tr. 35-36, 153. Hamilton testified that during his first week of work, he was setting up ground support when Quimby ordered the crew to stop. Tr. 37. Quimby told the crew that the support they installed was good enough and ordered them to blast. *Id.* Hamilton testified about other unsafe shortcuts he was ordered to take. Tr. 129-30, 179-80.

AMT denies these allegations. It argues that AMT was not behind schedule and did not push miners to prioritize production over safety. Christopher Corley, AMT's operations manager, stated that AMT was not under pressure to push production during the first few weeks of its contract at the mine. He testified that the initial challenges AMT faced at Fire Creek Mine were no different from the challenges it faces during startup at other mines and that Klondex understood these challenges. Tr. 363. Robert Crommelin, Klondex's Senior Safety Coordinator, testified that neither AMT nor its miners were penalized if production goals were not met. Tr. 470. On cross-examination, Hamilton admitted he had never been on a startup job before, AMT had accepted the job at Fire Creek at the last minute, and the project started the same week he began his employment at the mine. Tr. 35, 151. He also admitted that Woelki had been trying to acquire better mining equipment. Tr. 80.

The above history is background to the two specific safety complaints Hamilton made during the night shift of November 3, as set forth in the Secretary's discrimination complaint. I find that the first few weeks of AMT's operations at the Fire Creek Mine were a shakedown period for AMT. Everything was not in place for a smooth, efficient operation, which frustrated the miners. I also find that although Hamilton believed he was required to take shortcuts that compromised safety, his belief that he was under a risk of termination and that AMT was favoring production over safety is not correct. For purposes of this decision, however, I will assume that Hamilton complained to Quimby about safety conditions at least once between October 19, 2015 and November 2, 2015. Specific events before November 3, 2015, are not part of this case, however, because they were not included in MSHA's investigation of Hamilton's

complaint and are not mentioned in the Secretary's Discrimination Complaint or the First Amended Discrimination Complaint.[5]

In the discrimination complaint Hamilton filed with MSHA, Hamilton described two events that occurred on the night shift of November 3 that he contends constituted protected activities. Ex. R-2. The specific circumstances surrounding these activities are as follows:

1. When Hamilton arrived at the heading of Spiral #2 on November 3, he found a forklift with a dead battery. He drove a jumbo drill to the surface to find a mechanic who could fix the forklift. A jumbo drill takes 15-20 minutes to drive to the surface while a mucker takes about 5-10 minutes to drive the same distance. Tr. 184-85. When he reached the surface with the jumbo drill, he told Quimby about the forklift and that it was blocking an escapeway. Tr. 41, 250. Quimby wanted Hamilton to park the jumbo drill underground at a muck bay. Hamilton told Quimby that it would not fit there because another piece of equipment was parked there. Hamilton testified that Quimby became irritated and told Hamilton to park the jumbo at a sump underground. Hamilton told Quimby he could not park there because he would not be able to put the boom down. Tr. 42. Hamilton said that Quimby became more irritated and told him to stop talking and do what he was told. *Id.* Woelki had previously instructed the crew to refrain from bringing equipment out from underground because cold temperatures could freeze water lines in the equipment. Tr. 284-85.

This issue must have resolved itself because the jumbo drill was parked somewhere underground and Hamilton did not mention anything about not being able to lower the boom to anyone and did not record it on the equipment card or another document. Tr. 102. The problem with the forklift was corrected and Quimby drove Hamilton back to his work place. Quimby testified that he was not irritated because Hamilton raised a safety issue but because he believed Hamilton was taking too much time to perform preliminary tasks and making excuses. Tr. 251.

[5] The Secretary, in his brief, relies on several instances of alleged protected activity prior to November 3, 2015. Sec'y Br. 11-12. These instances are not mentioned in the complaint Hamilton filed with the Secretary, in the discrimination complaint the Secretary filed with the Commission, or in the declaration of MSHA Special Investigator Diane Watson dated February 4, 2016. Ex. R-2 (Watson's declaration was not filed with the Secretary's complaint in this case but was attached as Exhibit B to the Secretary's Application for Temporary Reinstatement in WEST 2016-259-DM). In *Sec'y of Labor on behalf of Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997), the Commission explained that the scope of a discrimination proceeding is determined not by the original complaint filed with MSHA by the alleged discriminatee but, rather, by the subject matter of the investigation conducted by the Secretary in response to the complaint filed by the alleged discriminatee. Watson's Investigation Report, dated February 4, 2016, focuses on the events of November 3-4, 2015. Ex. R-20. There is only one brief reference to Quimby's alleged conduct prior to November 3. *Id.* at 5. Although MSHA's investigation was limited to events of November 3-4, I have considered the evidence about working conditions at the mine prior to November 3 in reaching my conclusions.

2. Upon returning to the heading, Hamilton began examining his workplace. He examined the ground conditions and looked for potential hazards. Tr. 45. He did not find any issues, recorded his inspection on his 5-Point Safety Card, and proceeded to wet down the muck pile so he could muck out the area. Tr. 45-46; Ex. C-1 (Complainant's Exhibit 1). While he was mucking he noticed three drill holes along the spring line.[6] Tr. 47. He was unable to determine whether there was explosive material in these holes. He began to remove the rock from around these holes by moiling with his bolter. Tr. 50-53. Hamilton testified that, after doing so, he exposed enough rock to see what appeared to be explosives in at least one of the unblasted holes.[7] Tr. 53-54.

Hamilton testified that he tried to wash out the explosives with the water spray on the bolter. Tr. 54-56. When that failed, Hamilton testified that he began to install ground support and bolt up to the misfire to blast it. *Id.* He further testified that while scaling prior to installing ground support he discovered another misfire. He updated his 5-Point Safety Card to note the misfires. Sec'y Ex 1. Quimby came by at that time so Hamilton brought him up to speed as to what was going on. Hamilton testified that Quimby told him to use the mucker bucket to load the misfires and blast them in that manner. Tr. 60-61. Hamilton objected to loading and blasting under unsupported ground and to using the mucker bucket to load the misfires because the mucker bucket was not designed to hold people and did not have railings or fall protection. Tr. 60-61, 68. Hamilton testified that he had time to install ground support and blast the misfires safely, but while he was in the process of installing additional ground support his drill bit broke. Tr. 64-65. As a result, he was not able to install the ground support or blast the misfires by the end of his shift. *Id.* According to Hamilton, when Quimby found out that he had not blasted out the misfires by the end of the shift, Quimby told Hamilton he was required to do what he is told to do and that he was "writing [him] up for drilling on miss-holes." Tr. 64.

Quimby testified that Hamilton could have reached and re-blasted at least one of the misfires while remaining under pre-existing ground support. Tr. 254. Instead of reshooting the holes, Hamilton chose to use equipment to drill holes into the rock. This drilling on, in, and near the un-shot holes revealed the undetonated explosives, yet Hamilton continued to drill near and perhaps into these holes after the explosive material became visible to him. Tr. 53-56. Quimby testified that when he visited Hamilton during the shift he saw 50-60 drill holes in the vicinity of the undetonated holes. Tr. 270. Hamilton admitted that he drilled "50, 200 [a] lot" around the subject holes. Tr. 79. Quimby told Hamilton to reshoot the holes. Quimby testified that at the end

[6] The "spring line" is the area where the back meets the back (top) meets the rib. Tr. 73.

[7] Holes that were drilled during the previous shift and were filled with explosives that failed to detonate when the face was detonated were referred to as "misfires" or "miss-holes" by the witnesses.

of the shift, he called Woelki to tell him that Hamilton had drilled in and around undetonated blast holes, as discussed above.[8]

C. Analysis of the Issues

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. Pursuant to Commission case law, a *prima facie* case for a violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal. Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981).

The Commission will consider the following factors in determining whether the complainant has established a causal connection between the protected activity and the adverse action: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

It is rare for a section 105(c) case to be proven solely on direct evidence. Rather, it is more typical for such a case to be made by relying on indirect or circumstantial evidence. Therefore, it is of no surprise that the Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

Once a *prima facie* case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the operator is unable to successfully rebut, it may still establish an affirmative defense by proving that the adverse action was motivated by unprotected activity, and it would have taken the action based solely on the unprotected activity. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-2800.

[8] It is not entirely clear whether Hamilton drilled into the undetonated blast holes or drilled very close to the holes. Woelki and Carlson reviewed the cell phone photographs that were taken during the following shift before the area was blasted to remove the misfires. Ex. R-1. In this exhibit, the explosive material in the photographs is yellow in color and the holes that Hamilton drilled are the black circles. Whether Hamilton actually drilled into a blast hole is not critical because the exhibit clearly shows that he drilled extremely close to the undetonated explosive material in the holes. I credit Woelki's testimony that a miner cannot be very accurate in the placement of holes when using a roof bolter for this purpose. Tr. 440.

Did Hamilton Engage in Protected Activity?

I find that Hamilton engaged in protected activity. First, he raised concerns about the location of the forklift in a designated escapeway and the appropriate place to safely park the jumbo drill. Second, and more importantly, he raised concerns about loading and blasting under unsupported ground and to using the mucker bucket to load the misfires because the bucket was not designed to safely hold people and did not have railings or fall protection.

AMT described the interactions between Hamilton and Quimby on the night shift of November 3 as ordinary differences of opinion on work methods arising during the normal course of work. AMT Br. 5. Quimby testified that he believed the Hamilton was taking too much time to perform preliminary tasks, such as when he took the slowest piece of equipment to the surface to report that the battery was dead on the forklift.[9] Tr. 251, 184-85. AMT also argues that Hamilton's testimony that he objected to Quimby's suggestion that they use the mucker bucket to reach the misfired holes should not be credited because it contradicts the testimony of McCune. Tr. 183.

I find that AMT's arguments miss the point. These arguments are more generally directed to the question whether he was terminated as a result of these protected activities. I find that Complainant established that he engaged in protected activity.

Was Hamilton's Termination Motivated in any Part by the Protected Activity?

Complainant has the burden of establishing a *prima facie* case on this issue. The Commission has held that to establish a *prima facie* case of discrimination, "the complainant need only 'present[] *evidence sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by the activity'" *Jayson Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1065 (May 2011) (emphasis in original) (citation omitted). The Commission made clear that this burden is lower than the ultimate burden of persuasion that the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. *Id.*

A complainant often must rely on indirect or circumstantial evidence to establish a *prima facie* case. As stated above, an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case. *Baier*, 21 FMSHRC at 957. The Commission has stated that "[a]n operator may not escape responsibility by pleading ignorance due the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n. 4 (Feb. 1984). Thus, the fact that Woelki and Carlson were not aware of Hamilton's safety complaints does not necessarily mean that Complainant failed to establish a *prima facie* case of knowledge of the protected activity. If Quimby's made a recommendation that Hamilton should be terminated and if the recommendation influenced Woelki's and Carlson's decision to terminate Hamilton, then Quimby's knowledge and retaliatory animus may be attributed to the decision maker. *Turner*, 33 FMSHRC at 1068.

[9] Apparently, there were no two-way radios available at that time.

Evidence and Credibility

A close review of the evidence is critical in resolving the issues in this case. A judge's credibility determinations can be critical in analyzing the evidence in discrimination cases. Witnesses frequently provide different accounts of the same events and their perceptions can differ even if their accounts do not differ in a substantial degree. The Commission has long held that because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he 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). A recent Commission decision illustrates both in the majority decision and in the dissenting opinion, the pivotal role that a judge's credibility determinations often have in discrimination cases. *Sec'y of Labor on behalf of Charles Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC _____, No. VA 2014-343-D (Aug. 23, 2016).

Although I am not completely discrediting the testimony of any witness, I found that their credibility varied greatly.[10] I especially credit the testimony of Heinz Woelki for a number of reasons. He had a calm bearing and a credible demeanor. Ordinarily, he functions as a master mechanic for AMT but he was given the task of supervising AMT's project at the Fire Creek Mine during the start-up period. He was the superintendent for the project for about two months after which he again became a master mechanic. Tr. 187-88. He has about 46 years of experience in underground metal mining including time on mine rescue teams. Tr. 433, 439-40. He has worked in many positions during his career including ones involving the use of explosives. Tr. 442. His testimony was internally consistent and I found it to be especially trustworthy. He was quite candid in describing the mistakes he made in the manner in which Hamilton was terminated. I find that he honestly testified about the events that occurred and his reasons for terminating Hamilton's employment. I do not believe that he tailored his testimony to reflect what AMT management wanted him to say.

Quimby testified there was a spot underground where the jumbo drill could be safely parked and told Hamilton to park it there. Tr. 250. Woelki had told the crew earlier that the drill could not be brought outside because the water in the spray system would freeze. Tr. 285. Quimby told Hamilton that he was wasting time on this issue. Apparently, the drill was safely parked and the issue was not raised again. I find that this issue was resolved and it played no part in AMT's decision to terminate Hamilton or in Quimby's decision to discuss Hamilton's conduct with Woelki.

[10] In assessing the credibility of witnesses, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses. The witnesses were sequestered.

After the drill issue was resolved, Quimby dropped Hamilton off at the heading of the Spiral #2 and Quimby returned to his work area.[11] Later in the shift, Quimby returned to Hamilton's work area and saw that Hamilton was bolting up roof and rib support. Quimby observed the misfires at that time. Tr. 252. Hamilton gave Quimby his 5-Point Safety Card to sign. Ex. G-1. The card noted the misfires. Quimby told Hamilton to finish installing the roof bolt he was working on and get the misfires blasted. Quimby testified that Hamilton could insert blasting material into the misfires while standing on the muck pile while under supported roof. Tr. 254-55. Because Hamilton was an experienced miner, Quimby did not believe he had to babysit him. Tr. 256-57. I find that the evidence does not support a finding that Quimby required Hamilton to stand in the bucket of the mucker. Rather, because Hamilton was an experienced miner, Quimby expected Hamilton to work safely and efficiently to get the hazardous misfires down.

During his visit to Hamilton's work area, Quimby observed 50 or 60 holes drilled around and very close to the misfired holes. Tr. 270. Quimby testified that he was surprised that Hamilton had tried to drill out the misfires. Tr. 255. He said that he had never seen an experienced miner engage in such a negligent act. Tr. 255-56. Such an act is both illegal and very dangerous. Tr. 270. Because Hamilton had stopped trying to drill out the rock surrounding the misfires when Quimby arrived, he did not escort Hamilton out of the mine for his actions. Tr. 256. Quimby testified that he did not immediately remove Hamilton from the mine because Hamilton was pinning the roof and had stopped drilling into the misfires.

Before Hamilton was able to blast out the misfires, the drill steel on his roof bolter broke. As a consequence, he did not complete installing roof support and blasting out the misfires before the end of the shift. He advised Quimby about this on the surface after the end of the shift.[12] Tr. 268. Quimby told the leadman for the oncoming shift about the misfires. Tr. 285. The misfires were shot down after a few more roof bolts were installed during the following shift.

At the end of the shift, after he was on the surface, Quimby called Woelki to tell him that Hamilton had drilled into misfires. Quimby testified that, although he would not have told the oncoming crew about the misfires if Hamilton had shot them down, he would have told Woelki that Hamilton had drilled into the misfires in any event. Tr. 269-70.

Knowledge of Protected Activity

The parties disagree as to whether AMT had knowledge of Hamilton's protected activity. The Secretary asserts that Hamilton raised multiple safety concerns to Quimby with the result that AMT had knowledge of the protected activities. Sec'y Br. 15-16. The Secretary contends that AMT relied exclusively on Quimby's statements in deciding to terminate Hamilton. Further,

[11] Because Quimby was a leadman and not a foreman, he spent most of his time performing hourly production work. In addition, the miners on his crew were experienced, so he did not believe that they should require close supervision. Hamilton had about eight years of experience as an underground metal miner. Tr. 16.

[12] The shift ended early that day because of a scheduled power shutdown. Tr. 64.

Quimby was the only individual who gave a statement in AMT's post-termination investigation, was the individual who notified Hamilton of his termination, and filled out part of AMT's Notice of Employee Separation. *Id*. 16; Ex. C-3. Given Quimby's knowledge and the animus he harbored toward Hamilton's safety complaints, the retaliatory motive of Quimby should be imputed to AMT even if the ultimate decision makers did not have knowledge.

AMT argues that the individuals who made the decision to terminate Hamilton, i.e., Woelki, Carlson and Elloway, had no knowledge of Hamilton's alleged protected activity, could not have been motived by such, and made the decision to terminate Hamilton based only on information that Hamilton had drilled into misfires. AMT Br. 7-10. The decision to terminate was made only after they reviewed the photographs that were taken of the heading the following shift. Ex. R-1. These photographs clearly show that Hamilton had drilled very close to the undetonated explosives. Further, any knowledge Quimby may have had regarding Hamilton's alleged protected activities is not imputable to AMT since Quimby did not participate in any decision making, did not make any disciplinary recommendation, and only reported to Woelki that Hamilton had drilled into un-shot holes. Although AMT acknowledges that Quimby's delivery of the termination decision to Hamilton was a deviation from company procedure, Quimby did so only because Woelki instructed him to do so since Woelki could not get to the mine in time to notify Hamilton of the termination.

The Commission has explained that, if an immediate supervisor's recommendation to terminate an alleged discriminatee is at least partially a result of retaliatory animus and that recommendation influenced management to take the adverse action, then the immediate supervisor's knowledge and retaliatory animus may be attributed to the decision maker. *Turner,* 33 FMSHRC at 1068. The Secretary cites two Commission cases for the proposition that Quimby's knowledge is imputable to AMT, *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F. 3d 1136 (9th Cir. 2001) and the concurring opinion of Chairman Jordan in *Sec'y of Labor on behalf of Andrew Garcia v. Colorado Lava*, 24 FMSHRC 350 (Apr. 2002). In both instances, as well as in *Turner*, the imputation of knowledge of the protected activity hinged on the level of a supervisor's involvement in the decision which resulted in the adverse action. In *Bergene*, while the manager was not ultimately responsible for the decision that resulted in the adverse action, he was found to have played an "influential role" in that decision. Likewise, in *Garcia*, Commissioner Jordan's statement regarding imputation requires the supervisor to have "influenced" or "participated" in the decision that adversely affected the employee.

I find that Quimby's knowledge is not imputable to Woelki and Carlson, who made the decision to terminate Hamilton. I especially credit Woelki's testimony on this issue. Woelki, with the consent of Carlson, made the decision to terminate Hamilton. They had no knowledge of safety complaints. Tr. 436-437. Quimby did not make any recommendation to them about Hamilton's termination. *Id*. Rather, Quimby only told Woelki that Hamilton had drilled into the area of the misfires. Woelki made the decision based in large part on photographs. *See* Tr. 435-437 and Ex. R-1. Without the photographs to corroborate Quimby's statements to him, it is doubtful that Woelki would have determined that Hamilton should be immediately terminated. Woelki explained that Hamilton's act "was extremely dangerous, against our company policy, Klondex company policy and the Code of Federal Regulations[.]" Tr. 436, 440-442. The testimony of Carlson and Elloway support Woelki's decision. Tr. 386, 390, 392-94, 446-47.

Leadman Quimby was the only person with some management responsibility who had knowledge of Hamilton's protected activity and he simply advised Woelki that Hamilton had drilled in the vicinity of misfires. The relaying of this information to the ultimate decision maker did not rise to the level of involvement that would trigger imputation of Quimby's knowledge to AMT.[13] In addition, although Quimby was the person who told Hamilton he had been terminated, the decision had already been made and Woelki was unable to do it because he was not at the mine.

Hostility or Animus Toward the Protected Activity

The Secretary argues that AMT, through Quimby, demonstrated hostility or animus toward Hamilton's protected activity and safety in general at the mine. Specifically, he argues that AMT was under pressure to produce and AMT management threatened miners with the loss of jobs and bonuses if production goals were not met. Sec'y Br. 14. In addition, the Secretary contends that Quimby accused Hamilton of using safety concerns as an excuse for not producing and told Hamilton to shoot down the misfires whether he was able to get the roof bolted up or not. Sec'y Br. 5; Tr. 61.

AMT argues that production was not the focus at the expense of safety and there was no evidence of any hostility or animus towards protected activity. The mine was in startup phase, which involved normal initial challenges and difficulties and AMT was not under pressure from Klondex to step up production. AMT Br. 11-13. AMT's safety record is evidence that it does not focus on production at the expense of safety.

I find that there is evidence in the record to support a finding that Quimby was tired of Hamilton's delays and that he wanted him to blast down the misfires by the end of the shift. By pressuring Hamilton in such a manner, Quimby, whether intentional or not, displayed hostility toward Hamilton's protected activities. Quimby displayed hostility to any type of delay and his hostility was not specifically directed at safety complaints. Nevertheless, the record supports a finding that Quimby was hostile toward Hamilton's safety complaints. Those in management who made the decision to terminate Hamilton, on the other hand, did not demonstrate hostility or animus toward Hamilton's protected activity or to safety complaints in general at the mine. I do not credit evidence to the contrary.

I have already found that Quimby's knowledge of protected activity should not be imputed to AMT and that Woelki, Carlson and Elloway were unaware of any protected activity. Moreover, I credit the testimonies of both AMT Operations Manager Corley and Klondex Senior

[13] An argument could be made that, but for Hamilton's protected activity, Quimby would not have called Woelki to tell him that Hamilton drilled into the misfires. Once the misfires were blasted at the beginning of the next shift, any evidence of Hamilton's actions would have been destroyed. The Secretary called Quimby as an adverse witness. Quimby testified that he was surprised that Hamilton moiled (i.e. drilled) near the misfires, he had never observed an experienced miner do that before, and that he considered Hamilton's actions to be hazardous. Tr. 255-56. I credit this portion of Quimby's testimony and find that he would have called Woelki even if Hamilton had not engaged in protected activity.

Safety Coordinator Crommelin that AMT was not under pressure to push production and that it would not be penalized if production goals were not met. Tr. 363, 470. Roeller testified that miners were getting pushed to shoot rounds, but they often could not blast at the end of their shifts because the equipment provided by AMT was substandard. Tr. 150-51. I do not dispute that everyone was frustrated with the slow pace at the outset of AMT's project at the Fire Creek Mine or that miners were sometimes pushed to do more. AMT was in the midst of an initial shakedown period following the commencement of work and smooth operation had not yet been achieved. Nevertheless, I do not credit testimony that miners were threatened with their jobs as a result of the conditions at the mine and that they had to endure unsafe conditions as a consequence.

Coincidence in Time

The Secretary asserts that the temporal proximity between Hamilton's protected activities and his termination by AMT, without an investigation, "strongly indicates" AMT's discriminatory motive. Sec'y Br. 14. AMT argues that, given the short period of time Hamilton had worked at the Fire Creek Mine, no reasonable inference can be drawn from the timing of events. However, if any inference can be drawn, it is one in favor of AMT since it terminated Hamilton for his unprotected act the same day it was reported to management. AMT Br. 16.

It is self-evident that Hamilton's termination occurred very soon after his protected activity. I find that, while the temporal proximity of Hamilton's protected activity the night of November 3rd to his termination the following day would normally be indicia of discriminatory intent, here, the issue is not so clear. Even where a coincidence in time exists, "'[s]urrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Turner*, 33 FMSHRC at 1070 (citations omitted). The timing of Hamilton's termination, while close in time to his protected activity, was just as close in time to his unprotected hazardous activity. Consequently, although there can be no dispute regarding the temporal proximity of the protected activity and adverse action, I find that not much weight should be given to this issue.

Disparate Treatment

The Secretary argues that Hamilton was the subject of disparate treatment given that he violated no clear company policy and, unlike miner Richard Dahl, who was terminated for throwing an explosive down a drift, was not afforded an opportunity to explain himself or be suspended pending an investigation. Sec'y Br. 17-18. AMT argues that its treatment of Hamilton following his unprotected act was consistent with its company policy as well as its record of terminating employees for violations of company safety policies. AMT Br. 14. AMT has terminated multiple employees for violations of company safety policies. Although AMT may not have interviewed Hamilton before terminating him, as it did when it terminated Dahl under different circumstances involving explosives, there was photographic evidence of Hamilton's misconduct, a different superintendent made this decision, and Dahl was terminated after Hamilton. AMT Br. 14 n. 2.

There is no question that the manner in which AMT terminated Hamilton suffered from a number of irregularities. Some of these irregularities were due to the fact that Woelki was not

normally the superintendent of a mine. He did not follow the typical protocol for terminating an employee because it was not something that was a normal part of his job duties. In addition, he was on the way to Winnemucca when Quimby called him.

Normally, when an employer seeks to terminate an employee for an infraction of rules or safety procedures, the employee would be suspended with pay pending an investigation. That is what AMT did when it terminated Dahl. Tr. 370-75. He was suspended with pay while AMT conducted an investigation. During this investigation, AMT interviewed Dahl and other employees with knowledge of the facts. At the conclusion of the investigation, AMT terminated Dahl. In the present case, on the other hand, Hamilton was terminated soon after Woelki and Carlson reviewed the photographs of the heading where Hamilton had been drilling. AMT conducted the investigation of the events after Hamilton was terminated. Ex. C-15.

I find that, although Hamilton's termination differed from AMT's normal procedure, AMT provided adequate reasons for the difference. It should be self-evident to any experienced miner that Hamilton's actions were extremely dangerous and would be prohibited by any mine operator. Hamilton's actions were so inherently hazardous and unusual that one cannot compare it to other disciplinary actions taken at the mine. I agree with AMT that the circumstances of Dahl's termination are not sufficiently analogous Hamilton's situation. The drill holes created by Hamilton's actions were observed first hand by Quimby and documented in photographs that were reviewed by Woelki and Carlson. Tr. 270; Ex. R-1. The Secretary did not seriously dispute the authenticity or accuracy of the photos. I find that these photographs accurately depict the holes Hamilton drilled near the explosives. Dahl was terminated for throwing an explosive down a drift. Tr. 374. Although Dahl's conduct was certainly dangerous, it does not appear that such clear and convincing evidence of his conduct existed in the immediate aftermath so a pre-termination investigation was necessary. Here, the evidence of dangerous conduct was overwhelming. As noted by AMT, its employee handbook states that it retains discretion to terminate an employee immediately. Tr. 342; Ex. R-10.

Another anomaly in this case arises from the fact that Quimby filled out part of Hamilton's "Notice of Separation." Ex. C-3. It was highly unusual for a leadman to fill out or sign this form. Under the section of the form where management sets forth the reason for the termination, Woelki wrote "[d]rilling marks around the miss hole indicate the bolter operator was trying to use the bolter steel to remove powder." *Id.* Quimby wrote: "No communication. Was told to shoot miss hole. Did not shoot." *Id.* Although the reasons set forth by Woelki and Quimby are not entirely consistent, they both center on Hamilton's conduct with respect to the misfires. I credit AMT's argument that Quimby did not have the authority to terminate Hamilton. Quimby filled out part of the form because (1) Woelki was not at the mine at the time and he wanted the termination to be effective immediately and (2) Woelki was an inexperienced mine superintendent and was not aware that Quimby did not have authority to fill out or sign the separation notice.

Establishment of a Prima Facie Case and its Rebuttal

As stated above, I find that Hamilton engaged in protected activity. Hamilton's termination was the adverse action. The next issue is whether Complainant established a *prima*

facie case by presenting evidence sufficient to support a conclusion that his termination was motivated *in any part* by his protected activity. This burden is lower than the ultimate burden of persuasion that Complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. As discussed above, although Woelki did not have knowledge of the protected activity, Quimby certainly did. Quimby displayed some degree of animus or hostility toward the protected activity, as discussed above, but Woelki did not. Quimby was impatient with Hamilton's desire to completely support the roof but it is noteworthy that on the following shift the miners were permitted to complete the task of supporting the roof before the misfires were shot. There was a coincidence in time between the adverse action and the protected activity but also between the adverse action and the unprotected activity. Finally, although other miners have been terminated for serious safety infractions, the procedure used in the present case was not the norm. I find that Complainant established a *prima face* case.

I find that AMT rebutted Complainant's case by establishing that the adverse action was not motivated in any way by the protected activity. As stated above, I found the testimony of Heinz Woelki to be especially credible. Although he did not handle the situation in the manner that a human resources professional would have recommended, his motivation was pure. He did not want Hamilton returning to the mine because he considered his actions to be extremely hazardous to himself and the other miners. AMT could not afford to take the risk that Hamilton would take such actions in the future. Moreover, as discussed below, even if I assume that Hamilton's protected activity played a part in the decision to terminate him, AMT established that it would have taken that action based solely on the unprotected activity.

AMT's Affirmative Defenses

AMT alleges, as an affirmative defense, that it would have terminated Hamilton for his unprotected activity alone. AMT Br. 26. It maintains that the uncontroverted testimony shows that the impetus for Hamilton's termination was his "gross safety violation." *Id.* AMT management considered Hamilton's actions to be unnecessarily hazardous because the misfires could have been removed in a safe manner. In addition, Klondex Safety Coordinator Crommelin testified that Hamilton's actions were an "unacceptable practice" that was unsafe and in violation of Klondex's policies and MSHA regulations. Tr. 463-64; Ex. R-22. As a result of his actions, Klondex prohibited Hamilton from working at any of its mines in the future.

I find that even if I assume that part of the reason Hamilton was terminated was because of his protected activities, AMT would have terminated him for his unprotected act of drilling close to the misfires alone. As discussed above, Woelki believed that Hamilton was trying to drill the misfires out to save time, but such conduct was "extremely hazardous." Tr. 190. I credit Woelki's statement that "when someone attempts to remove explosives with a drill steel by moiling[,] there is a high chance of setting off the explosive and [these actions could] result in injury or death." Tr. 438. The "main hazard is the percussion; the impact on the explosive will set it off." Tr. 441. The same is true with respect to the blasting cap and the shock cord; an impact can set them off. *Id.* Woelki decided to terminate Hamilton only after he saw the photographs demonstrating that Hamilton had drilled many holes very close to the blasting material. Tr. 191. Woelki reviewed the photographs after he arrived in the Winnemucca office later on November 4. Tr. 436. I credit Woelki's testimony that he was unaware of any safety

complaints made by Hamilton and that Quimby did not recommend to Woelki that Hamilton be terminated. Tr. 436-37.

I find that AMT's stated reason for terminating Hamilton was not pretext to cover up the real discriminatory reason. In reviewing an operator's affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 993 (June 1982). The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). On the other hand, the Commission also held that "judges should not substitute for the operator's business judgment [their] views of 'good' business practice[.]" *Chacon*, 3 FMSHRC at 2516-17. "[O]nce it is determined that a business justification is not pretextual, then the judge should determine whether 'the reason was enough to have legitimately moved the operator' to take adverse action." *William H. Haro v. Magma Copper Co*., 4 FMSHRC 1935, 1938 (Nov. 1982) (citation omitted).

The Secretary argues that AMT's characterization of Hamilton's conduct should not be credited. He maintains that the actions that AMT accuses Hamilton of committing "is the sort of unbelievable conduct that when alleged by an employer, indicates pretext." Sec'y Br. 19 (citation omitted). Although a mine operator's accusations concerning unsafe conduct must be closely examined for the reasons suggested by the Secretary, Hamilton readily admitted that he drilled many holes around the explosive materials using the roof bolting machine. He was not simply using the bolter to scale down loose rock; he admits to drilling "plenty" of holes, "50, 200. A lot." Tr. 79. Hamilton's own testimony supports the "unbelievable conduct" that AMT accuses Hamilton of committing.

I find that the business justification offered by AMT was not pretextual. It was not "weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. I credit the testimony of Woelki that AMT terminated Hamilton solely for drilling in and around the misfires. The Secretary argues that AMT did not have a specific rule prohibiting a miner from using a drill in such a manner, which helps demonstrate that the company failed to follow its own procedures when terminating Hamilton. AMT did not need to have a rule telling experienced miners not to drill into or near undetonated explosives; such an obligation is self-evident. Experienced miners do not usually take such hazardous steps to remove undetonated explosives. Tr. 439. Hamilton's conduct in drilling close to explosive material was reason enough for a mine operator to terminate his employment. As Woelki stated, when a miner is using a machine to drill from ten feet away, he cannot be very accurate with the placement or direction of the drill. Tr. 440. Using drill steel to try to dislodge explosive material from the host rock was extremely dangerous and foolhardy. Woelki testified that when he was on mine rescue teams he retrieved the bodies of several miners who did something similar. Tr. 439-40. Hamilton is lucky to be alive.

III. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Jacob Hamilton is **DENIED** and this proceeding is **DISMISSED**. By order also issued today, my order of temporary reinstatement entered in WEST 2015-259-DM is dissolved.

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

Distribution:

Jessica M. Flores, Esq., and Joseph Lake, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Donna V. Pryor, Esq., and Erik Dullea, Esq., Husch Blackwell LLP, 1700 Lincoln Street, Suite 4700, Denver, CO 80203-4547 (Certified Mail)

RWM

ADMINISTRATIVE LAW JUDGE ORDERS

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

August 4, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CURTIS LOGSDON, Complainant v. PARK COUNTY GOVERNMENT, Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2016-380-DM MSHA No. RM MD 2016-07 Nine Pit Mine ID 05-04600

ORDER DENYING REQUEST FOR PRODUCTION OF DOCUMENTS

This discrimination case was brought by the Secretary of Labor on behalf of Curtis Logsdon against the government of Park County, Colorado ("Park County") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act") and 29 C.F.R. § 2700.40 et seq. The case is set for hearing on September 13, 2016. On April 19, 2016, Respondent served its First Set of Written Interrogatories, Requests for Production of Documents, and Requests for Admission on the Secretary. The Secretary served his response on May 17, 2016. On July 15, 2016, Respondent filed a motion to compel discovery. I issued an unpublished order disposing of most of the issues raised by the motion to compel on August 1, 2016.

Two of the discovery requests included in the motion to compel sought the production of documents. Park County asked the Secretary to produce (1) the "written notification from the Secretary to Logsdon of his determination that a violation has occurred as described in Section 105(c)(3) of the Mine Act" and (2) the "written determination of the Secretary that a violation has occurred in this matter as described in 29 CFR §2700.40(a) and 29 CFR §2700.41(a)." The Secretary objected to these requests as subject to the work product privilege, the attorney-client privilege, the deliberative process privilege, and the common interest privilege. Resp. Mot. 9.

In my August 1 order, I stated that I was unable to rule on Respondent's motion to compel with respect to these documents because I was not sure what information was contained within them. I ordered the Secretary to provide the documents to me for my *in camera* review. The documents have now been provided and I hold that they are subject to the work product rule, as set forth below. As a consequence, the Secretary is not required to produce them.

In its motion to compel, Park County argued that both documents are "discoverable since they are both relevant and admissible and required by law to be prepared and maintained by the Secretary." Resp. Mot. 9. In response, the Secretary stated that "these documents . . . were clearly prepared within the Solicitor's Office and in anticipation of litigation and, thus, [are] not only protected from disclosure by the work product doctrine, but by the deliberative [process] privilege as well." Sec'y Opposition 4.

The first document requested by Park County is required under the first sentence in section 105(c)(3) of the Mine Act. That sentence states that "[w]ithin 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, *in writing*, the miner . . . of his determination whether a violation has occurred." 30 U.S.C. § 815(c)(3) (emphasis added).

The second document is "the written determination of the Secretary that a violation has occurred" in this matter as described in 29 C.F.R. § 2700.40(a) and 29 C.F.R. § 2700.41(a). Resp. Mot. 9. Commission Procedural Rule 40(a) provides that a discrimination complaint shall be filed by the Secretary if, after an investigation, "the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred." 29 C.F.R. § 2700.41(a). The procedural rule does not require that a document be prepared by the Secretary other than the complaint of discrimination that is filed with the Commission and served on the mine operator. Commission Procedural Rule 41(a) provides that a "discrimination complaint shall be filed by the Secretary within 30 days after his *written determination* that a violation has occurred." 29 C.F.R. § 2700.41(a) (emphasis added).

THE WORK PRODUCT RULE

Although the Commission's Procedural Rules do not specifically set forth a work product rule, the Federal Rules of Civil Procedure guide Commission judges "as far as practicable" on procedural questions "not regulated by the [Mine] Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Federal Rule 26(b)(3)(A) allows a party to withhold otherwise discoverable materials under the work product rule if they are (1) documents or tangible things; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or its representative. Fed. R. Civ. P. 26(b)(3)(A); *see also ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) ("*ASARCO I*").

Commission Judge Alan G. Paez recently summarized the test to be used when analyzing the work product doctrine, as follows:

> Courts apply a "but-for" test to determine whether a substantially similar document would have been created if not for the prospect of particular litigation. *See ASARCO I*, 12 FMSHRC at 2558 ("If . . . [a] document can fairly be said to have been prepared *because of* the prospect of litigation, then the document is covered by the privilege. . . . In addition, *particular* litigation must be contemplated at the time the document is prepared.") (emphasis added); *see also U.S. v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *U.S. v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010). The Commission and its Judges have determined that documents prepared as a result of an MSHA investigation are prepared in anticipation of litigation. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997)[.]

Sec'y on behalf of Villa v. Molycorp Minerals, LLC, 36 FMSHRC 1076, 1078 (April 2014). The work product rule is qualified and documents that otherwise may be withheld under the rule may

be subject to disclosure 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. *Consolidation Coal Co.*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3)(A)(ii).

1. Notification to Miner Required by Section 105(c)(3)

This document is a letter, dated March 14, 2016, from Michelle A. Horn, counsel for Complainant, to Curtis Logsdon. It states that the Secretary of Labor will be filing a complaint of discrimination against Park County on his behalf. The remainder of the letter is equivalent to an engagement letter telling Logsdon what to expect as the case proceeds and that he has the right to obtain outside representation or the advice of a private attorney if he so choses. The letter contains no factual information about this particular discrimination case and a large part of the letter appears to be boilerplate.

I find that the Secretary is not required to produce this letter because it is subject to the work produce rule. But for the commencement of the present case, the document would not have been written. In addition, there is no information in the document that Park County needs in the preparation of its defense in this matter.

2. The Secretary's Written Determination that a Violation of Section 105(c) Occurred

This document is a legal memorandum entitled "Merits Analysis," dated February 26, 2016, from Michelle A. Horn to the Regional Solicitor and the Associate Regional Solicitor of the Department of Labor. In this memo, Ms. Horn sets forth the reasoning behind her recommendation that the Secretary file a complaint of discrimination on behalf of Curtis Logsdon. Printed across the top of the first page of the memo are the words: "FOR INTERNAL USE ONLY. This document may contain information that is privileged or otherwise exempt from disclosure under applicable law." This document was clearly prepared in anticipation of litigation by the Secretary's attorney. It was only prepared because of the prospect of this particular litigation. *See ASARCO I*, 12 FMSHRC at 2558.

The purpose of the memo is to convince Ms. Horn's supervisors in the Office of the Solicitor to support her conclusion that the Secretary should proceed with this litigation. The memo briefly presents some basic facts, presumably gathered by MSHA's special investigator, but most of the memo consists of a recitation of Commission case law followed by Ms. Horn's analysis of the issues applying this case law. The memo is infused with the "mental impressions, conclusions, opinions, [and] legal theories of [Ms. Horn] concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). It would be difficult to parse out those portions of the memo that discuss the facts from her legal analysis, in part because revealing the facts that are emphasized in the memo would disclose the mental impressions and legal theories of Ms. Horn.

Commission Procedural Rule 56(b) provides 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). The memo is certainly relevant to the issues in this case and the facts contained therein would be admissible at hearing. Nevertheless, I

am not willing to require the disclosure of any part of an internal memo prepared by an attorney in the Office of the Solicitor directed to her supervisors for the purpose of convincing them that a case should be filed before the Commission, including those portions of the memo that set forth the facts that she relied upon. That Commission Procedural Rule 41(a) requires the Secretary to file his discrimination complaint within 30 days after this written determination is prepared is irrelevant to the disclosure issue. *Id.* at 2700.41(a). I find that the memo is protected by the work product rule. In addition, my review of the memo convinces me that Park County would not be able to demonstrate that it has a substantial need for any part of the memo to prepare its case or that it cannot, without undue hardship, obtain by other means the facts that it does not already possess.

My analysis on this issue incorporates some of the principles of the deliberative process privilege. The Commission has held that "public officials are entitled to the private advice of their subordinates and to confer among them themselves privately and frankly, without fear of disclosure[.]" *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 991 (June 1992) (citation omitted). I find that disclosure of any part of the subject memo would not only reveal the Secretary's work product, as that concept is set forth in the Federal Rules of Civil Procedure, but it would also violate the Secretary's reasonable expectation that the advice and recommendations of its counsel will be kept confidential.

ORDER

For the reasons set forth above, Respondent's motion to compel the disclosure of the two documents sought by Park County in Requests for Production Nos. 4 and 5 is **DENIED.**

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

Distribution:

Michelle A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518

Herbert C. Phillips, Esq., PO Box 1046, Fairplay, CO 80440

Timothy P. Schimberg, Esq., and Joel J. Fulton, Esq., Fowler, Schimberg & Flanagan, 1640 Grant St., Suite 150, Denver, CO 80205

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 11, 2016

MARSHALL JUSTICE, Complainant, v. GATEWAY EAGLE COAL CO., LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2015-924-D PINE-CD 2015-03 Gateway Eagle Mine Mine ID: 46-06618

ORDER

Before: Judge Simonton

This case is before me upon a complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Complainant Marshall Justice filed a complaint of discrimination with MSHA in May 2015 against his employer, Gateway Eagle Coal Company. The Secretary issued a determination on July 9, 2015, finding insufficient evidence of discrimination. Complainant filed the instant action with the Commission on August 10, 2015. When Gateway failed to file a response to the complaint within 30 days, the Chief Administrative Law Judge issued an Order to Show Cause on October 20, 2015, giving Gateway another 30 days to respond. Gateway did not file a response. On February 4, 2016, Complainant filed a Motion for Default Judgment. The case was assigned to me on February 10, 2016.

In his Motion for Default Judgment, Complainant asked that judgment be entered against not only Gateway, but also against Rockwell Mining, LLC, which Complainant alleged is a successor-in-interest to Gateway. Compl.'s Mem. Supp. Mot. Default J. 2-4. At the request of the Court, Rockwell filed a memorandum of law opposing Complainant's motion to add it as a party. Rockwell argued that Complainant had failed to set out a claim upon which relief could be granted, because Rockwell had obtained the Gateway Eagle Mine in a bankruptcy sale, and the bankruptcy court's sale order barred successor liability claims against Rockwell based on actions of Gateway. Rockwell's 1st Mem. Law 14-19. After considering Rockwell's filing, I ordered the parties to submit additional briefs on the issue of Rockwell's status as a successor. On the basis of those briefs and the prior submissions of the parties, I make the following findings and order.

I. BACKGROUND

Marshall Justice began his employment with Gateway Eagle Coal Company in 2012, when Gateway took ownership of the mine where he was an employee. Compl. 2. Justice alleges that Gateway took disciplinary action against him in February and May 2015 in retaliation for a safety complaint Justice made to MSHA on February 6, 2015. He seeks compensation for work days missed, injunctive relief, and attorneys' fees.

The parent company of Gateway Eagle Coal Company, Patriot Coal Corp., filed a petition for relief under Chapter 11 on May 12, 2015. Complainant filed a proof of claim with the bankruptcy court on July 27, 2015, regarding the discriminatory discipline alleged in this case. Compl.'s Suppl. Br., Ex. 4. As part of the bankruptcy proceeding, arrangements were made to sell the assets of Patriot Coal. After a bidding process, Blackhawk Mining, LLC, won the right to purchase Patriot's assets, and the bankruptcy court approved the sale on October 9, 2015. *In re Patriot Coal Corp*., Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015) (order confirming plan of reorganization) ("Confirmation Order"). Blackhawk's subsidiary Rockwell Mining, LLC, registered with MSHA as the operator of the Gateway Eagle Mine as of October 26, 2015. Compl.'s Suppl. Br., Ex. 9.

The bankruptcy court's confirmation order states that the sale of Patriot's assets to Blackhawk was "free and clear of all Liens, Claims and interests." Confirmation Order ¶ 114. The order further states that:

> Blackhawk is not and shall not be deemed … to: 1) be a successor (or other such similarly situated party) to any of the Debtors . . . .
>
> Blackhawk … is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity . . . .
>
> [Blackhawk and its affiliates] shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of … successor or transferee liability [or] labor, employment or benefits law … with respect to the Debtors or their affiliates . . . .

Confirmation Order ¶¶ 76, 116, 120.

II. DISCUSSION

A. Default Judgment Against Gateway

Complainant argues that default judgment should be entered against Gateway because it did not file an answer in this case and did not respond to the Order to Show Cause. Compl.'s Mot. Default J. 1-2.

The Commission's procedural rules provide that an order of default may be entered against a party who fails to respond to an order to show cause. 29 C.F.R. § 2700.66. Here, the initial complaint was served on Gateway on August 10, 2015. Compl.'s Mot. Default J., Ex. 1. Gateway then had 30 days to respond to the complaint, 29 C.F.R. § 2700.43, but failed to file an answer. An Order to Show Cause was issued on October 20, 2015. Gateway did not file an answer or otherwise respond to the order to show cause. Accordingly, I find that it is appropriate to enter an order of default against Gateway.

B. Default Judgment Against Rockwell

Complainant also seeks entry of a default judgment against Rockwell Mining, LLC. Rockwell was not a named party in Complainant's original complaint, but Complainant alleges in his motion that Rockwell is a successor-in-interest to Gateway. Accordingly, I interpret Complainant's motion as seeking to amend the complaint to join Rockwell as a respondent on a theory of successor liability.

Amendment of a complaint in Commission cases is governed by Federal Rule of Civil Procedure 15(a). *See Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990); 29 C.F.R. § 2700.1(b) (stating that Federal Rules are applicable where no Commission rule on point). Under Rule 15, a court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, a court may properly deny leave to amend where amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Steinburg v. Chesterfield*, 527 F.3d 377, 390 (4th Cir. 2008).

The Commission has held that a corporate successor may be held liable for its predecessor's violations of the Mine Act. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp*., 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co*., 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act case). However, Rockwell argues that successor liability is not available in a case where the alleged successor company acquired the predecessor's assets "free and clear" as part of a bankruptcy proceeding. Rockwell's 1st Mem. Law 5. The Commission has not decided the issue of the effect of a free-and-clear asset sale on successor liability under the Mine Act.

Rockwell acquired the Gateway Eagle Mine when Rockwell's parent company, Blackhawk, purchased the assets of Patriot Coal in a sale authorized by the bankruptcy court. Section 363(f) of the Bankruptcy Code permits a trustee in bankruptcy to "sell property under subsection (b) or (c) free and clear of any interest in such property of an entity other than the estate." 11 U.S.C. § 363(f). Courts have generally held that this language empowers the trustee to sell assets free and clear of successor liability claims. *See, e.g., In re Motors Liquidation Co.,* No. 15-2844-BK(L), 2016 WL 3766237, at *12 (2d Cir. July 13, 2016); *In re Chrysler LLC,* 576 F.3d 108, 126 (2d Cir. 2009), *vacated as moot sub nom. Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009); *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("*TWA*"); *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 582 (4th Cir. 1996); *but see Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). These courts have interpreted the "interests in property" language to refer not only to *in rem* interests, but also to interests that

"arise from the property being sold." *Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 290; *see also Motors Liquidation*, 2016 WL 3766237, at *12. Thus, the Fourth Circuit, where the Gateway Eagle Mine is located, has held that a pension fund's right to collect premium payments from a successor under the Coal Act is an "interest in property" that may be extinguished in a §363 sale because

> [t]hose rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if [the debtors] had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them.

Leckie, 99 F.3d at 582.

Additionally, these courts have observed that allowing a claimant to assert a successor liability claim against a §363 asset purchaser would "subvert the Bankruptcy Code's priority scheme, by allowing a low-priority, unsecured claim to leapfrog over other creditors in the bankruptcy." *In re Grumman Olson Indus., Inc*., 467 B.R. 694, 703 (S.D.N.Y. 2012); *see also Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 292; *New Eng. Fish Co*., 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982). Moreover, courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables the trustee to maximize the sale price of the assets. *See Douglas v. Stamco*, 363 F. App'x 100, 103 (2d Cir. 2010); *TWA*, 322 F.3d at 292-93; *Leckie*, 99 F.3d at 586-87. While this may be at the expense of successor liability claimants, it is consistent with the Bankruptcy Code's goal of preserving jobs. *See TWA*, 322 F.3d at 293.

Complainant argues that a bankruptcy court does not have the power to extinguish claims for successor liability under the Mine Act, citing *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) ("*ITP*"). Compl.'s Suppl. Br. 5. In that case, the NLRB held that a bankruptcy court's free and clear sale order did not extinguish a successor's liability for back pay under an NLRB order against the debtor. 249 N.L.R.B. 1301, 1303 (1980) ("*ITP*"). The Board stated that

> [W]hile a bankruptcy court may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts.

ITP, 249 N.L.R.B. at 1303. A FMSHRC ALJ recently cited *ITP* in an order suggesting that a §363 sale order does not preclude a finding of successor liability under the Mine Act. *Varady v. Veris Gold USA, Inc*., 38 FMSHRC __, slip op. at 14, No. WEST 2014-307-DM (Mar. 4, 2016) (ALJ); *but see Bailey v. Osborne*, 38 FMSHRC __, slip op. at 5-6, No. WEVA 2016-241-D (July 14, 2016) (ALJ) (order denying motion to dismiss) (noting "questionable" status of *ITP*). However, *ITP* was decided under the previous Bankruptcy Act, and it is unclear whether it is

applicable under the current Code. The decision was not appealed, and it appears to be contrary to the decisions of the courts of appeals cited above. Accordingly, I decline to apply it here.

In this case, the bankruptcy court ordered the sale of Patriot's assets to Blackhawk "free and clear of all Liens, Claims and interests," and stated that Blackhawk would not be liable as a successor to Patriot. Confirmation Order ¶¶ 114, 116. This was within the bankruptcy court's power under §363. Accordingly, Rockwell cannot be held liable under a theory of successor liability for acts of discrimination by Gateway. Complainant's proposed amendment to his complaint adding Rockwell as a respondent would be futile.

III. ORDER

Upon review of the complaint and the entire record in this case, Complainant's motion for a default judgment against Gateway Eagle Coal Company, LLC, is hereby **GRANTED**. Should Complainant wish to obtain an order of payment against Gateway, he is directed to submit a claim for personal relief no later than August 26, 2016. Complainant's motion to amend his complaint to add Rockwell Mining, LLC, as a party to this action under a theory of successor liability is **DENIED**, and his motion for a default judgment against Rockwell is **DENIED**.

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

Distribution: (U.S. First Class Mail)

Samuel B. Petsonk, Mountain State Justice, Inc., 1031 Quarrier Street, Suite 200, Charleston, WV 25301

Jonathan R. Ellis, Steptoe & Johnson, PLLC, P.O. Box 1588, Charleston, WV 25326

Gateway Eagle Coal Company, 54912 Pond Fork Road, Wharton, WV 25208

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 24, 2016

SHAWN HIRT, Complainant, v. GARY SERVAES ENTERPRISES, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2015-0598-DM RM MD 15-13 Atchison Quarry Mine Mine ID: 14-01710

DECISION AND ORDER

Appearances: Shawn Hirt, *pro se*, Atchison, Kansas, Complainant;

Allen A. Ternent, Ternent Law Office, Atchison, Kansas, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by Shawn Hirt against Gary Servaes Enterprises pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). The parties presented testimony and documentary evidence at a hearing on July 6, 2016, in Kansas City, Missouri.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In this case the witnesses on both sides were neither totally truthful nor presented the entire picture. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Gary Servaes Enterprises operates the Atchison Quarry Mine in Atchison, Kansas. The quarry mines limestone both underground and on the surface using explosives. Servaes Enterprises is owned by Gary Servaes and is considered a small operator. At the time of Hirt's employment, the company had about ten employees at Atchison. The company is subject to the jurisdiction of the Act.

Shawn Hirt was hired at the mine in November 2014 as a blaster assistant. He primarily worked underground assisting the lead blaster, Josh Tull, in loading holes and blasting. He was also assigned other jobs as needed. Hirt began working for Servaes as a part-time employee while he was doing other independent contract work. He believes he was later given a full-time position, although the mine's records indicate that he did not normally work a 40-hour week. Resp. Ex. E. The records show that he worked overtime hours on five occasions. *Id*. He was paid $11.00 per hour with no benefits. Hirt last worked for Servaes Enterprises on April 9, 2015.

In January 2015, the mine was inspected by MSHA, ATF, and the Kansas Fire Marshal. According to Hirt, management was aware of the upcoming inspection and gathered miners together before the inspection, telling them not to speak to the inspectors or to cooperate in the investigation. However, when the inspectors arrived, management told Hirt to speak with the MSHA inspector. Hirt told the inspector that his job was to help load explosives. According to Hirt, the information he provided to the inspector resulted in a $5,000.00 citation being issued to the mine. He alleges that the mine did not call him back to work in April 2015 because the owners were angry that he had spoken with MSHA.

I take judicial notice that the MSHA data retrieval system confirms that a large number of MSHA citations were issued to the mine on January 12, 2015, and again on January 13, 2015, including a number of Section 104(d) citations and orders and a failure-to-abate order. Although many were assessed $4,000.00 penalties, one flagrant violation involving an explosives magazine that was not locked was assessed a penalty of $96,300.00. Additionally, the MSHA website shows that several more 104(d) orders were issued on January 29, 2015. Two violations involved a vehicle containing explosive material and were assessed penalties of $56,900.00 and $12,563.00. All of these citations and orders are in contest. Hirt did not describe the violation that he allegedly caused to be issued, but vaguely stated that it was related to a truck he was driving. Although Hirt did not say when the citation was issued, the record indicates that the mine received a number of serious, high-penalty citations as a result of the January inspections, at least two of which involved a vehicle, and five of which were unwarrantable violations related to explosives.

In addition, an order was issued to Gary Servaes Enterprises on February 3, 2015, for failing to provide task training for three employees who were handling explosives. One of the listed miners was Shawn Hirt, and the order withdrew him from working with explosives in any way. The order also referenced Mike Tull, presumably the blaster who worked with Hirt, and Patrick Miranda, a miner for whom Hirt filled in during an absence in April. It appears that Miranda did not return to work, though the mine operator claimed not to remember the details at hearing. Darryl Servaes, son of Gary Servaes and superintendent of the mine, testified that all persons at the mine who handled explosives were task trained. Darryl later indicated that the mine had received a citation for failing to provide task training, but that it was vacated ten months after it was received. MSHA records show that the mine did receive a citation involving task training, for both Hirt and Tull, and contrary to Servaes' testimony, the citation has not been vacated. ATF and the Kansas Fire Marshal also found problems with the mine's training. Gary Servaes stated that the law had changed and under previous law MSHA task training satisfied ATF and Kansas requirements. However, there is no evidence that ATF or the Kansas fire marshal had changed their requirements for blasters and blasting assistants.

The testimony was confusing and incomplete, but it appears that the three persons who were blasting at the mine had not been trained, did not have ATF or fire marshal certifications, and are no longer working at the mine. A separate 104(g) order was issued to withdraw Michael Hinson from handling explosives because he was not task trained, but the citation indicates that Hinson was no longer working at the mine in February. By April, when Hirt was not called back and Miranda did not come back to work, all of the persons who were withdrawn for violations of task-training requirements in handling explosives were no longer working at the mine.

Darryl Servaes stated that the mine fully cooperated with the inspections and provided records as requested. However, two failure-to-abate orders were issued to the mine in April and May, about the time Hirt was let go. These allege that the mine would not allow MSHA to conduct an inspection without law enforcement present. One of the failure-to-abate orders related to a truck, which may have been the citation Hirt referred to as the one in which the mine held him responsible.

As a result of the inspection by the three agencies, the mine lost its Kansas state blasting license. It also "voluntarily" gave up its ATF license. Subsequently, the mine suspended blasting on the underground level and hired a contractor to conduct blasting work on the surface only. Prior to January 2015, the primary production of limestone was based upon the underground supply. But after the inspections, production was from the surface only. This resulted in a reduction in production and the need for fewer workers. However, the mine continued to have work for its full-time employees. The reduced production status lasted approximately a year until January 2016, when the mine had its permits restored and was able to resume its own blasting work. Darryl Servaes testified that several employees quit during 2015. Tull, the lead blaster, was terminated in April 2015 about the same time that Hirt was not called back to work.

According to the mine's payroll records, Hirt continued to work regularly at the mine after the inspection in January through February 2015, including some overtime hours. Although Darryl Servaes claims Hirt did not work with explosives after the January inspection, Hirt testified that he worked on bringing the explosive boxes, signs, and other items used for blasting out of the mine. He then believes he was laid off, though Darryl Servaes claims he was still on call as needed. In March 2015, the payroll records show that Hirt worked only four days, with none in the second two weeks of March. He then worked six days during the first two weeks of April. Servaes claims that there was no work for Hirt during March, but that he called him in to fill in for a full-time employee, Patrick Miranda, in April. This likely corresponds to Hirt's description of being called back to work as a truck driver for a few weeks.

Hirt's last day of work was April 9, 2015. On that day, Darryl Servaes told Hirt that he would call him if Miranda did not return the following Monday. However, at hearing, Servaes could not remember whether Miranda ever returned to work. Servaes did not call Hirt the following Monday, and so Hirt sent him a text message. Hirt believed Servaes had hired someone to replace him, and conveyed this in his text message to Servaes. Servaes testified that a person was hired that day, but the person was a crusher operator who had specialized experience. No one was hired to replace Hirt. Hirt believes that he was not called back to work because Servaes was angry at him for providing information to MSHA that led to a citation.

I note that much of the testimony of both Darryl and Gary Servaes amounted to yes or no responses and so provides little direct information. The testimony of each is incomplete and contradictory, and I did not find either witness to be credible. When asked if Hirt was terminated because of his involvement with the ATF and MSHA inspections, Darryl Servaes responded "no" to the question, but offered no further explanation. While he admitted that he was aware that Hirt spoke to MSHA during the inspection, he indicated that all of the employees at the mine spoke to MSHA and ATF at some point during the inspections. He acknowledged that the mine received ten or twelve citations during the first day or two of the inspections in January, but claimed that none were related to anything Hirt did. He stated that he was unaware that Hirt had said anything to MSHA that led to a citation. Gary Servaes admitted that he viewed the MSHA file after the January inspection, but said he did not see anything that would have led him to blame Hirt for the company getting cited. However, nearly every citation issued in January and February by MSHA was related to blasting and explosives, work that involved Hirt.

Darryl Servaes gave several reasons for why he did not call Hirt back. First, he described the text message he received from Hirt on the Monday Hirt was to return to work as "abrasive" and "agitated." He said he got the impression that Hirt did not want to come back to work, and also thought the message was a sign that Hirt would not be a good person to bring back. Although Servaes at first mentioned messages and conversations in the plural, he later stated that he received just one text message from Hirt the week he was not called back. In addition to the text message, Servaes later learned that Hirt had filed a discrimination complaint. The complaint stated that Hirt was not seeking to return to work.[1] However, Servaes did not find out about Hirt's complaint until July, several months after Hirt was not called back to work. Servaes also indicated that he had no work for Hirt after the mine stopped underground blasting. Finally, Servaes indicated that he could not bring Hirt back to work because during the course of having the mine's blasting license reissued, the fire marshal required that the company not have anyone with a felony record working at the mine. It is unclear when Servaes came to understand the requirement, as the company continued to employ Hirt until April, then without any explanation failed to call him back to work.

Hirt decided to make a discrimination complaint to MSHA on the advice of Tull, who also made a complaint. The mine argues that Hirt falsified his MSHA forms by marking them with the incorrect date. Hirt dated the MSHA documents for April 2, 2015, the day he believed he was terminated. Resp. Exs. A-D. However, he did not submit the documents by fax until July 2015. Hirt explained that he did not understand at the time that he should have returned the documents within 60 days. He also was uncertain about what dates to put on the documents. Hirt indicated on the documents that he worked 40 hours a week, when in fact he typically did not. When questioned repeatedly by the mine operator, Hirt tried to explain that he thought he was a full-time employee and listed 40 hours per week because that is what he expected to work, as well as some overtime. I do not believe he intentionally misled anyone with his statements on the forms, but rather tried to provide the information he thought was necessary to move forward with his MSHA complaint.

[1] Hirt claims he said in his complaint that he did not wish to return to work with Servaes based upon advice from MSHA. I do not find that argument credible and disregard it.

II. DISCUSSION

A. Late Filing

As a preliminary matter, Respondent argues that Hirt's complaint should be dismissed because it was not timely filed. Section 105(c)(2) of the Act provides that a miner who believes he has been discriminated against must file a complaint with the Secretary "within 60 days after such violation occurs." 30 U.S.C § 815(c)(2). However, the Commission has held that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan.1984); *Herman v. Imco Servs.*, 4 FMSHRC 2135, 2137 (Dec. 1982). The Commission's interpretation is based on the legislative history of the Mine Act, which states that

> 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. 95-181, at 36 (1977). In *Hollis*, the Commission upheld a judge's dismissal of a late-filed claim where the miner's assertion that he did not know about his rights under the Mine Act until after the filing deadline was not credible. 6 FMSHRC at 24. In *Herman*, the Commission upheld a dismissal where the miner's reason for filing late was that he spent several months deciding whether to file a complaint. 4 FMSHRC at 2138.

In this case, I find first, that Hirt did bring his complaint to MSHA within the filing deadline by making a verbal complaint. He did not return the forms he received from MSHA within 60 days, however. I find that Hirt misunderstood his rights under the Act and genuinely did not know there was a 60-day time limit for filing the written forms. Although he dated his complaint for April, he did not intend to deceive anyone in doing so. Rather, he believed he was supposed to date the complaint for the day he believed he was discriminated against. When he faxed the document to MSHA, he was not aware that it should have been done within 60 days of the date he learned of his termination. Further, the complaint would have been due in mid-June but was filed in early July. Because the delay in filing was relatively small, the staleness of the claim is not a serious concern. Accordingly, I find that dismissal of Hirt's complaint on the basis of late filing of the forms he received from MSHA is not warranted.

B. Discrimination Claim

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator … of an alleged danger or safety or health violation" or "because of the exercise by such miner … of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *Driessen v. Nev. Goldfields, Inc*., 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom*. *Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden of proof for a prima facie case is "lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner v. Nat'l Cement Co. of Cal*., 33 FMSHRC 1059, 1065 (May 2011).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen*, 20 FMSHRC at 328-29; *Robinette*, 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen,* 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of persuasion for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

i. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. Section 105(c)(1) enumerates four protected activities: (1) filing or making a complaint under or related to the Act, including a complaint of an alleged danger or safety or health violation; (2) being the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101; (3) instituting a proceeding under or related to the Act or testifying in such a proceeding; or (4) exercising "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

The legislative history of the Mine Act states that Congress intended that "the scope of the protected activities be broadly interpreted." S. Rep. No. 95-181 at 35 (1977). The Senate Report notes that "the listing of protected rights contained in [Section 105(c)(1)] is intended to be illustrative and not exclusive" and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36.

Hirt claims he spoke with an MSHA inspector during the course of an inspection at the mine in January 2015 and discussed various safety issues that resulted in the mine receiving citations. Conversations between a miner and an inspector are considered protected activity if they contain discussions about unsafe conditions at the mine. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy*, *Inc*., 19 FMSHRC 833, 837 (May 1997). The mine does not deny that Hirt spoke to an MSHA inspector. Therefore, I find that Hirt engaged in activity protected by the Mine Act.

ii. Adverse Action

Hirt's last day of employment with the mine was April 9, 2015. Respondent claims that there was no adverse action because Hirt was an intermittent employee and was simply not called back to work because he was no longer needed. I find that the decision not to call Hirt back to work amounts to a discharge from employment and therefore is an adverse action.

iii. Discriminatory Motive

Hirt must next demonstrate that the protected activity, speaking with an MSHA inspector, is connected to the adverse action. A complainant is not required to produce direct evidence of an operator's motive. *Sec'y on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981). More often, the complainant proves motive using circumstantial evidence. *Id*. Facts that may be relevant to establishing motive include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment. *Id*. at 2510-13.

Gary and Darryl Servaes denied knowing that Hirt provided information to MSHA that resulted in a citation. Gary Servaes testified that he reviewed materials from MSHA received through a FOIA request and found no mention of Hirt being involved in a citation. However, Darryl Servaes stated that every employee of the mine spoke with MSHA. Additionally, the fact that the mine received citations relating to Hirt's training and work suggests that the operator had knowledge of Hirt's protected conversations with the inspectors. Hirt worked as a blasting assistant, and the majority of the high-penalty citations dealt with blasting and explosives. The mine also received a high-dollar citation for failing to task-train three miners, including Hirt and Tull. The citation was not vacated as Servaes claimed.

There is also evidence of the operator's hostility or animus towards the protected activity of providing safety-related information to MSHA. I credit Hirt's statement that management told the employees not to cooperate with the MSHA and ATF investigations or provide information to the inspectors. The mine's animus toward MSHA is also seen in the failure-to-abate orders issued in April, which indicate that the mine would not allow inspectors onto the mine site without law enforcement agents. Finally, the timing of the MSHA citations and Hirt's discharge supports an inference that Hirt was discriminated against. Hirt believed that management was most upset about a citation regarding a truck that had been driven by Hirt. A failure-to-abate order relating to a citation involving a truck was issued in April, around the time Hirt was discharged.[2]

The mine asserts that it did not fire Hirt based on his participation in the MSHA investigation, and instead presents several reasons why he was not called back to work. First, Darryl Servaes testified that Hirt sent him an inappropriate text message on the first day he was not called back. However, it is my interpretation of the evidence that the one text message

[2] All references to citations and orders issued to Servaes are from documents found at the MSHA website, and its data retrieval system. I have taken judicial notice of all of the citations and orders discussed in this decision.

received by Servaes was not adequate cause to discharge Hirt and Servaes had already decided not to call him back to work. Similarly, I am not persuaded by Respondent's argument that the mine declined to hire Hirt back because of statements in his discrimination complaint saying he was not seeking to return to employment at the mine. Hirt did not file the complaint until July, so it could not have affected Servaes's decision in April not to call him back. The mine also asserts that it had no more work for Hirt to do once it lost its blasting certification. However, the mine hired two new employees after Hirt and Tull were let go, which suggests the mine did have work available. Finally, the mine claims that it could not have anyone with a felony conviction working at the mine because of the fire marshal's rules. However, the witnesses were unclear on when they learned of that requirement.

I find that there is circumstantial evidence of a connection between Hirt's discharge and his protected activity. I am not persuaded by the mine's attempts to refute the allegation that they received a high-dollar citation involving a truck that caused them to terminate Hirt's employment. Thus, Hirt has proven a prima facie case of discrimination.

iv. Affirmative Defenses

Even if Servaes terminated Hirt on the basis of his protected activity, the company may still avoid liability by proving that Hirt was discharged in part because of unprotected activity, and it would have fired him based on the unprotected activity alone. The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 993 (June 1982). The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990).

The mine first argues that Hirt was not called back to work because the mine had no work for him after it lost its blasting license. The mine was not working underground, which was a large part of their production, and blasting at the surface had to be done by a contractor. However, the mine was able to keep its full-time employees working, although a few employees quit. The mine also hired at least two new workers after Hirt was let go. The mine asserts that one of the people hired was an experienced crusher operator for a position that Hirt could not fill. The witnesses did not explain the duties of the others hired. Given that the full-time employees were kept busy and the mine hired at least two employees, I find that the mine's defense of lack of work is pretextual.

The mine next asserts that it could no longer employ Hirt at the mine because he has a felony conviction and has not applied for a waiver to work around explosives. Darryl Servaes

explained that in the course of attempting to get the company's blasting license back from the Kansas Fire Marshal, the fire marshal told them that they could not have anyone employed at the mine who had a felony record. Servaes's testimony was unclear as to when he learned of this rule. However, he discussed the rule as a reason for why he could not hire Hirt back rather than as a reason for why Hirt was discharged. Thus, I find that the mine did not know about the felony rule when Hirt was fired in April. While it may be the case now that Hirt cannot return, the mine has not shown that it fired Hirt in April for that reason.

The only plausible defense raised by the mine is that after seeing a text message from Hirt, Darryl Servaes did not believe that he had the attitude of a good employee or that he really wanted to come back to work. However, Hirt sent the text message when he was not called back to work on Monday, after Servaes had decided on Thursday or Friday April 9 or 10 to fire him based on the MSHA citation. NLRB case law indicates that "when a company wrongfully fires an employee, . . . there is 'some leeway for impulsive behavior.'" *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105, 1108 (8th Cir. 1992) (quoting *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977)). Hirt's single angry text message to his boss was within the bounds of reasonable behavior in response to a wrongful discharge, and should not cause him to lose his remedial rights. Nevertheless, by the time the mine saw the discrimination complaint in July, it was clear that Hirt did not wish to return. Although the timing is not clear, the mine would have learned shortly after this time that Hirt could not return to work because of his felony conviction. Accordingly, I find that the mine had no plausible business reason to fire Hirt in April, but that by July, the mine had a legitimate business reason not to hire Hirt back.

III. PENALTY

Hirt has brought this case individually without the assistance of the Secretary and thus no penalty has been proposed by the Secretary. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision is being sent to the Secretary for the assessment of a civil penalty against Gary Servaes Enterprises.

IV. DAMAGES

Hirt earned $11.00 per hour and worked an average of 29 hours per week while employed with Servaes. I find that he is due back pay from April 10 through the end of July. By the time Hirt submitted his claim for discrimination in July, the company had a legitimate reason not to re-hire him, since the complaint stated that Hirt was not seeking reinstatement. Additionally, Hirt made little effort to find other employment after he was discharged. "[A] discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits without good reason." *Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co*., 21 FMSHRC 1207, 1212 (Nov. 1999) (emphasis omitted) (quoting *NLRB v. Madison Courier, Inc*., 472 F.2d 1307, 1317 (D.C. Cir. 1972)). The burden of proof is on the operator to show that the complainant failed to seek employment. *Id*. at 1214. Hirt could recall only two places where he submitted job applications after he was fired. I find that had Hirt been diligent in searching for work, he would have obtained a new position by July of 2015.

Consistent with these findings, Hirt is due back pay in the amount of $319.00 per week for 16 weeks, a total of $5,104.00. Given that Hirt has resumed working at his own business and has a felony that prevents him from working at the mine, I do not find reinstatement or front pay to be appropriate remedies in this case.

The Commission has held that awards of back pay should include interest from the date the amount should have been paid through when it is actually paid. *See Local Union 2274, Dist. 28, United Mine Workers of Am. v. Clinchfield Coal Co*., 10 FMSHRC 1493, 1503 (Nov. 1988). Interest is to be assessed on a quarterly basis at the short-term Federal underpayment rate established by the IRS. *Id*. at 1505.

V. ORDER

Gary Servaes Enterprises is **ORDERED** to pay back pay to Shawn Hirt in the amount of $5,104.00 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co*., 5 FMSHRC 2042, 2053 n.15 (Dec. 1983). Such payments shall be made within forty days of the date of this order. The case is referred to MSHA for assessment of a civil penalty.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

Shawn Hirt, 590 Rawlins Road, Atchison, KS 66002

Allen A. Ternent, Ternent Law Office, P.O. Box 396, Atchison, KS 66002

Gary Servaes, Gary Servaes Enterprises, 4756 254th Road, Atchison, KS 66002

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 29, 2016

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, on behalf of STEVE GLOSSON, Complainant, v. LOPKE QUARRIES, INC., Respondents.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2016-299-DM MSHA Case No. SE-MD-16-09 Mine: Dunn Construction Mine ID: 01-03411

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Rae

I. STATEMENT OF THE CASE

This matter is before me upon an Application for Temporary Reinstatement filed by the Secretary of Labor ("the Secretary") on behalf of Steve Glosson ("the Complainant") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(c)(2), and Commission Procedural Rule 45, 29 C.F.R. § 2700.45.

The application seeks reinstatement of the Complainant to his former position as a loader operator at the Dunn Construction limestone quarry ("the mine") operated by Lopke Quarries, Inc. ("the Respondent") pending final disposition of a discrimination complaint the Complainant has filed against the Respondent. Alternatively, the application requests that the Respondent provide temporary economic reinstatement to the Complainant.

The application was filed with the Commission on August 16, 2016. The Respondent has not submitted a response or requested a hearing. The Commission's procedural rules provide that if a hearing is not requested within ten calendar days following receipt of a temporary reinstatement application, the presiding administrative law judge shall immediately review the application and issue a written order of temporary reinstatement if he or she determines that the miner's underlying discrimination complaint "was not frivolously brought." 29 C.F.R. § 2700.45(c). Accordingly, I now review the Secretary's application pursuant to Rule 45(c).

II. FACTUAL BACKGROUND[1]

The Complainant began working for the Respondent as a loader operator at the Dunn Construction mine on February 15, 2016. He operated a Kawasaki loader and two Dresser loaders, which were used to move limestone from a stockpile to a hopper, under the supervision of plant supervisor Timmie Decker. During his time at the mine, the Complainant allegedly reported a number of safety-related problems with the loaders on pre-operation paperwork and lodged multiple safety complaints with Decker. The complaints concerned problems with the loaders' brakes, lights, windows, windshield wipers, and heating and air conditioning systems, as well as oil leaks. In addition, after Decker allegedly instructed the Complainant to allow the Dresser loaders to coast to a stop at the hopper rather than engaging the brakes, the Complainant complained to Decker that this procedure was unsafe.

The Respondent terminated the Complainant's employment on April 1, 2016. On April 22, 2016, the Complainant filed a discrimination complaint with MSHA under section 105(c) of the Mine Act claiming that he was terminated because he had reported safety hazards. MSHA investigated the complaint and interviewed Decker, who allegedly admitted telling the Complainant to coast to a stop when approaching the hopper and agreed that the Complainant had reported problems with the loaders. Decker also told the MSHA special investigator that the Complainant took 40 to 45 minutes to perform preshift examinations on the equipment. Based on the information gathered during the investigation, the Secretary concluded that the Complainant's discrimination complaint was not frivolously brought and initiated this temporary reinstatement proceeding.

III. LEGAL FRAMEWORK AND ANALYSIS

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right that is protected under the Act. "[I]f 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). Thus, unlike a trial on the merits of a discrimination complaint, where the complainant bears the burden of proof by a preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute to the narrow question of whether the underlying discrimination complaint was "not frivolously brought." *Id.*; *see* 29 C.F.R. § 2700.45(d); *Sec'y of Labor o/b/o Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012); *Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). This standard reflects Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747-48 (11th Cir. 1990).

[1] Because the Respondent has not responded to the application for temporary reinstatement, this section is premised entirely on the facts alleged in the Secretary's application as well as in the Complainant's underlying discrimination complaint and the declaration of MSHA special investigator Robert Ashley, both of which are appended to the application.

In accordance with the narrow scope of a temporary reinstatement proceeding, it is not the judge's duty at this stage to make credibility determinations or resolve conflicting evidence. *Deck*, 34 FMSHRC at 2390; *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009); *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The judge must decide only whether the complaint "appears to have merit." *Deck*, 34 FMSHRC at 2390 (citing legislative history of Act). Although the complainant is not required to make out a prima facie case of discrimination, it is useful to analyze the complaint in terms of the elements of a prima facie case, which include: 1) that the miner engaged in protected activity, and 2) that he suffered an adverse employment action that was motivated at least in part by the protected activity. *Williamson*, 31 FMSHRC at 1088. Motivation can be established by showing the employer's knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the protected activity and the adverse action. *Sec'y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Without making any credibility determinations, after reviewing the partial written statement of the Complainant[2] and the initial report from the MSHA special investigator, I find that the complaint appears to have merit. The Complainant alleges that he made multiple safety complaints to the operator between February 15 and April 1, 2016. This constitutes protected activity under section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). The Complainant suffered an adverse action when his employment was terminated on April 1. His supervisor allegedly admitted knowledge of the protected activity to the MSHA special investigator and further stated that the Complainant took 40 to 45 minutes to perform preshift examinations. This statement could be construed to show hostility toward the protected activity of checking equipment for safety defects. The coincidence in time between the adverse action and the alleged protected activities, which occurred over the six-week period immediately preceding the Complainant's termination, could support a finding that the termination was motivated at least in part by intent to discriminate against the Complainant because of his protected activities. Accordingly, I find that his complaint was not frivolously brought and that he is entitled to temporary reinstatement.

[2] At least one page is missing from the complaint he filed with MSHA.

ORDER

The Application for Temporary Reinstatement is hereby **GRANTED**. The Respondent is **ORDERED** to immediately begin providing the Complainant with economic reinstatement at his usual rate of pay and overtime[3] plus any benefits to which the Complainant would be entitled if he retained his former position as a loader operator.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

Melanie A. Stratton, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

Steve Glosson, 226 Creel Loop, Brierfield, AL 35035

Mike Lindhorst, General Superintendent, 3430 State Route 434, Apalachin, NY 13732

[3] The complaint indicates that he worked 40 hours per week at the mine at a rate of $17.50 per hour plus 20 to 30 hours of overtime each week at a rate of $26.25 per hour.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

August 30, 2016

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER CORRECTING TYPOGRAPHICAL ERROR

Before: Judge Feldman

This Order corrects typographical errors in the Decision on Remand issued on this date, reflecting that the citation on Page 3 for the Decision on Relief in this matter should read "38 FMSHRC 255, 268 (Feb. 2016)(ALJ)" and the citation on Page 7, Footnote 9, for the Decision on Relief should read "38 FMSHRC at 258".

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

Evan B. Smith, Esq., Wes Addington, Esq., Appalachian Citizens Law Center, Inc., 317 Main Street, Whiteburg, KY 41858

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522

David Hardy, Esq., Scott Wickline, Esq., Hardy Pence PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548, Charleston, WV 25329

/acp