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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

July 8, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2011-827
PREMIER ELKHORN COAL COMPANY	

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

DECISION

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

This case involves two citations issued to Premier Elkhorn Coal Company ("Premier") by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident in which a coal truck hit a berm and turned over. Pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), MSHA issued citations alleging violations of 30 C.F.R. § 77.1607(b)[1] and 30 C.F.R. § 77.1605(b).[2]

The Administrative Law Judge found that the Secretary failed to establish either the cause of the fatal accident or that the brakes on the truck were inadequate. He vacated both citations. 35 FMSHRC 150, 164 (Jan. 2013) (ALJ). For the reasons that follow, we conclude that the Judge erred by vacating the citation alleging that the mobile equipment operator failed to maintain full control of his vehicle. We affirm the vacation of the citation alleging that the mobile equipment was equipped with inadequate brakes.[3]

[1] 30 C.F.R. § 77.1607(b) requires that "[m]obile equipment operators shall have full control of the equipment while it is in motion."

[2] 30 C.F.R. § 77.1605(b) provides that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

[3] On this same date, the Commission is also issuing a decision in a companion case which arose from the same incident. *Trivette Trucking*, 38 FMSHRC ___, No. KENT 2011-1223 (July 8, 2016); *see also infra* note 4.

I.

Factual and Procedural Background

Premier operates a surface coal mine in Kentucky and a nearby preparation plant. In December 2009, Steve Johnson, chief mechanic of contract trucking company Trivette Trucking, was hauling coal from the mine to Premier's plant in a 2006 International Paystar coal truck. During his first trip to the plant, Johnson began to experience problems with his truck's power steering after his truck was loaded with coal. Johnson notified a fellow coal truck driver of the steering problem over the CB radio and pulled his truck over so that he and the other driver could inspect the steering system. They were not able to identify any defects, so Johnson resumed driving to the plant.

The section of haulage road on which Johnson was traveling was a relatively straight, but steep, gravel road flanked with berms on both sides. After about 1300 feet at a downward grade of 15–18%, the road leveled out for approximately two miles. While descending the steep section of the road, Johnson's truck left the normal travelway and started heading directly towards the left berm. Before the truck began to make contact with the berm, Johnson jumped out of the truck's cab but was unable to clear the vehicle. Johnson became ensnared in the back left tandem wheels and was dragged down the hillside until the truck ultimately flipped over. Johnson's injuries were fatal.

Following its fatality investigation, MSHA issued Premier two citations.[4] Citation No. 8230316 alleges a violation of 30 C.F.R. § 77.1607(b) for failure to maintain full control over the haulage truck while it was in motion. The citation contends that Johnson's truck was overloaded by 37,600 pounds based on the maximum gross vehicle weight rating ("GVWR") recommended by the truck's manufacturer and that the overloading contributed to Johnson losing control of his vehicle. Citation No. 8230317 alleges a violation of 30 C.F.R. § 77.1605(b) for failure to maintain the truck's brakes in adequate condition. The citation notes that axle grease was present on the left and right brake drums and that the brake on the right rear tandem axle was not functional. MSHA designated both violations as S&S, attributable to high negligence on the part of Premier. Citation No. 8230316 was designated as an unwarrantable failure.[5]

In his decision, the Judge vacated both citations issued to Premier in connection with the fatal accident. Concerning Citation No. 8230316, the Judge held that the Secretary failed to prove that Johnson's truck was hauling an unsafe amount of coal. Consequently, he could not find a violation of the standard**.** 35 FMSHRC at 155. The Judge noted that the Secretary failed to

[4] Johnson's employer, Trivette Trucking, was also issued two orders. Order No. 8230314 alleged a violation of 30 C.F.R. § 77.1607(b), and Order No. 8230315 alleged a violation of 30 C.F.R. § 77.1605(b).

[5] The S&S and unwarrantable failure 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," 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."

establish a weight at which the truck would become unsafe or that exceeding the manufacturer's GVWR was *per se* hazardous. *Id*. at 155–56. The Judge found that the load in Johnson's truck was not too heavy for Johnson's truck to safely haul the coal even if it exceeded 120,000 pounds as the Secretary alleged. *Id*. at 156–57.

With regard to Citation No. 8230317, the Judge suggested that a violation of section 77.1605(b) could be found if the Secretary could prove either: (1) that the condition of the brakes of Johnson's truck caused the accident, or (2) that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. *Id.* at 163. The Judge, however, found that the accident was most likely attributable to a steering problem or another problem that caused the brakes and steering to fail simultaneously. *Id*. at 161, 163. In addition, the Judge credited the testimony of Premier's expert witness that the brakes, while suffering from minor defects, would have been adequate to stop Johnson's truck at an estimated speed of 10 mph.[6] Accordingly, the Judge found that the Secretary had not met his burden of proof to show that the brakes on Johnson's truck were inadequate.

The Commission granted the Secretary's petition for discretionary review.

II.

Disposition

A. Exclusion of Evidence

At the hearing, the Judge made several evidentiary rulings that the Secretary claims were detrimental to his case. In particular, the Judge did not admit Secretary's Exhibit 29, a vehicle manual purported to apply to the truck Johnson was driving. The Secretary had sought to introduce this evidence to establish that he truck's manufacturer warned that overloading in excess of the GVWR of 82,600 pounds could cause "component failure, result in property damage, personal injury, or death." Tr. 222. However, the Judge found that the Secretary failed to establish sufficient foundation that the manual related to the particular truck in question, in part because the manual was published in 2005 while the truck was a 2006 model. Tr. 220–22.

The Judge also excluded Secretary's Exhibits 13–17, which purported to demonstrate that Premier regularly loaded trucks in excess of 120,000 pounds. These exhibits included truck weight tickets for the trucks loaded immediately before Johnson's truck on the day of the accident and for loads that Johnson had taken a couple of weeks prior to the accident. Tr. 53. The Judge ruled that the weight tickets were irrelevant to determining the weight of Johnson's truck at the time of the accident and noted that the small sample size was inadequate to establish a pattern of overloading. Tr. 64.

[6] The Judge found the Secretary's expert witness's testimony to the contrary to be unconvincing. The Judge noted that he gave such testimony little weight due to the witness's lack of experience in steering systems, inconsistencies between his report and his testimony, "generally poor reasoning," and reliance on a potentially biased report authored by the manufacturer of the steering system. 35 FMSHRC at 164.

The Commission's procedural rules and other federal rules place a low bar on the relevancy of evidence that can be admitted. Commission Procedural Rule 63(a) states only that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Section 556(d) of the Administrative Procedure Act, in turn, states that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).[7]

The Commission's rules do not define what constitutes "relevant evidence." However, Rule 401 of the Federal Rules of Evidence defines it as evidence having "any tendency to make a fact more or less probable than it would be without the evidence" where that fact "is of consequence in determining the action."[8] Fed. R. Evid. 401. Generally, courts have viewed Rule 401 as having "a low threshold of relevancy." *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994); s*ee also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109–10 (3d Cir. 1999) ("Rule 401 does not raise a high standard.").

We conclude that the Judge erred by not admitting both the truck manual[9] and the weight tickets into evidence. The weight tickets presented sufficiently similar factual situations for a factfinder to draw reasonable inferences as to Premier's loading practices. The tickets were issued in close temporal proximity to the accident, involved the same or similar haulage trucks, and were from the same mine. Similarly, the truck manual, even if it was for the vehicle's prior

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[7] Section 556(d) of the Administrative Procedure Act ("APA") does not directly apply to Commission proceedings, because section 507 of the Mine Act states that provisions of the APA do not apply unless the Mine Act explicitly states that they do. 30 U.S.C. § 956. However, section 556(d) provides useful guidance in this case.

[8] While the Federal Rules of Evidence are not required to be applied to Commission hearings, they may have value by analogy. *Mid-Continent Res., Inc.,* 6 FMSHRC 1132, 1135–36 & n.6 (May 1984).

[9] While the threshold for admissibility is low, a party seeking to introduce evidence must nonetheless provide a proper foundation to establish its relevance. In the case of the truck manual, Commissioner Young questions whether this was done. He notes that the Judge may have foreclosed the Secretary's efforts to provide a foundation for admissibility. Had the exclusion of evidence been prejudicial, preventing a party from offering facts demonstrating its relevance would be reversible error. *See Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359–60 (Aug. 2013) (noting an abuse of discretion standard for evaluating the Judge's exclusion of evidence, but characterizing exclusion of critical evidence as an "'extreme' sanction."). Conversely, if the Secretary had not effectively made a record of the evidence's relevance, his objection to the exclusion of that evidence may be deemed waived. *See Cavataio v. City of Bella Villa,* 570 F.3d 1015, 1021 (8th Cir. 2009) (the requirement of making an offer of proof to preserve the issue for appeal is "[o]ne of the most fundamental principles in the law of evidence."); *but see Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir. 1983) (the failure to make an offer of proof is not fatal where the "substance of the excluded evidence is apparent from context within which the questions were asked.").

model year, could be relevant for the question of how much weight Johnson's truck could safely carry.

Nevertheless, the decision to exclude the evidence above did not prejudice the Secretary's case and thus was harmless error. *See* Fed. R. Civ. P. 61. Although the Judge stated that he excluded the evidence, it is apparent from his decision that he considered the evidence anyway, but afforded it little weight.[10] The weight tickets and the truck manual do not definitely prove the Secretary's theory of causation. Rather, they only provide limited circumstantial evidence that the weight of Johnson's truck may have caused or contributed to the fatal accident. In light of the credited expert testimony and evidence at the scene of the accident, however, the Judge determined that the weight of the evidence ultimately did not prove that Johnson's truck was carrying a load that was too heavy for it to safely haul coal. 35 FMSHRC at 155–57.

B. Citation No. 8230316 – Failure to Maintain Full Control of the Truck

The Judge vacated Citation No. 8230316 because he found that the Secretary was unable to prove that Johnson's truck was loaded in excess of what it could safely haul. However, the Secretary argues that the act of driving the truck off a haulage road constituted a *per se* violation of section 77.1607(b). The Secretary points to the fact that there is no evidence to support the contention that Johnson was in complete control of his vehicle as the standard requires. Numerous witnesses testified that Johnson lost control of his truck, and the Judge mentions this fact several times in his decision. *See, e.g.*, Tr. 150 (Premier Safety Director Wilder), 205–06 (MSHA Mining Engineer Bellamy), 323 (MSHA Mechanical Engineer Medina); 35 FMSHRC at 158, 160–01.

The Commission previously addressed this issue in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013). In *Clintwood*, the Judge vacated a citation alleging a violation of section 77.1607(b) in part because he believed that the citation was "'predicated on the unproved allegation that overloading existed.'" *Id*. at 370 (citing 32 FMSHRC 1880, 1890 (Dec. 2010) (ALJ)). The Commission, however, concluded that section 77.1607(b) did not require the Secretary to prove "a causal or contributing factor for the loss of control." *Id.* The proper scope of analysis for a violation under this standard is limited to the question of whether the driver maintained control of his vehicle.

As the Judge himself recognized in his subsequent decision in *Trivette Trucking*, our holding in *Clintwood Elkhorn* requires that we reverse the Judge's vacation of Citation No. 8230316. *See Trivette Trucking*, 35 FMSHRC 1934, 1943 (June 2013) (ALJ). It is uncontroverted that Johnson failed to maintain control of his truck. It can be easily inferred from the record that Johnson would not have placed himself in mortal danger by jumping out of the truck had he been in full control of his vehicle. Even if we declined to make such an inference, the fact that Johnson left the cab before the vehicle stopped clearly establishes that he did not

[10] Additionally, we note that the Judge did not wholly exclude such evidence. The Judge permitted the Secretary's witnesses to testify as to the truck's GVWR (Tr. 48) and the approximate load Johnson's truck was carrying at the time of the accident. Tr. 312–315, 328–29. Similar information was also entered into evidence through MSHA's accident report. Sec'y Ex. 4.

maintain control of the vehicle. Accordingly, we reverse the Judge and hold that the Secretary has established a violation of section 77.1607(b).

Having found a violation, we next turn to the Secretary's S&S determination. Given the tragic result of Johnson's inability to maintain control of his truck, we find that the record can only support a finding that the violation was S&S. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (where the evidence supports only one conclusion, remand on that issue is unnecessary). Stated simply, the failure of the driver to maintain control of the truck violated the standard, constituted the hazard at which the standard is directed, and was reasonably likely to result in serious injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

Finally, we address the unwarrantable failure allegations. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001.

We conclude that the Judge's factual findings and credibility determinations are supported by the record and preclude a finding that the violation resulted from an unwarrantable failure. The Secretary's allegations of a heightened degree of negligence were predicated on the theory that Johnson's loss of control of his vehicle was caused, or contributed to, by the overloading of his truck. However, the Judge determined that the record was insufficient to establish the Secretary's theory.

The Secretary's evidence that Johnson's truck was loaded in excess of 120,000 pounds is, at best, circumstantial. The fact that the Secretary only relied on weight tickets of the truck involved in the accident from four dates prior to the accident, and weight tickets of a different type of truck from the day of the accident, calls into question the reliability of any inference as to the weight of Johnson's truck on the day of the accident. Moreover, the Secretary was unable to convincingly establish that the GVWR set by the manufacturer was a reliable measure for determining the maximum load that this particular truck could safely transport. It is thus difficult to discern what the operator could have done differently to prevent or mitigate a hazardous condition or practice.

Even considering the excluded evidence and assuming that Johnson's truck was loaded in excess of the manufacturer's GVWR, the Judge's findings do not support the Secretary's theory. Importantly, the Judge credited the testimony of Premier's expert witness, Steve Rasnick, who testified that Johnson's truck was capable of safely handling a 120,000 pound load. 35 FMSHRC at 1942. We see no basis for overturning the Judge's determination on this point. *See, e.g.*, *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that Judge's credibility determinations are entitled to great weight and may not be overturned lightly).

Consequently, we find that the Secretary has failed, as a threshold matter, to meet his burden of proof as to the unwarrantable failure designation.[11]

Accordingly, we reverse the Judge and find a violation of section 77.1607(b). We further find that the violation was S&S, but that it was not the result of an unwarrantable failure to comply with the standard.

C. Citation No. 8230317 – Failure to Equip Truck with Adequate Brakes

To find a violation of section 77.1605(b), the Judge determined that the fact of the violation could be established on either of two separate grounds. First, the Secretary could show that the condition of the brakes on Johnson's truck caused the fatal accident. If the brakes played a role in the accident, the Judge reasoned that the inadequacy of the brakes would be self-evident. Failing to establish the brakes' role in the accident, the Secretary could also prove a violation by showing that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 163. The Judge ultimately found that the Secretary had failed to establish either theory and vacated the citation.

On appeal, the Secretary argues that the Judge should be reversed because his analysis concerning this second citation was predicated on his prior finding that the Secretary had failed to prove that the truck was overloaded. The Secretary also contends that the Judge should not have credited the testimony of Premier's expert witness over his own expert witness.

We conclude that the Judge's finding that the brakes did not cause the fatal accident is supported by substantial evidence.[12] The events leading up to the accident were not indicative of an accident caused by a brake failure. Prior to the accident, Johnson complained that he was having difficulty steering his vehicle. Tr. 139–40. The problem was serious enough that Johnson felt the need to pull the truck temporarily out of service to examine the vehicle.[13] Additionally, at the scene of the accident there were no skid marks to indicate that Johnson had unsuccessfully attempted to slow or stop his vehicle. Rather, the tire tracks indicated that Johnson drove straight into the berm.

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[11] Because the Secretary was unable to prove, as a threshold matter, that overloading the truck caused the accident and that the operator was highly negligent in this regard, we need not employ in this case the seven-factor test for an unwarrantable failure set forth in *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009), and other decisions.

[12] 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)).

[13] We note that during the accident investigation, it was discovered that the truck's steering system was not well maintained. Several seals on the truck's steering mechanism had been installed backwards, resulting in a leakage of power steering fluid. 35 FMSHRC at 160.

Furthermore, Premier's expert witness advanced a plausible theory of causation that better fit the evidence in the record. The expert hypothesized that Johnson's truck may have been stuck in idle mode, causing both the brakes and steering to be simultaneously rendered ineffective. 35 FMSHRC at 162. While the expert's testimony did not definitively conclude that the accident was caused by the truck slipping into idle mode, the existence of the expert's alternate theory of causation substantially detracts from the Secretary's theory of the case.[14]

Next, we examine the Judge's finding that the defects in the truck's brakes were not significant enough to cause the brakes to fail in typical usage. It was undisputed that the brakes on Johnson's truck had some defects, but that alone is insufficient to constitute a violation of section 77.1605(b). Neither party's expert witness testified that the defects were great enough to render the brakes completely inoperable. Rather, the disagreement lies in whether the brakes, in the condition in which they were found during MSHA's investigation, would have been adequate to stop Johnson's truck on the roads it typically travels.

The crux of the Judge's analysis on this point is the weight he gave to the testimony of each party's expert witness. The Secretary's expert witness testified that the faults in the truck's service brakes would have prevented Johnson from safely stopping his vehicle and that it was likely that the truck was traveling at a speed of more than 10 miles per hour. However, the Judge gave little weight to this opinion due to the witness' lack of experience with steering systems, inconsistencies in his testimony concerning the speed of the truck and the condition of the parking brake, and "generally poor reasoning." 35 FMSHRC at 164. The Judge also noted that the opinion of the Secretary's expert as to the cause of the accident was influenced by a report from manufacturer of the steering box, whom the expert admitted had an interest in finding that the steering box was not at fault.. *Id*. at 160.

At the same time, the Judge found that the testimony of Premier's expert witness was well explained. *Id.* at 163–64. Premier's expert witness testified that the defects in the service brakes were not extensive, with only one of the six drum brakes too worn to have functioned. Notwithstanding this defect, the expert testified that Johnson should have been able to stop his vehicle traveling at a rate of 10 miles per hour. *Id.* at 159–60. Similarly, Premier's expert testified that the presence of grease on the brake drums and evidence of past overheating would not have a meaningful effect on the brake's performance. *Id*. at 158–59.

A Judge's determinations of the weight given to expert opinions may not be overturned lightly. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981). Further, the Commission has 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)).

Although the Secretary offered some evidence that the brakes on Johnson's truck were incapable of stopping the truck, such evidence was mainly derived from testimony from a

[14] Of course, as a general matter, in order to prove a violation of this standard requiring adequate brakes, the Secretary is not required to prove that the violation caused an accident.

witness that the Judge determined not to be credible. We see no reason to take the extraordinary step of disturbing the Judge's credibility determination. Accordingly, we affirm the vacation of Citation No. 8230317.

III.

Conclusion

For the foregoing reasons, we reverse the Judge on Citation No. 8230316 and find that section 77.1607(b) was violated and that the violation was S&S. We affirm the Judge's vacation of Citation No. 8230317. We hereby remand the case to the Chief Administrative Law Judge for reassignment[15] and assessment of a civil penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

[15] We note that Judge Jeffery Tureck, who originally decided this case, has retired from the Commission.

Commissioner Cohen, dissenting:

Although I agree with my colleagues that the record unquestionably demonstrates that Premier Elkhorn committed an S&S violation of section 77.1607(b), I cannot join them in dismissing the Judge's erroneous exclusion of relevant evidence as mere harmless error. For the reasons that follow, I conclude that this matter must be remanded for the Judge to reconsider Premier Elkhorn's level of negligence and the MSHA-alleged unwarrantable failure in violating section 77.1607(b), and also whether the mine operator violated section 77.1605(b).[1]

Steve Johnson was a mechanic and truck driver for Trivette Trucking, a contractor that hauled coal from Premier Elkhorn's PE Southern Pike Co. coal mine to the company's preparation plant. On December 12, 2009, Johnson was driving a 5600i-model International Paystar truck built in May 2005. Sec'y Ex. 1, 2, 12.

Truck manufacturers assign each vehicle a gross vehicle weight rating ("GVWR") which prescribes the weight that the truck's components are designed to handle. The GVWR derives from a combination of factors, including the tire and rims on the vehicle, the suspension system, and the axle and braking system. Tr. 273–74. International Paystar assigned a GVWR of 82,600 pounds to the truck Johnson used in December 2009. Tr. 272, 521. International Paystar rated the truck's axle and braking system up to 85,000 pounds. Tr. 274–75. In the January 2005 operator's manual for International Paystar's 5000i truck, the manufacturer warned that exceeding the truck's gross axle weight, gross vehicle weight, or gross combination weight rating by overloading "can cause component failure resulting in property damage, personal injury, or death." Tr. 222; Sec'y Ex. 29 (excluded). Heavier vehicles require more force to stop than do lighter vehicles. Tr. 229. A driver would need to use the brakes harder and longer to stop a heavier truck. Tr. 278–79. The friction from using a brake generates heat. Tr. 278. When a brake overheats, it becomes less effective. Tr. 233, 291. This phenomenon, called brake fade, can ultimately lead the brake to fail outright. Tr. 233, 278. To prevent overheating, the truck is equipped with brake drums that dissipate the heat from the braking system. Tr. 233. When the truck is overloaded beyond the gross axle weight, however, the brakes can generate more heat than can be dissipated through the brake drums. Tr. 277–78, 292–93. Truck drivers use the engine's braking power to help control the vehicle's speed and preserve the regular brakes. Tr. 319. This engine brake, called a Jake brake, does not function when the truck is out of gear or when the truck engine enters a self-preserving idle mode. Tr. 319, 454.

Unloaded, Johnson's truck weighed approximately 42,000 pounds. Tr. 286, 315, 354. The truck's bed could hold nearly 80,000 pounds of the coal mined at the Premier Elkhorn mine. Tr. 315. Accordingly, the truck would weigh approximately 120,000 pounds when loaded to the brim. Tr. 313–15, 521–22.

[1] I recognize that Judge Jeffrey Tureck, who decided this case, has retired. I would have Chief Judge Robert Lesnick assign another Judge to decide the issues of negligence and unwarrantable failure for the section 77.1607(b) violation, as well as liability under section 77.1605(b), on remand. This case involved the fatality of a truck driver whose coal truck was overloaded, and the virtual exoneration of the production operator, Premier Elkhorn. The Secretary—and indeed the community of American citizens concerned about mine safety and health—is entitled to have the issues in this case correctly adjudicated.

On the day of the accident, Premier Elkhorn miner Bobby Warf was operating the front-end loader to load the Trivette trucks with coal. Tr. 118–21. Because Premier Elkhorn's front-end loaders did not have bucket scales weighing each bucket of coal, Warf was not aware of precisely how much coal he loaded into the Trivette trucks.[2] Tr. 127–28, 132. When Kentucky state transportation officials were in the area, however, Warf and the other Premier Elkhorn load operators routinely lightened the trucks' loads to keep the vehicles from exceeding the state's 90,000 pound weight limit. Tr. 130–32.

Warf told MSHA that he had loaded Johnson's truck "heavy with a hump." Tr. 83, 113–14. Warf himself testified that he, like other Premier Elkhorn employees, loaded the coal transport trucks with a hump in the back of the bed, called a graveyard hump. Tr. 125. On December 12, 2009, Warf loaded Johnson's International Paystar truck the same way that he loaded the previous four trucks, including a graveyard hump. Tr. 114, 124–25. Because Johnson's truck overturned, officials could not determine precisely how much coal the truck was carrying prior to the accident. Tr. 82. The truck immediately following Johnson's was similarly loaded, with a graveyard hump protruding above the top of the truck bed. Premier Ex. 6; Tr. 435–36. Because Premier Elkhorn paid Trivette by the weight of coal hauled, the mine maintained weight records for each truck's delivery. Tr. 61–63, 163, 187. The four trucks before Johnson's each carried between 71,000 and 85,000 pounds of coal. *See* Sec'y Ex. 17 (excluded); Tr. 51–56, 71–73. Fully loaded, those four trucks, which were Mack trucks approximately the same size as Johnson's International Paystar truck, weighed from 116,000 pounds to 124,000 pounds.[3] *Id.* In the two previous Saturdays hauling coal from the PE Southern Pike Co. mine, Johnson made four trips, on average carrying nearly 73,000 pounds of coal per trip and weighing slightly less than 115,000. *See* Sec'y Exs.13, 15 (excluded). Johnson similarly carried heavy loads from other Premier Elkhorn mine sites, with his vehicle averaging approximately 116,000 pounds. *See id.*; Sec'y Exs. 14, 16 (excluded).

MSHA's accident investigation uncovered a number of problems with Johnson's truck. One of the four rear brakes did not function whatsoever, allowing the truck's rear right wheels to roll even without the additional weight of coal. Tr. 285–86, 354. All three of the rear brake drums that MSHA could safely examine were worn beyond the acceptable level. Tr. 288–90. The worn-out drums had a diminished ability to transfer heat, reducing the brakes' effectiveness. Tr. 288–90. In addition, both of the truck's front brake drums were covered with grease that lubricated the brakes, potentially reducing the friction produced and thus the brakes' effectiveness. Tr. 287.

MSHA's regulations require operators to perform safety checks each day and fix any discovered problems before the vehicle is put into service. *See* Tr. 457–58. Premier Elkhorn's expert witness testified that truck operators should keep a log book of all such pre-operational examinations and repair work performed on the vehicle. Tr. 457–59. During MSHA's investigation, however, the agency was unable to find any record of daily examinations being

[2] Premier Elkhorn installed bucket scales on its front-end loaders in the weeks following the fatal accident on December 12, 2009. Tr. 174.

[3] MSHA's mechanical engineer, Ronald Medina, testified that he had never seen a coal truck with a GVWR exceeding 90,000 pounds. Tr. 247–50, 275–77.

performed or maintenance and repairs to Trivette's fleet of trucks for more than a month prior to the fatal accident. Tr. 105–107. Meanwhile, Premier Elkhorn did not have any system in place to ensure its contractor, Trivette, was complying with MSHA regulations. Tr. 175–78.

Analysis

A. The Excluded Evidence

At the hearing, the Judge refused to admit several pieces of evidence that formed the foundation of the Secretary's case. First, the Judge excluded Secretary's Exhibits 13–17, the alleged weight tickets from the four trucks that immediately preceded Johnson's on the day of the accident and other weight tickets from Johnson's trucks during the weeks leading up to Johnson's death. Tr. 64, 67–68, 71. The ALJ reasoned that the weight tickets were not relevant to determining the weight of Johnson's vehicle. Tr. 64–65. Next, the Judge refused to admit Secretary's Exhibit 29, an operator's manual for a 5000i-model International Paystar truck containing a warning regarding the hazards of exceeding the vehicle's GVWR. Tr. 218–22. The Judge determined that the Secretary had failed to provide sufficient foundation for the manual. Tr. 222.

Commission Procedural Rule 63(a) provides, "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Federal Rules of Evidence are not binding for Commission proceedings, the Commission has looked to the rules for guidance. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135–36 & n.6 (May 1984). Federal Rule of Evidence 401 defines evidence as relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. The federal courts have held that Rule 401 has set a low bar for establishing relevancy. *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109–10 (3d Cir. 1999) ("Rule 401 does not raise a high standard.").

The Secretary asserts that Johnson's truck was too heavily laden with coal for the brakes to stop the vehicle. PDR at 23–29. The weight tickets suggest that at least 17 times in the three weeks prior to the December 12 accident, Premier Elkhorn loaded Johnson's truck with nearly twice as much coal as the vehicle's components were designed to carry. Sec'y Exs. 13–16; Tr. 223–26. The tickets further suggest that on the morning of the accident, Premier Elkhorn loaded the four similar trucks that immediately preceded Johnson's with equally oversized loads. Sec'y Ex. 17. These weight tickets suggest that Premier Elkhorn customarily loaded Trivette's trucks beyond the vehicles' GVWR, and therefore similarly loaded Johnson's truck.[4] The evidence from the weight tickets is completely consistent with Mr. Warf's statement that he and other employees at Premier Elkhorn regularly loaded trucks "heavy with a hump." Tr. 83, 114, 125. Indeed, Mr. Warf testified that he did not load Johnson's truck any differently from the way he had loaded the four preceding trucks. Tr. 124–25. He also testified that he would load the trucks

[4] "Evidence of habit or custom is relevant to an issue of behavior on a specific occasion because it tends to prove that the behavior on such occasion conformed to the habit or custom." *Frase v. Henry*, 444 F.2d 1228, 1232 (10th Cir. 1971).

more lightly when he was aware that state Department of Transportation inspectors were on the nearby highway and might inspect them. Tr. 131–32.

The weight tickets also support MSHA's evidence that the brakes on Johnson's trucks had been worn down from heavy use. Similarly, the operator's manual supports the assertion that overlarge loads caused the brake components in Johnson's truck to fail. The manual contained the following warning set out in bold type preceded by the sign of an exclamation point in a black triangle: "**WARNING: Do not exceed the truck's gross axle weight, gross vehicle weight, and gross combination weight ratings. Exceeding these ratings by overloading can cause component failure resulting in property damage, personal injury or death**." Sec'y Ex. 29 at 100.[5] Given the relevancy of this evidence, the Judge clearly erred by excluding the Secretary's exhibits.

Contrary to my colleagues, I cannot dismiss the Judge's erroneous exclusions of relevant evidence as mere harmless error. Before even reaching the merits of the Secretary's case, the Judge stated outright, "I will not consider any proposed findings for which excluded evidence is cited as support." 35 FMSHRC 150, 151 (Jan. 2013). Thus, the Judge preemptively foreclosed any consideration of the Secretary's assertion that the truck was overloaded during the accident and that overloading can strain a vehicle's brakes, causing them to fail catastrophically. Given the Judge's ruling, it is difficult to understand how my colleagues could conclude that the admittedly erroneous exclusion of the Secretary's evidence was harmless.

Indeed, after foreclosing consideration of the Secretary's evidence and suggested findings, the Judge determined that lack of evidence compelled him to conclude that "it is impossible for the Secretary to prove that the truck was overloaded." *Id.* at 155. This was an impossibility of the Judge's own design. Because Premier Elkhorn was not using a bucket scale on the front-end loader, the operator only registered a truck's weight after delivery to Premier Elkhorn's preparation plant. *See* Tr. 127–28, 133. Under the Judge's logic and evidentiary rulings, the Secretary could never demonstrate that the truck was overloaded, shy of setting Johnson's overturned truck upright, picking up every bit of spilled coal from the roadway, placing all the coal back in the truck bed, and then weighing the truck with the coal in it.

In addition to finding that the truck was not overloaded, the Judge further determined that "there is no basis to find that it is inherently unsafe for a truck to haul a load in excess of the manufacturer's GVWR." 35 FMSHRC at 156. In stating such, the Judge not only ignored the relevant operator's manual, but also disregarded detailed, uncontradicted testimony regarding the

[5] The Judge excluded the truck manual because it was dated January 2005 and the truck, which had been manufactured in May 2005 according to the VIN number, was a 2006 model. Tr. 166–69, 220, 222; Sec'y Ex. 12. The Judge's statement in excluding the manual was: "Probably doesn't cover a 2006 model." Tr. 166–69. It is inconceivable to me how the Judge could determine that a manual containing a clear warning that loading the truck in excess of its GVWR can cause component failure resulting in death was not relevant to this case simply because it was printed in conjunction with a year-earlier model of the truck. Perhaps the Judge was thinking that International Paystar would omit the warning in the manual for next year's 5000i-model truck because some change in the configuration of the 2006 model of the 5000i made the warning unnecessary.

wear that extra weight places on a vehicle's brakes. MSHA's Bellamy and Medina both explained that the additional friction necessary to stop overloaded vehicles wears down the vehicle's brakes and generates excess heat. Tr. 228–30, 232–33, 277–79.

Indeed, in addition to ignoring the Secretary's evidence, the Judge misconstrued the testimony of Medina, MSHA's expert witness. Medina explained that Johnson's truck was capable of carrying a load of up to 120,000 pounds. Tr. 313. However, he did not suggest, as the Judge wrongly claimed, that the truck could carry such a heavy load safely on a steep incline. 35 FMSHRC at 156–57. To the contrary, Medina testified that carrying such large loads risked the deterioration and ultimate failure of the brakes.[6] Tr. 278–79, 318–22.

Under the harmless error rule, an error in admitting or excluding evidence may provide a basis for granting a new trial if it affects a party's "substantial rights" or if justice so requires. Fed. R. Civ. P. 61; *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 584 (6th Cir. 2015) (citing *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 514 (6th Cir. 1998)).

Given the rulings by the Judge, I can only conclude that he did not give due consideration to either the excluded evidence or related evidence from the Secretary, and thus adversely affected the Secretary's substantial rights.[7] Here, justice required that the Judge give full consideration to the Secretary's erroneously-excluded evidence. The exclusion of the evidence adversely affected the Secretary's ability to prove high negligence and unwarrantable failure in the section 77.1607(b) violation and to prove the section 77.1605(b) violation.

B. Citation No. 8230316 – Failure to Maintain Control of the Truck (Sec'y Ex. 2)

I agree with the majority that the record unquestionably demonstrates that Johnson failed to maintain control of his truck. The Judge incorrectly concluded that the Secretary needed to demonstrate the cause of the accident to prove a violation of the section. The Commission's holding to the contrary in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013), is controlling and requires that we reverse the Judge's vacation of Citation No. 8230316 and find a

[6] Premier Elkhorn's expert, Rasnick, did not challenge Medina's testimony regarding the greater strain that overloading can place on a vehicle's components.

[7] The majority insists that the Judge nevertheless gave proper consideration to the evidence. *See* slip op. at 5. Where the Judge expressly considered excluded evidence, however, he did so to detriment of the Secretary. *See* 35 FMSHRC at 157 n.3 ("Had I admitted into evidence the weight records for coal haul trucks that the Secretary proffered, they would have shown that the trucks routinely carried loads of about 120,000 pounds without incident."). In determining whether a lower court abused its discretion in excluding relevant evidence under Federal Rule of Evidence 403, however, the court views the excluded evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force. *See Laney v. Celotex Corp.*, 901 F.2d 1319, 1320–21 (6th Cir. 1990), citing *U.S. v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988); *Kelso v. Noble*, 162 F.3d 1161, —— (6th Cir. 1998) (unpublished table decision). Accordingly, the majority's reliance upon the Judge's reading of the evidence is misplaced.

violation of section 77.1607(b). *See* slip op. at 6. I similarly agree with my colleagues that the record can only support a finding that the violation was S&S. *Id.* However, I disagree with their conclusion that the Secretary would be unable to prove unwarrantable failure on remand.

Given the Judge's incorrect understanding of the law and his improper exclusion of evidence, the Commission should not rely upon his analysis to determine the operator's level of negligence. The courts have found a Judge's improper evidentiary decisions to be reversible error where the Judge incorrectly understood the evidence's relevance to the substantive law at issue. *See Laney v. Celotex Corp.*, 901 F.2d 1319, 1320 (6th Cir. 1990) (reversing and remanding for a new trial where the Judge improperly excluded evidence relevant to determining whether a product was a substantial factor in plaintiff's sickness); *Davidson Oil Country Supply Co. v. Klockner, Inc.*, 917 F.2d 185, 186–87 (5th Cir. 1990) (remanding for a new trial because the Judge's incorrect exclusion of evidence of similar product failures prevented appellant from developing case).

Here, the Judge declined to consider the truck's weight and GVWR in the context of the violation. *See* 35 FMSHRC at 156. While that evidence is not necessary to show a violation of section 77.1607(b), it is highly relevant as to whether Premier Elkhorn was negligent in overfilling Johnson's truck. By overloading the trucks, Premier Elkhorn increased the strain and wear on the vehicles' brakes, and thus the chances of a driver being unable to stop in an emergency.[8] Warf's testimony and the excluded weight tickets suggest Premier Elkhorn did just that to Johnson's truck. Having dismissed Citation No. 8230316 outright, the Judge never gave consideration to what role Premier Elkhorn's actions played in causing the accident.

After reversing the Judge's primary holding in this case, the majority nevertheless decides to embrace the Judge's other findings and holdings to reach conclusions the Judge never considered. Because the Judge failed to properly consider the evidence in this matter, I would remand the case for further deliberation regarding Premier Elkhorn's negligence and whether the operator's actions constituted an unwarrantable failure to comply with section 77.1607(b).[9] The Judge makes no mention of Trivette's failure to maintain a log of inspections and repairs for its vehicles, or of Premier Elkhorn's lax oversight of its contractor. These inadequacies similarly militate for this case to be remanded for further consideration.

[8] I note that, contrary to the Judge's view of incentives, 35 FMSHRC at 157, Premier Elkhorn's policy of paying Trivette by the weight of coal hauled established an economic incentive for Trivette to overload its trucks, move as much coal as possible in a limited time, and then move on to another job. Trivette's incentive to have its trucks overloaded created the economic benefit to Premier Elkhorn of moving its coal more quickly.

[9] Although the majority summarily rules out a finding of unwarrantable failure in this matter without analyzing the factors relevant to such determinations, it remains unclear what negligence they would assign to the operator in this matter. Slip op. at 7.

C. Citation No. 8230317 – Failure to Equip Truck with Adequate Brakes

In determining whether Premier Elkhorn violated section 77.1605(b) by failing to provide adequate brakes, the Judge reasoned that the Secretary could prove a violation in two ways: (1) by showing the condition of the brakes on Johnson's truck caused the fatal accident, or (2) by demonstrating the brakes were not adequate to stop the vehicle while carrying its typical load on the road it normally travels. 35 FMSHRC at 163. In his analysis, the Judge determined that "[t]he only way this accident makes any sense is if both the steering and the brakes were not applied or stopped functioning simultaneously." *Id.* at 161. Nevertheless, the Judge concluded that the vehicle's defective brakes were not the cause of the crash. *Id.* at 162. Moving to the second step, the Judge determined that the Secretary had not proven the defects in the vehicle's brakes would fail in typical usage.

The majority affirms the Judge's findings.[10] Again, I cannot join them.

As to the first prong, the Judge himself said that both the steering and the brakes ceased working. *Id.*at 161. Yet, the Judge's analysis failed to recognize that causation necessarily includes contribution. *See*, *e.g.*, *Michael v. United States*, 338 F.2d 219, 221 (6th Cir. 1964) (recognizing that a negligent act "need not be the final and immediate cause, but may be actionable if it is a cause concurring with other negligence in proximately bringing about the charged injury.").

Regarding the second prong, as explained above, the Judge failed to fully consider relevant evidence regarding the vehicle's typical weight as loaded and the usual adequacy of its brakes. This evidence goes to the heart of the adequacy of the vehicle's brakes in everyday usage. Moreover, the Judge misunderstood or misrepresented the testimony of witnesses, and subsequently discounted their testimony. *See* 35 FMSHRC at 158.[11] Because I find that the Judge failed to properly consider excluded evidence and misunderstood the evidence before him, I would vacate his decision to dismiss Citation No. 8230317.

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[10] In upholding the Judge's determinations, the majority reasons in part that "[n]either party's expert witness testified that the defects were great enough to render the brakes completely inoperable." Slip op. at 8. To the contrary, however, Medina testified that the damaged brakes on Johnson's truck would not have held a 120,000 pound vehicle on a 15% slope without the help of the engine retarder. Tr. 318. Medina further testified that the brakes were unsafe even when the truck was not overloaded. Tr. 323;
35 FMSHRC at 158.

[11] Medina testified the parking brake did not work whatsoever on one of the truck's wheels. He explained, however, that the parking brake simply engaged the truck's regular brakes on the rear axles. Tr. 267–68, 346–47. This testimony does not conflict with MSHA's investigation report. I note that the Judge discounted Medina's testimony because Medina had limited experience with steering systems, and because Medina relied upon a report that Rasnick *embraced*. 35 FMSHRC at 160, 164. It is thus a mystery to me why the Judge disregarded all of Medina's testimony.

Conclusion

For the foregoing reasons, I would reverse the Judge on Citation No. 8230316 and find an S&S violation of section 77.1607(b). I would remand the decision for a new Judge to consider the negligence and unwarrantable failure designations for the violation. I would also vacate and remand the Judge's decision on Citation No. 8230317.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

July 8, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2011-1223
TRIVETTE TRUCKING	

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

DECISION

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

This case involves two orders issued to Trivette Trucking ("Trivette") by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident in which a coal truck hit a berm and turned over. Pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), MSHA issued orders alleging violations of 30 C.F.R. § 77.1607(b)[1] (requiring full control of moving equipment) and 30 C.F.R. § 77.1605(b)[2] (requiring adequate brakes).

The Administrative Law Judge found a violation of section 77.1607(b) but held that the Secretary did not meet his burden of establishing that the violation was the result of an unwarrantable failure. The Judge vacated the order alleging a violation of section 77.1605(b). 35 FMSHRC 1934, 1943–45, 1951 (June 2013) (ALJ).

For the reasons that follow, we affirm the Judge's decision.[3]

[1] 30 C.F.R. § 77.1607(b) requires that "[m]obile equipment operators shall have full control of the equipment while it is in motion."

[2] 30 C.F.R. § 77.1605(b) provides that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

[3] On this same date, the Commission is also issuing a decision in a companion case which arose from the same incident. *Premier Elkhorn Coal Co.*, 38 FMSHRC ___, No. KENT 2011-827 (July 8, 2016); *see also infra* note 4.

I.

Factual and Procedural Background

Premier Elkhorn Coal Company ("Premier") operates a surface coal mine in Kentucky and a nearby preparation plant. In December 2009, Steve Johnson, chief mechanic of contract trucking company Trivette Trucking, was hauling coal from the mine to Premier's plant in a 2006 International Paystar coal truck. During his first trip to the plant, Johnson began to experience problems with his truck's power steering after his truck was loaded with coal. Johnson notified a fellow coal truck driver of the steering problem over the CB radio and pulled his truck over so that he and the other driver could inspect the steering system. They were not able to identify any defects, so Johnson resumed driving to the plant.

The section of haulage road on which Johnson was traveling was a relatively straight, but steep, gravel road flanked with berms on both sides. After about 1300 feet at a downward grade of 15–18%, the road leveled out for approximately two miles. While descending the steep section of the road, Johnson's truck left the normal travelway and started heading directly towards the left berm. Before the truck began to make contact with the berm, Johnson jumped out of the truck's cab but was unable to clear the vehicle. Johnson became ensnared in the back left tandem wheels and was dragged down the hillside until the truck ultimately flipped over. Johnson's injuries were fatal.

Following its fatality investigation, MSHA issued two orders to Trivette, the independent contractor that owned and maintained Johnson's truck.[4] Order No. 8230314 alleges a violation of 30 C.F.R. § 77.1607(b) for failure to maintain full control over the haulage truck while it was in motion. The order contends that Johnson's truck was overloaded by 37,600 pounds based on the maximum gross vehicle weight rating ("GVWR") recommended by the truck's manufacturer and that the overloading contributed to Johnson losing control of his vehicle. Order No. 8230315 alleges a violation of 30 C.F.R. § 77.1605(b) for failure to maintain the truck's brakes in adequate condition. The order notes that axle grease was present on the left and right brake drums and that the brake on the right rear tandem axle was not functional. MSHA designated both violations as S&S and involving unwarrantable failures attributed to high negligence.[5]

[4] Premier, the owner of the mine, was also issued two citations for violating the same standards. *See generally Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006) (the Secretary's decision to cite the owner-operator of a mine and/or its independent contractor, is an unreviewable exercise of prosecutorial discretion).

[5] The S&S and unwarrantable failure 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," 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."

The orders issued to Trivette did not go to a hearing. Instead, the parties agreed to adopt the record developed in the *Premier* case and filed cross-motions for summary decision. 35 FMSHRC at 1935; *see also Premier Elkhorn Coal Co.*, 35 FMSHRC 150 (Jan. 2013) (ALJ).

In his decision, the Judge upheld the order alleging failure to maintain control over the truck, but removed the unwarrantable failure designation. The Judge found the Commission's decision in *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365 (Feb. 2013), to be controlling and thus held that Trivette violated § 77.1607(b) when Johnson failed to maintain control of his truck. 35 FMSHRC at 1942–43.[6] However, the Judge attributed no negligence to Trivette and vacated the unwarrantable failure designation. The Judge reasoned that the Secretary's theory of negligence had been premised on the unproven allegation that Johnson's truck was overloaded and found that there was insufficient proof to establish that Trivette could have done anything to prevent the fatal accident. *Id.* at 1944–45.

With regard to the order alleging inadequate brakes, the Judge suggested that a violation of section 77.1605(b) could be found if the Secretary could prove either: (1) that the condition of the brakes of Johnson's truck caused the accident, or (2) that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 1951. The Judge, however, found that the accident was most likely attributable to a steering problem or another problem that caused the brakes and steering to fail simultaneously. *Id*. In addition, the Judge credited the testimony of Premier's expert witness that the brakes, while suffering from minor defects, would have been adequate to stop Johnson's truck at an estimated speed of 10 mph.[7] Accordingly, the Judge found that the Secretary had not met his burden of proof to show that the brakes on Johnson's truck were inadequate.

The Commission granted the Secretary's petition for discretionary review ("PDR"). In his PDR, the Secretary argued that the Judge erred by removing the unwarrantable failure designation from Order No. 8230314 and vacating Order No. 8230315.

II.

Disposition

A. Exclusion of Evidence

The Secretary argues that the Judge erred in his analysis of whether Johnson's failure to maintain control of his truck constituted an unwarrantable failure by Trivette Trucking to comply with a mandatory safety standard. In particular, the Secretary contends that his case was

[6] *Clintwood Elkhorn* was issued shortly after the Judge's decision in *Premier Elkhorn* but before his decision in *Trivette Trucking*. In *Clintwood Elkhorn*, the Commission found that section 77.1607(b) did not require the Secretary to prove "a causal or contributing factor for the loss of control" of a vehicle. 35 FMSHRC at 370.

[7] The Judge found the Secretary's expert witness's testimony to the contrary to be unconvincing. 35 FMSHRC at 1951.

prejudiced by a series of evidentiary rulings that resulted in the exclusion of several key pieces of evidence.

At the *Premier Elkhorn* hearing, the Judge did not admit Secretary's Exhibit 29, a vehicle manual purported to apply to the truck Johnson was driving. The Secretary had sought to introduce this evidence to establish that he truck's manufacturer warned that overloading in excess of the GVWR of 82,600 pounds could cause "component failure, result in property damage, personal injury, or death." Tr. 222. The Judge also excluded Secretary's Exhibits 13–17, which purported to demonstrate that Premier regularly loaded trucks in excess of 120,000 pounds. These exhibits included truck weight tickets for the trucks loaded immediately before Johnson's truck on the day of the accident and for loads that Johnson had taken a couple of weeks prior to the accident. Tr. 53.

The Commission's procedural rules and other federal rules generally place a low bar on the relevancy of evidence that can be admitted. 29 C.F.R. § 2700.63(a); 5 U.S.C. § 556(d); Fed. R. Evid. 401; *see also In re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782–83 (3d Cir. 1994) (finding Rule 401 to have "a low threshold of relevancy"). However, an error in admitting or excluding evidence is generally deemed harmless if a party's substantial rights have not been affected. Fed. R. Civ. P. 61.

For the reasons set forth in our decision in *Premier Elkhorn*, we find that the failure to admit the truck manual[8] and the weight tickets constituted harmless error. *Premier Elkhorn Coal Co.*, 38 FMSHRC ___, No. KENT 2011-827 (July 8, 2016).

B. Order No. 8230314 – Failure to Maintain Full Control of the Truck

Although he had vacated a nearly identical citation issued to Premier, the Judge changed his mind in his *Trivette Trucking* decision because of our decision in *Clintwood Elkhorn*. 35 FMSHRC at 1942–43, citing 35 FMSHRC at 370. Thus the only issue before us is whether the Judge erred in removing the unwarrantable failure designation.

[8] While the threshold for admissibility is low, a party seeking to introduce evidence must nonetheless provide a proper foundation to establish its relevance. In the case of the truck manual, Commissioner Young questions whether this was done. He notes that the Judge may have foreclosed the Secretary's efforts to provide a foundation for admissibility. Had the exclusion of evidence been prejudicial, preventing a party from offering facts demonstrating its relevance would be reversible error. *See Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359–60 (Aug. 2013) (noting an abuse of discretion standard for evaluating the Judge's exclusion of evidence, but characterizing exclusion of critical evidence as an "'extreme' sanction"). Conversely, if the Secretary had not effectively made a record of the evidence's relevance, his objection to the exclusion of that evidence may be deemed waived. *See Cavataio v. City of Bella Villa,* 570 F.3d 1015, 1021 (8th Cir. 2009) (the requirement of making an offer of proof to preserve the issue for appeal is "[o]ne of the most fundamental principles in the law of evidence."); *but see Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir. 1983) (the failure to make an offer of proof is not fatal where the "substance of the excluded evidence is apparent from context within which the questions were asked.").

We conclude that the Judge's factual findings and credibility determinations are supported by the record and preclude a finding that the violation resulted from an unwarrantable failure. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001.

The Secretary's allegations of a heightened degree of negligence were predicated on the theory that Johnson's loss of control of his vehicle was caused, or contributed to, by the overloading of his truck. However, the Judge determined that the record was insufficient to establish the Secretary's theory.

The Secretary's evidence that Johnson's truck was loaded in excess of 120,000 pounds is, at best, circumstantial. The fact that the Secretary only relied on weight tickets of the truck involved in the accident from four dates prior to the accident, and weight tickets of a different type of truck from the day of the accident, calls into question the reliability of any inference as to the weight of Johnson's truck on the day of the accident. Moreover, the Secretary was unable to convincingly establish that the GVWR set by the manufacturer was a reliable measure for determining the maximum load that this particular truck could safely transport. It is thus difficult to discern what the operator could have done differently to prevent or mitigate a hazardous condition or practice.

Even considering the excluded evidence and assuming that Johnson's truck was loaded in excess of the manufacturer's GVWR, the Judge's findings do not support the Secretary's theory. Importantly, the Judge credited the testimony of Premier's expert witness, Steve Rasnick, who testified that Johnson's truck was capable of safely handling a 120,000 pound load. 35 FMSHRC at 1942. We see no basis for overturning the Judge's determination on this point. *See, e.g.*, *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that Judge's credibility determinations are entitled to great weight and may not be overturned lightly). Consequently, we find that the Secretary has failed, as a threshold matter, to meet his burden of proof as to the unwarrantable failure designation.

C. Order No. 8230315 – Failure to Equip Truck with Adequate Brakes

To find a violation of section 77.1605(b), the Judge determined that the fact of the violation could be established on either of two separate grounds. First, the Secretary could show that the condition of the brakes on Johnson's truck caused the fatal accident. If the brakes played a role in the accident, the Judge reasoned that the inadequacy of the brakes would be self-evident. Failing to establish the brakes' role in the accident, the Secretary could also prove a violation by showing that the defects in the brakes were significant enough to cause the brakes to fail during typical usage of the vehicle. 35 FMSHRC at 1951. The Judge ultimately found that the Secretary had failed to establish either theory and vacated the order.

On appeal, the Secretary argues that the Judge should be reversed because his analysis concerning this second order was predicated on his prior finding that the Secretary had failed to

prove that the truck was overloaded. The Secretary also contends that the Judge should not have credited the testimony of Premier's expert witness over his expert witness.

We conclude that the Judge's finding that the brakes did not cause the fatal accident is supported by substantial evidence.[9] The events leading up to the accident were not indicative of an accident caused by a brake failure. Prior to the accident, Johnson complained that he was having difficulty steering his vehicle. Tr. 139–40. The problem was serious enough that Johnson felt the need to pull the truck temporarily out of service to examine the vehicle.[10] Additionally, at the scene of the accident there were no skid marks to indicate that Johnson had unsuccessfully attempted to slow or stop his vehicle. Rather, the tire tracks indicated that Johnson drove straight into the berm.

Furthermore, Premier's expert witness advanced a plausible theory of causation that better fit the evidence in the record. The expert hypothesized that Johnson's truck may have been stuck in idle mode, causing both the brakes and steering to be simultaneously rendered ineffective. 35 FMSHRC at 1949–50. While the expert's testimony did not definitively conclude that the accident was caused by the truck slipping into idle mode, the existence of the expert's alternate theory of causation substantially detracts from the Secretary's theory of the case. [11]

Next, we examine the Judge's finding that the defects in the truck's brakes were not significant enough to cause the brakes to fail in typical usage. It was stipulated that the service brakes on Johnson's truck had some defects, but that alone is insufficient to constitute a violation of section 77.1605(b). *See* 35 FMSHRC at 1937. Neither party's expert witness testified that the defects were great enough to render the brakes completely inoperable. Rather, the disagreement lies in whether the brakes, in the condition in which they were found during MSHA's investigation, would have been adequate to stop Johnson's truck on the roads it typically travels.

The crux of the Judge's analysis on this point is the weight he gave to the testimony of each party's expert witness. The Secretary's expert witness testified that the faults in the truck's service brakes would have prevented Johnson from safely stopping his vehicle and that it was likely that the truck was traveling at a speed of more than 10 miles per hour. However, the Judge gave little weight to this opinion due to the witness' lack of experience with steering systems, inconsistencies in his testimony concerning the speed of the truck and the condition of the

[9] 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)).

[10] We note that during the accident investigation, it was discovered that the truck's steering system was not well maintained. Several seals on the truck's steering mechanism had been installed backwards, resulting in a leakage of power steering fluid. 35 FMSHRC at 1948.

[11] Of course, as a general matter, in order to prove a violation of this standard requiring adequate brakes, the Secretary is not required to prove that the violation caused an accident.

parking brake, and "generally poor reasoning." *Id.* at 1951. The Judge also considered the fact that the Secretary's expert appeared to have changed his mind on whether the speed at which the truck was driven contributed to the accident. *Id*. at 1946.

At the same time, the Judge found that the testimony of Premier's expert witness was well explained. *Id*. at 1951. Premier's expert witness testified that the defects in the service brakes were not extensive, with only one of the six drum brakes too worn to have functioned. Notwithstanding this defect, the expert testified that Johnson should have been able to stop his vehicle traveling at a rate of 10 miles per hour. *Id*. Similarly, Premier's expert testified that the presence of grease on the brake drums and evidence of past overheating would not have a meaningful effect on the brake's performance. *Id*. at 1947.

A Judge's determinations of the weight given to expert opinions may not be overturned lightly. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has 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)).

Although the Secretary offered some evidence that the brakes on Johnson's truck were incapable of stopping the truck, such evidence was mainly derived from testimony from a witness that the Judge determined not to be credible. We see no reason to take the extraordinary step of disturbing the Judge's credibility determination. Accordingly, we affirm the vacation of Order No. 8230315.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision removing the unwarrantable failure designation for failure to maintain full control of the truck and vacating the order alleging a failure to equip the truck with adequate brakes.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Cohen, dissenting:

This case involves a fatal accident to Steve Johnson, the chief mechanic of Trivette Trucking ("Trivette"). Trivette was an independent contractor, hauling coal for Premier Elkhorn Coal Company. On the day of the accident, Johnson was driving a Trivette-owned truck and lost control of his vehicle on a road with a 15–18% grade.

Following an investigation, MSHA issued citations to both Trivette and Premier Elkhorn, charging both companies with violations of 30 C.F.R. § 77.1607(b), which requires operators to maintain full control of moving equipment, and 30 C.F.R. § 77.1605(b), which requires adequate brakes on mobile equipment. The Premier Elkhorn case came before a Commission Judge who conducted a hearing, following which he dismissed all charges. *Premier Elkhorn Coal Co.*, 35 FMSHRC 150 (Jan. 2013) (ALJ). In critical part, the Judge excluded significant evidence offered by the Secretary which tended to show that the truck Johnson was driving was grossly overloaded, that the trucks driven by Trivette employees in hauling coal for Premier Elkhorn were routinely overloaded, and that the manufacturer of the truck had issued a prominent warning that driving an overloaded truck can cause component failure leading to injury and death.

Following the issuance of the *Premier Elkhorn* decision, the Secretary and Trivette agreed, before the same Judge, that the *Trivette* case could be decided on cross-motions for summary decision, based on the evidentiary record made in the *Premier Elkhorn* case and joint stipulations. The Judge then issued his decision in this case, (1) upholding the section 77.1607(b) violation against Trivette but reducing the negligence from high to none, eliminating the designation of unwarrantable failure, and reducing the penalty to $1,000, and (2) dismissing the order which charged a violation of section 77.1605(b). *Trivette Trucking*, 35 FMSHRC 1934 (June 2013) (ALJ). The Secretary appealed both decisions, and the Commission directed review.

Earlier today, the Commission released its decision in *Premier Elkhorn Coal Co.*, 38 FMSHRC __, KENT 2011-827 **(**July 8, 2016). Because I could not conclude that the Judge's erroneous exclusion of evidence constituted harmless error, and because I disagreed with my colleagues' consideration of the Judge's handling of the two citations, I dissented from the majority opinion in that case. 38 FMSHRC __, slip op. at 13–18.

I incorporate my dissenting opinion in *Premier Elkhorn* herein. For the same reasons expressed therein, I renew my dissent here. I would vacate and remand this case so the Judge[1] could properly consider all of the Secretary's evidence in analyzing the level of Trivette Trucking's negligence in the section 77.1607(b) violation and in determining whether the company committed a violation of section 77.1605(b).

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

[1] Judge Jeffrey Tureck, who decided this case, has retired. I would direct Chief Judge Robert Lesnick to appoint another Judge to handle this case on remand.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

July 8, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KENTUCKY FUEL CORPORATION	Docket Nos. KENT 2011-1557 KENT 2011-1558

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Kentucky Fuel Corporation challenges a Judge's decision affirming a citation charging a violation of 30 C.F.R. § 77.1606(c). Among other things, the Judge ruled that the citation was not duplicative of a citation charging a violation of 30 C.F.R. § 77.404(a) that the Judge had already upheld.[1] 36 FMSHRC 159 (Jan. 2014) (ALJ). For the reasons that follow, we reverse the Judge and conclude that in this instance the citation for the section 77.1606(c) violation was duplicative of the citation for the section 77.404(a) violation.

I.

Factual and Procedural Background

Kentucky Fuel operates the Beech Creek Surface Mine, a coal mine in Phelps, Kentucky. In April 2011, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") went there to investigate a complaint MSHA had received the previous day regarding the use of defective equipment. When the inspector was seen from a guard shack arriving at the mine, a call was made to a miner who had been operating a bulldozer all morning to remove rock and dirt. The miner was instructed to take the dozer to a service area of the mine.

[1] Section 77.1606(c), which applies to loading and haulage equipment, provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used." Section 77.404(a) applies to "[m]obile and stationary machinery" and provides that such "equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Consequently, the inspection of the dozer was conducted in the service area. The inspector then issued Citation No. 8258770, alleging 11 separate defects in the dozer. The citation was subsequently modified to allege a twelfth defect.

The first standard alleged to be violated was 30 C.F.R. § 77.404(a), the general equipment maintenance standard for surface coal mines. The inspector designated the violation as significant and substantial ("S&S") and attributable to Kentucky Fuel's unwarrantable failure and high negligence.[2] MSHA subsequently proposed a penalty of $14,000 against Kentucky Fuel for this alleged violation.

The inspector also issued Citation No. 8258773, the one at issue on review, for a violation of section 77.1606(c). The citation largely relies on the section 77.404(a) violation for its narrative. It states that Kentucky Fuel "failed to correct equipment defects affecting safety prior to using the equipment. The operator of the Cat D0N dozer, Co. #1, has recorded numerous defects that needed to be corrected since 3-18-2011, and the operator failed to make any corrections." Gov't Ex. 7, at 1. The inspector alleged that a fatal injury from operating the dozer was highly likely to occur, that the violation was S&S, and that the negligence involved was high. MSHA later proposed a penalty of $14,373.

Addressing the first alleged violation (of section 77.404(a)), the Judge found that, while Kentucky Fuel was disputing that some of the cited defects would affect the safe operation of the dozer, it did not deny that the dozer's horn and backup alarm were not working, that its engine cover was missing, and that it was leaking oil. The Judge also found that the inspector's review of Kentucky Fuel's pre-operation inspection reports for the dozer that could be located indicated that the defects in the dozer had been noted going back to March 18. Consequently, the Judge affirmed the violation and the S&S, unwarrantable failure, and high negligence designations, and assessed an increased penalty of $20,000. 36 FMSHRC at 163-64.[3]

The Judge also affirmed the second citation. She rejected Kentucky Fuel's argument that a dozer is not covered by section 77.1606(c) because it cannot be considered to "load" or "haul" material under definitions of those terms. She found a violation based on the fact of the uncorrected defects that supported the first citation, along with the evidence of the dozer's use by Kentucky Fuel. For that reason, she did not agree with Kentucky Fuel that the two citations are

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

[3] Pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), the Secretary of Labor had also sought to collect a $3,000 penalty from Kentucky Fuel foreman Lloyd Keith Branham for the violation. The Judge declined to find Branham liable under section 110(c), concluding that there was insufficient evidence that he knew of the dozer's defects. The Judge instead found that the mine superintendent at the time of the violation, but who soon thereafter left the mine, was collecting the incriminating inspection reports. 36 FMSHRC at 164-66.

duplicative. She upheld the S&S and high negligence designations, and assessed a slightly increased penalty of $15,000. *Id*. at 166-68.

II.

Disposition

Kentucky Fuel argues that the Judge erred in concluding that the citation for the section 77.1606(c) violation is not duplicative of the citation the operator received for violating section 77.404(a). The operator contends that the purpose of both standards is to prohibit the operation of equipment with defects.

The Secretary responds that section 77.404(a) imposes a maintenance obligation that was not met by Kentucky Fuel. The Secretary argues that the Judge was thus correct to recognize that section 77.1606(c), by prohibiting the operation of defective equipment, imposes an additional obligation that is not mentioned in section 77.404(a), and thus the two citations were not duplicative under the case law.

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); S*partan 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 gate 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.

Section 77.404(a) requires that any "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The citation issued to Kentucky Fuel for violating that standard recites the defects in the dozer, and states that the defective dozer was "being used at this mine site," and "[m]anagement was well aware of the defects . . . since 3-18-2011[,]" but "made the decision and could not justify the continual operation of the dozer without correcting the defects. The operator has engaged in more tha[n] ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard." Gov't Ex. 1, at 1-2.

Consequently, in affirming the violation, the Judge read the citation to allege that Kentucky Fuel had not only failed to maintain the dozer or remove it from service, as section 77.404(a) requires, but that the operator had also taken the further step of using the dozer in its defective condition. *See* 36 FMSHRC at 164 ("Further, the dozer was being operated on the day of the citation but was taken out of service as soon as the mine learned that an inspector was nearing the site."). The Judge then took the fact of that use into account in finding the violation to be attributable to the operator's unwarrantable failure to comply with the Mine Act, and in assessing a penalty 33% higher than the Secretary had requested. *Id*. ("This violation is further

aggravated by the fact that the dozer was being used earlier that day but taken out of service immediately when the inspector arrived on the property. For all of the reasons listed herein, I assess a penalty of $20,000.00.").

With regard to why Kentucky Fuel was cited in this instance for also violating section 77.1606(c), the more specific loading and haulage equipment standard, nothing in the record establishes any difference in how it was applied to Kentucky Fuel's conduct. Section 77.1606 states in pertinent part that:

> (a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.
>
> . . . .
>
> (c) Equipment defects affecting safety shall be corrected before the equipment is used.

Kentucky Fuel was cited for violating the standard because it "failed to correct equipment defects affecting safety prior to using the [dozer]." Gov't Ex. 7, at 1. In seeking to have the section 77.1606(c) violation affirmed, the Secretary can point to no conduct by Kentucky Fuel in using the dozer that was not already considered by the Judge in finding a violation of section 77.404(a) and assessing a penalty for that violation. Consequently, under *Western Fuels-Utah*, the section 77.1606(c) citation is duplicative. *See* 19 FMSHRC at 1004 & n.12 (conduct governed by the two standards was the same given the facts of the two citations).

We note that MSHA recognizes the potential for duplicative citations to be written when section 77.404(a) is invoked. Its Program Policy Manual states that the section "should be used only where such condition is not covered by any other regulation." PPM Vol. V, at 171 (Feb. 2003).

The Secretary argues that the differences in abatement between the two violations establish that the citations were nevertheless not duplicative. The section 77.404(a) citation was terminated four days after issuance when it was determined by MSHA that the defects in the dozer had been corrected. Tr. 73; Gov't Ex. 1, at 4. The section 77.1606(c) violation was not terminated for another week. Tr. 79; Gov't Ex. 7, at 2.

Termination of the latter violation, however, included MSHA's ascertaining whether Kentucky Fuel was making repairs as identified from the pre-operation inspections it had conducted subsequent to the date of the original MSHA inspection. Moreover, the equipment MSHA was checking was not limited to the dozer, but rather extended to other equipment at the mine that had not been cited. Tr. 79. Given these circumstances, the differences in abatement do not rebut the duplicative nature of the two citations here.

Because we are reversing the Judge's determination regarding the duplicative nature of two citations at issue here, we need not address Kentucky Fuel's additional contention that the

dozer, because it merely "pushe[d]" dirt or rock, does not qualify as either "loading" or "haulage" equipment to which section 77.1606 applies.

III.

Conclusion

For the foregoing reasons, we reverse the Judge's decision affirming Citation No. 8258773 for a violation of section 77.1606(c) and vacate the citation.

/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

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July 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. VA 2013-275-M VA 2013-276-M VA 2013-291-M
v.	
SUNBELT RENTALS, INC.; LVR, INC.; and ROANOKE CEMENT CO., LLC	

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

DECISION

BY: Jordan, Chairman, Nakamura, and Althen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") and involve three citations issued to Sunbelt Rentals, Inc. ("Sunbelt"), LVR, Inc. ("LVR"), and Roanoke Cement Co., LLC ("Roanoke") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). All three citations allege a violation of 30 C.F.R. § 56.18002(a), which requires the operator's designated examiner to examine each working place at least once each shift for safety and health hazards.[1] Sunbelt, LVR, and Roanoke were each cited for failing to adequately examine a workplace.

The assigned Administrative Law Judge dismissed the three citations because he found that the Respondents[2] had met the requirements of section 56.18002(a). In this regard, the Judge found that the standard does not require an "adequate" workplace exam and that the Respondents, in any event, lacked notice of such an "adequacy" requirement. 35 FMSHRC 3208, 3214-15 (Sept. 2013) (ALJ).

[1] 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 conditions."

[2] Sunbelt, LVR, and Roanoke are sometimes referred to collectively herein as the "Respondents."

The Secretary filed a petition for discretionary review of the Judge's decision, which we granted. LVR and Roanoke subsequently filed a motion to be dismissed from these proceedings.[3]

For the reasons that follow, we deny LVR and Roanoke's motion and vacate and remand the Judge's decision as to all three citations.

I.

Factual and Procedural Background

Roanoke operates a preheat[4] tower comprised of six vertically connected conical vessels ("cyclones") which process heated limestone material. LVR contracted with Roanoke to perform annual pre-heat tower maintenance. Sunbelt contracted with LVR to erect scaffolding within the tower so LVR could perform its annual maintenance.

The tower contains an exterior staircase, which can be used to access a small two-foot by two-foot door at the seventh level. By looking through this doorway, one can examine the seventh level. On January 8, 2013, Sunbelt, the subcontractor, was planning to erect scaffolding at the sixth level of the pre-heat tower. At the start of the shift, Kendrick Lavon Davis, who has supervised scaffold erection projects for Sunbelt for the prior seven years, examined the sixth level. While on the sixth level of the tower, Davis also visually inspected the seventh level. However, Davis did not climb the external staircase and look through the small doorway at the seventh level.

During the shift on January 8, 2013, unspecified falling material knocked a Sunbelt employee, Brian Tyler, unconscious while he was working in the pre-heat tower. Subsequently, MSHA Inspector David Nichols looked through the aforementioned two-foot doorway into the seventh level and observed a buildup of material which could have fallen through a six-foot long hole between the sixth and seventh levels, above where Tyler was working.

Inspector Nichols issued three citations, one each to Sunbelt,[5] LVR,[6] and Roanoke.[7] The proposed penalty assessments were $51,900, $47,300 and $52,500 respectively. The inspector

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[3] In an order issued on January 13, 2014, the Commission stated that it would consider Roanoke and LVR's motion to drop at a later time, along with the issues raised in the Secretary's petition.

[4] Preheat is defined as "[t]o heat beforehand; as . . . to heat (metal) prior to a thermal or mechanical treatment." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 424 (2d ed. 1997).

[5] Citation No. 8723677 was issued to Sunbelt because it "did not do an adequate work place exam in the area [the workers] were working as there [was] hanging material overhead that had not been noted on the workplace exam. The area above [on the seventh level] was never checked" (emphasis added).

specified that each of the Respondents in question violated section 56.18002(a) due to its failure to "adequately" inspect the seventh level of the pre-heat tower, the area above where the employees were working.[8]

II.

The Judge's Decision

Before the hearing, the Secretary filed a motion for partial summary decision, Sunbelt filed a cross-motion for summary decision, and LVR and Roanoke filed a joint cross-motion for summary decision. 35 FMSHRC at 3209. Based on his findings, the Judge granted the Respondents' cross-motions for summary decision, and dismissed the proceedings.

The Judge found that the standard does not require that the workplace exam be "adequate." Instead, the Judge found that the competent person designated by the operator must simply conduct a workplace exam, although a failure to identify "numerous," "obvious," or "egregious" hazards would equate to a failure to conduct the exam. *Id*. at 3215 n.7. The Judge concluded that Davis had conducted the required workplace exam; that Sunbelt, LVR and Roanoke had designated Davis to examine the workplace; and that Davis was "competent" based on his experience and qualifications. *Id*. at 3215. However, the Judge speculated that Davis may have been negligent when conducting the workplace exam. *Id.*.

The Judge dismissed LVR and Roanoke from these proceedings, rejecting "any . . . argument that [s]ection 56.18002[a] imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person." *Id.* at 3214. The Judge also found that all three Respondents lacked notice that the standard required "adequate" workplace exams. *Id.* at 3215.

The Judge briefly discussed whether the seventh level was a "working place" as the term is used in the standard but did not resolve that question. *Id.* at 3213-14.

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[6] Citation No. 8723676 was issued to LVR because it "did not do an adequate work place exam as [it] never inspected the area [on the seventh level] above where the employees were working where there was hanging material." (emphasis added). In the condition or practice section for Citation No. 8723676, the inspector mistakenly referred to Sunbelt rather than LVR. As noted in Citation No. 8723676-01, the inspector amended the citation to correct the error.

[7] Citation No. 8723675 was issued to Roanoke because it "[had] last done a workplace exam 7 days before the accident of the area the contractor was working in. The last workplace exam was done on 12/30/2012 and at that time the area [on the seventh level] above where the contractor was working was not checked for hazards before turning over the area to the contractor."

[8] Unlike the citations issued to Sunbelt and LVR, the citation issued to Roanoke did not expressly use the term "adequate."

III.

Post-Decisional Proceedings

The Secretary's Petition for Discretionary Review ("PDR") raised the following issues: (1) whether the Judge erred in ruling that 30 C.F.R. § 56.18002(a) does not require that workplace examinations be "adequate," (2) whether the Judge erred in ruling that Respondents lacked fair notice that the standard requires "adequate" workplace exams, and (3) whether, if the standard contains an "adequacy" requirement, the Judge erred in ruling that there was no issue as to any material fact and that Respondents were entitled to judgment as a matter of law. The PDR maintained that an "adequate" exam had not been conducted but did not define the term "adequate" in the context of workplace exams under the standard.

A. LVR and Roanoke's Motion

After the Commission issued its Direction for Review, LVR and Roanoke filed a motion requesting that the Commission dismiss them from these proceedings. *See* Motion To Drop Respondents Roanoke Cement and LVR For Misjoinder and Dismiss Docket Nos. VA 2013-276-M and VA 2013-275-M. LVR and Roanoke contend that they were not cited under a theory of strict liability for failing to ensure that Sunbelt had conducted an "adequate" workplace exam. Instead, they claim they were cited independently of Sunbelt's actions because allegedly they themselves did not conduct independent "adequate" workplace exams. They claim that the Judge, when discussing whether the standard imposes a duty on multiple operators to perform multiple exams of the same workplace, found a second independent workplace exam of the same area to be unnecessary even if the first workplace exam was so flawed that it violated the standard. Based upon these premises, they assert that the Secretary's PDR failed to appeal the ruling by the Judge regarding the duty to conduct multiple exams.

In response, the Secretary maintains that the Judge dismissed LVR and Roanoke from these proceedings because he found that Sunbelt's exam satisfied the standard's requirements as interpreted by the Judge. According to the Secretary, because the Judge's dismissal of the citations against LVR and Roanoke was premised upon no violation by Sunbelt, the vacation of the dismissals against them is necessarily implicated by the Secretary's challenge presented to the Commission. The Secretary asserts that if the standard requires "adequate" workplace exams, the Judge must reconsider his finding that Sunbelt's exam met the standard's requirements and, therefore, also must reconsider his dismissals of LVR and Roanoke.

B. The Meaning of the Term "Adequate" as Applied to the Standard

The Secretary did not define the term "adequate" before the Judge or in his PDR. During oral argument before the Commission, the Secretary sought to rectify this omission and stated that a workplace exam under the standard is "adequate" "if it is reasonably likely to identify conditions which may adversely affect safety and health." Oral Arg. Tr. 9-10. After oral argument in this case, the Secretary requested an opportunity to file a supplemental brief, whereupon the Commission ordered Sunbelt and the Secretary to file supplemental briefs. In his supplemental brief, the Secretary asserted that a workplace exam is "adequate" if the "operator's

examiner [identifies] all of the conditions that a reasonably prudent examiner would identify that may adversely affect safety and health." S. Supp. Br. at 5-6.

Sunbelt responded that we should reject the Secretary's interpretation of the term "adequate" because it was provided unfairly for the first time on appeal during oral argument and that, in any event, it is not entitled to deference. Sunbelt further contends that it did not receive fair notice of the proffered definition. Furthermore, an independently sufficient basis supports affirmance of the Judge's decision.

IV.

Disposition

A. LVR and Roanoke's Motion to Dismiss[9]

We deny LVR and Roanoke's motion to dismiss. It is well established that MSHA has discretion to cite production-operators for violations of mandatory safety standards committed by their independent contractors on the mine site. *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 314 (4th Cir. 2008) (the Secretary has discretionary authority to cite the operator, the independent contractor, or both for an independent contractor's violations); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157-58 (D.C. Cir. 2006) (the Secretary has unreviewable discretion to cite production-operator, the independent contractor, or both, for contractor violations); *see also Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240 (4th Cir. 1977) (finding that under the Coal Act of 1969, the Secretary may hold a mining company liable for violation committed by its construction company).

Moreover, we have no doubt that the inspector knew that Sunbelt was the entity responsible for the examination but found that a violation by Sunbelt also implicated LVR and Roanoke.[10] It is not reasonable to think that the inspector in this case would have cited LVR and Roanoke if Sunbelt's examination complied with the examination standard. It simply is not plausible for us to believe, or for LVR or Roanoke to contend, that had the inspector been present during the inspection and found the examination to be adequate, the inspector would

[9] Commissioners Young and Cohen do not join this section of the opinion.

[10] We do not demand that inspectors write citations with the legal precision of attorneys sitting in comfortable offices. We read the citations as reflecting the inspector's knowledge that, if a contractor does not comply with an examination obligation, he may also cite the production-operator.

have cited LVR and Roanoke for failing to conduct simultaneous inspections.[11] Such a claim is not the gravamen of the citation.[12]

Because the Judge decided the case upon summary judgment, there is no hearing record supporting theories of liability or defense. However, in reviewing the Judge's decision, it appears that the Judge's dismissal of LVR and Roanoke was based upon his finding that Sunbelt had not violated the standard. Specifically, the Judge rejected "any . . . argument that [s]ection 56.18002[a] imposes a duty on multiple operators to perform multiple examinations of the same working place when the exam has already been done by a competent person."[13] 35 FMSHRC at 3214 (emphasis added).

Thus, the Judge expressly linked his dismissal of LVR and Roanoke to his finding that Sunbelt complied with the mandatory safety standard. In effect, the Judge recognized that the validity of the citations against LVR and Roanoke was inextricably intertwined with the citation to Sunbelt. That being the case, our review of the Sunbelt citation necessarily is relevant to the dismissals of LVR and Roanoke.[14]

[11] We are unaware of any instance in which MSHA has asserted that a production-operator has a duty to conduct a duplicative examination of a working place that is under the exclusive control of an independent contractor that has inspected the area satisfactorily. We reject the suggestion that the Judge interpreted the issue with respect to LVR and Roanoke as whether they had a separate duty to perform duplicative examinations of the same workplace even if Sunbelt conducted a compliant examination.

[12] *See Brock v. Dow Chemical U.S.A.,* 801 F.2d 926, 930 (7th Cir. 1986) (holding that it is well-established that administrative pleadings are to be liberally construed, that this is particularly true for citations issued under the Occupational Safety and Health Act of 1970, because the citations are drafted by non-legal personnel who must act quickly and that to hold inflexibly the Secretary of Labor to a narrow construction of the language of a citation would unduly cripple enforcement of the Act).

[13] The phrase "competent person" refers to a requirement of the standard, that a "competent person" designated by the operator conduct the workplace exam. 30 C.F.R. § 56.18002(a).

[14] Thus, we find that the Secretary's Petition for Review, challenging the Judge's finding of no violation of the examination standard, raised the issue of LVR and Roanoke's liability.

We deny LVR and Roanoke's motion to dismiss.[15]

B. Interpretation of 30 C.F.R. § 56.18002(a)

The principal issue before the Commission is the extent to which section 56.18002(a) creates substantive requirements for the conduct of an examination pursuant to that section. The Judge found the section does not require that the workplace examination be "adequate." Instead, the Judge held merely that an examiner's failure to identify "numerous," "obvious," or "egregious" hazards might equate to "failure to perform the requisite exam." *Id*. at 3215 n.7. The Judge's holding that the examination need not be adequate was erroneous. Accordingly, we vacate his decision.

We do not agree that the operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all. Section 56.18002(a) consists of only two sentences. The first sentence 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." 30 C.F.R. § 56.18002(a). The requirement that the operator designate a "competent person" to conduct the examination must mean that there will be substance to the examination. Many miners could detect "obvious" or "egregious" hazards. The requirement that a competent person examine the working place certainly raises the substantive requirement for the examination to the level of a meaningful examination.

The second sentence of section 56.18002(a) mandates that, "[t]he operator shall promptly initiate appropriate actions to correct such conditions." *Id*. Therefore, this sentence requires the correction of the conditions referred to in the preceding sentence – "conditions that may adversely affect safety or health." By doing so, it sets forth the substantive

[15] As discussed below, we remand the Judge's decision for a determination of whether Sunbelt's examination complied with the requirements of section 56.18002(a) as set forth in this decision. If the Judge finds that Davis' inspection did not meet the requirements of section 56.18002(a), he will have to make a negligence determination for each Respondent. Negligence determinations necessarily require analysis of whether each Respondent met its particular duty of care considering the actions a reasonably prudent operator in its position would have taken under the same or similar circumstances. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). For example, in *Jim Walter*, the Commission affirmed a finding that the production-operator was not negligent when one of its contractors failed to require use of fall protection in violation of 30 CFR 77.1710(g). *Id.* at 1975-76. Factors used by the Commission in assessing the production-operator's liability include whether the record demonstrates the production-operator was negligent in hiring the contractor, the contractor was appropriately aware of MSHA's regulations, the contractor had provided its employees required training, and whether there is any indication of negligence by the production-operator with respect to the specific violation. *Id.* at 1976-77.

requirement for the examination. The examination is to identify "conditions that may affect safety or health."[16] *Id*.

Having determined that under the standard, the examination must be adequate, we must articulate the appropriate test for such an examination. We conclude that the application of the "reasonably prudent" miner test is appropriate here. *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005). Before the Judge and in his PDR, the Secretary argued that workplace exams must be "adequate" but failed to define that term. In his supplemental brief on appeal, the Secretary argued that to be "adequate" the workplace examination "must identify all of the conditions that a reasonably prudent examiner would identify that may adversely affect safety and health." S. Supp. Br. at 5-6. He asserted that compliance with 30 C.F.R. § 56.18002(a) must be judged according to a reasonably prudent person test just like compliance with any other generally worded standard. *Id.* at 14.

The Commission has consistently applied the reasonably prudent person test to broadly worded standards. *See U.S. Steel Mining Co.,* 27 FMSHRC at 439.[17] 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).

In *Spartan Mining,* for example, the standard at issue required that equipment be maintained in safe operating condition. We held that under this standard, "the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." 30 FMSHRC at 711. We concluded that "a reasonably prudent foreman would have recognized that the damaged cable at issue constituted a hazard warranting corrective action." *Id.* at 713.

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[16] This construction of section 56.18002(a) is consistent with Commission case law construing regulations to further the protective purposes of the Mine Act. *See, e.g., Sedgman*, 28 FMSHRC 322, 330 (Jun. 2006). The requirement set forth in this opinion accords with our avoidance of absurd interpretations of regulations. *See Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Rock of Ages Corp.,* 20 FMSHRC 106, 122 (Feb. 1998), *aff'd* 170 F.3d 148, 161 (2d Cir. 1999).

[17] Accordingly, although the definition of "adequate" was articulated by the Secretary for the first time, in this case, at oral argument, it is certainly not a novel theory of regulatory interpretation. Rather, it is a consistent concept in Commission common law, and has been repeatedly applied to broadly worded mandatory safety standards. *See infra.*

In *FMC Wyoming Corporation,* 11 FMSHRC 1622, 1629 (Sept. 1989), the Commission found that 30 C.F.R. § 57.18002(a), was "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine." This standard, which governs workplace exams for underground metal and non-metal mines, contains language identical to section 56.18002(a). It follows that section 56.18002(a), also must be "broadly adaptable" and, therefore, is appropriate for application of the reasonably prudent person standard.[18]

Therefore, we hold that an examination of working places, to comply with 30 C.F.R. § 56.18002(a), must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.

C. Notice

As noted *supra,* Sunbelt contends that any standard of adequacy adopted by the Commission in this case should not be applied to it because the Secretary failed to provide fair notice to Sunbelt of the new regulatory interpretation. Sunbelt Supp. Br. at 9-11.

The Commission has historically applied the reasonably prudent person standard, described above, as an objective standard to resolve issues of notice. *See, e.g., Otis Elevator Co.*, 11 FMSHRC 1896, 1906-07 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Alabama By-Products Corp.*, 4 FMSHRC at 2129. In the notice context, the Commission has expressed this test as '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). When addressing issues of fair notice, we have previously considered whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Island Creek Co.*, 20 FMSHRC 14, 25 (Jan. 1998).

In light of the protective purposes of the Act and our extensive case-law regarding the reasonably prudent person test, we hold that the Respondents should have been aware that broadly-worded standards requiring examinations by competent persons must meet a standard of adequacy under the reasonably prudent person test. Respondents cannot claim to be surprised that the examination required under section 56.18002(a) must be adequate to uncover workplace hazards. This is, obviously, the purpose of the examination. Nothing about our adoption of this

[18] At issue in *FMC Wyoming* was the competence of the examiner, rather than the quality of the examination. The Commission applied the reasonably prudent person test to the requirement under section 57.18002(a) that a competent person designated by the operator periodically conduct workplace examinations. We held that the term "competent person" must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry. 11 FMSHRC at 1629.

standard should cause an operator to act differently in conducting an examination.[19] Thus, Respondents had fair notice of the requirement of adequacy in section 56.18002(a).

V.

Conclusion

We deny LVR and Roanoke's motion to dismiss. We vacate the Judge's decision that Sunbelt, LVR, and Roanoke did not violate 30 C.F.R. § 56.18002(a) and further find that the Respondents were provided fair notice of the standard's requirements, as set forth in this decision.

We remand for further proceedings as to whether the workplace examination conducted by Davis met the requirements of the standard. On remand, the Judge should consider both whether the seventh level of the pre-heat tower was a "working place," and whether Davis' workplace examination was adequately conducted, as defined by this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[19] Moreover, Sunbelt is not prejudiced in the presentation of a defense. This case was decided by the Judge on cross-motions for summary decision. Since we are remanding the case for an evidentiary hearing, Sunbelt will be able to put on evidence and cross-examine the Secretary's witnesses regarding the adequacy of the examination.

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

We join the majority decision in this case, except for Disposition Section A, the denial of the motion to dismiss filed by LVR, Inc. ("LVR") and Roanoke Cement Co., LLC ("Roanoke"). Slip op. at 5-6. In our view, LVR and Roanoke should be released from these cases.

Fundamental to due process is the principle that a person or other entity charged with a violation be given notice of the charges against it. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957)(the federal pleading rules require the complaint to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007)*; Carmichael v. Jim Walter Res., Inc.*, 20 FMSHRC 479, 484 n.9 (May 1998) ("the complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried"). In this case, our colleagues would include LVR and Roanoke in the remand based on a theory that these entities can be held responsible for Sunbelt's allegedly inadequate examination. However, LVR and Roanoke were never charged with liability based on anything other than their own alleged failures to perform an examination of the working place under 30 C.F.R. § 56.18002(a). A review of the procedural facts of the case makes this clear.

On January 10, 2013, Citation No. 8723676 was issued against LVR, charging this contractor with a violation of section 56.18002(a) as follows: "When checked it was found that the contractor Sunbelt Rentals did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material. A work place exam is to be done by the operator at least once each shift for conditions which may adversely affect safety or health. . . ." The negligence was listed as "high." Four days later, the inspector modified the citation because the "wrong contractor name was used in the body of the citation," *i.e.,* it "should have been LVR instead of Sunbelt Rentals."

On January 10, 2013, Citation No. 8723675 was issued against Roanoke, charging this operator with a violation of section 56.18002(a) as follows: "It was found that Roanoke Cement had last done a work place exam 7 days before the accident of the area the contractor was working on. The last workplace exam was done on 12/30/2012 and at that time the area above where the contractor was working was not checked for hazards before turning over the area to the contractor. A work place exam is to be done by the operator at least once each shift for conditions which may adversely affect safety or health . . . ." As with LVR, the negligence was listed as "high."

Subsequently, MSHA issued "special assessments" against both LVR and Roanoke pursuant to 30 C.F.R. § 100.5. The civil penalties proposed were $47,300 against LVR and $52,500 against Roanoke. On May 1, 2013, after the proposed penalties were contested, the Secretary, by an attorney from the Solicitor's Office of the Department of Labor, issued a Petition for Assessment of Civil Penalty against LVR and Roanoke based on these citations and special assessments. The attorney did not amend the citations to allege that LVR and Roanoke failed to ensure that the exam was performed.

On August 7, 2013, the Secretary filed a Motion for Partial Summary Decision against Sunbelt, LVR, and Roanoke in which he alleged that work place examinations under section 56.18002(a) must be adequate, and that operators have a duty either to perform a proper work place examination or to ensure that a contractor performs such an examination. The motion failed to recognize that LVR and Roanoke had not actually been charged with failure to ensure that a proper examination had been done.

Roanoke and LVR then filed a Joint Opposition to the Secretary's Motion and Cross-Motion for Summary Decision. In this pleading, Roanoke and LVR alleged that each entity had been cited for failing to perform its own examination, and not for a failure to ensure that an examination had been performed. They argued that they did not have a duty to perform separate, multiple examinations of the same work place, and that they had relied on Sunbelt to perform the necessary examination.

The Secretary then filed a Response to Roanoke and LVR's Motion for Summary Decision and Reply to Roanoke and LVR's Response to the Secretary's Motion for Partial Summary Decision. In the portion of the pleading responding to the Roanoke/LVR motion for summary decision, the Secretary again argued that an adequate examination had not been performed. The Secretary further alleged that Roanoke and LVR did not designate Sunbelt's examiner, Von Davis, to perform an examination on their behalf.

In the portion of the pleading supporting his own Motion for Partial Summary Judgment, the Secretary reiterated his argument that Roanoke and LVR had a duty either to perform an adequate examination or to ensure that one was performed. The Secretary then quoted the two citations, arguing that they alleged a failure to have a valid workplace exam performed.

In effect, this pleading was saying (1) that the Secretary based his argument that Roanoke and LVR failed to ensure that a proper examination was performed on the allegation that they had not designated Sunbelt to perform it, and (2) that the Secretary relied on the language of the citations as sufficient to charge both that Roanoke and LVR had failed to perform a proper examination, and that they had failed to ensure that a proper examination was performed.

In his decision, the Judge erroneously rejected the Secretary's fundamental position that section 56.18002(a) contains a requirement of adequacy, which was a sufficient basis for him to dismiss all three Respondents. But the Judge also rejected the Secretary's allegation that Roanoke and LVR had not designated Davis to perform the examination for all three entities. 35 FMSHRC at 3214.

In its PDR, the Secretary alleged that: (1) the Judge erred in ruling that section 56.18002(a) does not require work place examinations to be adequate; (2) the Judge erred in ruling that the three Respondents lacked fair notice; and (3) there is a genuine issue of material fact relating to the adequacy of Davis' examination which precludes summary decision for the Respondents. The PDR did not allege any issues relating to the liability of LVR and Roanoke separate from the liability of Sunbelt.

In view of this record, we conclude that although it was error to issue a summary decision in favor of Sunbelt, there is no basis at this point for keeping LVR and Roanoke in the case. The citations alleged that LVR and Roanoke themselves did not perform an examination. The citation against LVR first alleged that Sunbelt did not perform an adequate examination, but then was modified to say that "LVR did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material." The citation against Roanoke alleged that it "had last done a work place exam 7 days before the accident . . . The last workplace exam was done on 12/30/12 and at that time the area above where the contractor was working was not checked for hazards before turning over the area to the contractor."

Manifestly, these citations did not allege a failure to *ensure* that an adequate examination was performed. Rather, they charge that LVR and Roanoke did not, themselves, perform an adequate examination.

The purpose of a citation is to give the operator notice of the conduct or actions which the Secretary contends violated the Mine Act. Section 104(a) of the Act imposes specific responsibilities on the Secretary's representatives. The law commands the inspector to issue a citation to the operator when (s)he believes that an operator has violated the Act. The law further requires that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation." 30 U.S.C. § 814(a). The operator is entitled to construct a defense to the charges alleged.

Commission law is clear that leave to amend citations is freely given in the interests of justice. *Cyprus Empire Corp.,* 12 FMSHRC 911, 916 (May 1990) (citing Rule 15(a) of the Federal Rules of Civil Procedure). Hence, at virtually any point while this case was before the Judge, the Secretary could have amended the citations so as to allege that LVR and Roanoke failed to ensure an adequate examination. The Secretary simply chose not to do so.

The Secretary's argument for partial summary decision as to LVR and Roanoke was legalistic – first, that he has the enforcement discretion to cite a production-operator, an independent contractor, or both, for violations of the Mine Act committed by the independent contractor, and second, that operators have a duty to either perform a proper workplace examination or to ensure that the contractor performs an adequate examination. Neither of these principles is in dispute, but neither principle addresses the actual citations given to LVR and Roanoke and the facts relating to those citations.

In their Joint Opposition to the Secretary's Motion and Cross-Motion for Summary Decision, LVR and Roanoke made their position clear: they did not have to perform separate examinations because it was sufficient that they had relied on Sunbelt's examiner. Certainly, at this point the Secretary could have moved to amend the citations to address the defense raised by LVR and Roanoke.

Instead, however, in his Response to the cross-motions, the Secretary doubled down, setting forth the text of the citations and contending that they were sufficient to bear the weight of the Secretary's legal argument. Indeed, the Secretary confused the matter by arguing that LVR

and Roanoke had not, in fact, designated Sunbelt's examiner to perform the examination on their behalf.

In Commission procedure, notice of the charges which an operator must defend against is set forth in the citation or the citation as amended. It is not sufficient that the Secretary set forth his theory of the operator's liability as an abstract legal principle in a motion for summary decision or a response to the operator's motion for summary decision. *Torres v. City of Madera*, 655 F. Supp. 2d 1109, 1128 (E.D. Cal. 2009), *rev'd and remanded on other grounds*, 648 F.3d 1119 (9th Cir. 2011) ("If the complaint focuses on one theory of liability, the plaintiff cannot turn around and surprise the defendant at the summary judgment stage with a new theory of liability."); *Silverman v. Motorola, Inc.*, 772 F. Supp. 2d 923, 936 (N.D. Ill. 2011) ("Plaintiffs cannot raise a new theory of liability in opposition to a motion for summary judgment.") (citations omitted); *Casseus v. Verizon New York, Inc.,* 722 F.Supp.2d 326, 344 (E.D.N.Y. 2010) ("As a threshold matter, courts generally do not consider claims or completely new theories of liability asserted for the first time in opposition to summary judgment.").

We have no doubt that the Secretary could have charged LVR and Roanoke with a failure to ensure that Sunbelt performed an adequate examination. If the Secretary had done so, we would have no trouble including LVR and Roanoke in the remand. The Secretary's failure, however, to clearly allege in the citation or an amended citation that the liability of LVR and Roanoke was predicated on their failure to ensure that an adequate examination was performed should result in the dismissal of the citations against these entities.

Finally, we recognize and completely agree with the majority's footnote 10: "We do not demand that inspectors write citations with the legal precision of attorneys sitting in comfortable offices." There's an inherent irony in the majority's application of that sound doctrine to this case. Thus, the majority defends the Secretary's failure here by relying on the lassitude afforded to administrative pleadings. *See* Slip op. at 6, n.12, ("[A]dministrative pleadings are to be liberally construed" because they are drafted by non-legal personnel who must act quickly) (citing *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930 (7th Cir. 1986)). At the same time, though, the majority also reminds us that the determination of which operator to charge is an exercise of *prosecutorial discretion*. *Twentymile Coal Co.*, 456 F.3d 151, 154-55 (D.C. Cir. 2006). To assert simultaneously that this decision may not be disturbed because it represents a sacrosanct professional legal opinion while being simultaneously entitled to the kind of lassitude one affords a pro se litigant or lay inspector is clearly illogical.

The fault here is not on the part of the inspector. Rather, the citations were reviewed on numerous occasions by the Secretary's attorneys – "sitting in comfortable offices" – who at each opportunity failed to ensure that a governmental agency seeking to impose liability upon a private citizen complied with its duty, under the Constitution and section 104(a) of the Act, to communicate the nature of the violation alleged. It is error to not recognize this failure for what it is and to require LVR and Roanoke to continue to defend against a charge that has yet to be articulated properly.[1]

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

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

[1] Concerning the nature of the violation, we note that these citations were specially assessed, alleging high negligence against both LVR and Roanoke. Not a single fact has been produced, or even a cogent allegation made, showing that either party was negligent. Indeed, before us the agency appears to believe that these parties should be held vicariously liable, a theory wholly inconsistent with the assertion of negligence in the citations.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

July 18, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LEECO, INC.	Docket No. KENT 2012-166

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

DECISION

By: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

Pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Leeco, Inc. after MSHA investigated a fatal accident at the operator's No. 68 Mine. The citation alleged a violation of Leeco's roof control plan. At the hearing, the only issues were the operator's negligence and the amount of the penalty. A Commission Administrative Law Judge found that Leeco was moderately negligent and assessed the penalty amount that the Secretary of Labor proposed. 36 FMSHRC 1866 (July 2014) (ALJ).

Leeco filed a petition for discretionary review, which we granted. For the reasons set forth below, we reverse the Judge's decision and conclude that substantial evidence does not support a finding that the operator was negligent. As a result, we remand to the Judge for assessment of a new penalty.

I.

Factual and Procedural Background

This case involves whether, and to what extent, Leeco was negligent in supervising one of its continuous mining machine operators. Continuous miner operator Bobby Smith had run a continuous mining machine on Foreman Harry Bronson's section for six to seven months. Smith was killed while attempting to free the continuous miner after it was hung against the rib during a cleanup run. There were no witnesses to the accident, and the foreman was in another part of the section doing a pre-shift inspection when the accident occurred. The Secretary's inspector who investigated the accident determined that Smith was killed after he stepped into the "red zone" while trying to free the machine. The "red zone" is a pinch point area where serious and fatal crushing accidents have occurred. According to the inspector, Smith was pinned against the rib when the continuous miner broke free. 36 FMSHRC at 1867, 1870; Tr. 105.

Smith had 12 years of mining experience, and he had worked as a continuous mining machine operator at Leeco for 89 weeks before the accident. "[A] couple of months" before the accident, Superintendent Rick Campbell observed Smith standing "in the outer area of the red zone" while he was tramming the continuous miner. 36 FMSHRC at 1867. Campbell made Smith shut down the machine, counseled him about what he did wrong and how important it is to avoid the red zone, and showed him where he should and should not position himself. *Id.* at 1867, 1871; Tr. 81-83. Campbell also spoke with Foreman Bronson about the incident and asked Bronson to watch Smith for more of this behavior. Bronson testified that he watched Smith for red zone violations, but did not observe Smith approaching the red zone after Campbell spoke with him. Bronson admitted that he did not observe Smith tramming the continuous miner very often. 36 FMSHRC at 1868.

All of Leeco's miners undergo annual training, which includes discussions of red zone issues. Posters explaining the dangers of the red zone are hung in the mine foreman's office as well as Leeco's changing rooms, light house, and warehouse. Leeco also holds weekly safety meetings, and red zone issues are discussed in these meetings about once a month. *Id.* at 1870. Campbell did not recall holding a safety meeting in response to Smith's red zone incident. *Id.* at 1868. Bronson testified that he had never seen Smith in the red zone while operating the continuous miner. He also testified that he had no reason to believe Smith would enter the red zone while operating the continuous miner, but the judge disregarded this testimony. *Id.* at 1870, 71.

MSHA issued the citation after completing its investigation. It alleged a violation of 30 C.F.R. § 75.220(a)(1), which requires the operator to develop and follow a roof control plan. Leeco's roof control plan required that "[w]hile using remote controls, the continuous mining machine operator and all other persons will position themselves [w]hen the continuous mining machine is in operation, in a safe location away from such machine and away from pinch points created by either the continuous mining machine and/or haulage equipment." Sec'y Ex. 4 at 10. The parties stipulated to the fact of a violation. The parties also stipulated that the violation was significant and substantial ("S&S"),[1] that one miner was fatally injured, and that Leeco abated the citation in good faith and in a timely manner. At the hearing, the only issues were the negligence level and the penalty amount.

The Judge upheld the citation's "moderate" negligence designation and assessed the penalty amount proposed by the Secretary—$21,442. The Judge found that the operator was moderately negligent because Campbell had instructed Bronson to keep an eye out for Smith near the red zone. The Judge decided that Bronson had reason to believe that Smith would enter the red zone again because of this instruction, which made Smith's actions on the day of the

[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."

accident foreseeable.[2] 36 FMSHRC at 1871. The Judge determined that, because of the need for this admonishment, the operator should have been more vigilant about watching Smith and preventing the accident. The Judge further found that Leeco took no "concrete steps" to prevent continuous miner operators from entering the red zone. *Id.* at 1872. He dismissed Campbell's actions in counseling Smith and asking Bronson to keep an eye on him because Campbell did not follow up with Smith or Bronson at a later time or hold a safety meeting about Smith's conduct, and because Bronson did not observe Smith tramming the continuous mining machine very often. *Id.*

II.

Disposition

Leeco argues that there is no evidence that Smith had ever actually entered the red zone before the accident, and that the Judge erred by treating Smith's conduct as a prior violation that proved that Smith would enter the red zone in the future. According to Leeco, evidence that an hourly employee came close to committing a violation should not prove a level of knowledge sufficient to establish that Leeco was negligent. Leeco also claims that its actions were consistent with the standard of care as outlined by the Secretary's witness. Leeco argues that because the Secretary concedes that its miners were adequately trained, and because the company made reasonable efforts to make sure that employees were aware of the red zone's dangers, it should not be held liable for Smith's negligence. Finally, Leeco contends that because it was not negligent, the penalty should be reduced.

In response, the Secretary argues that regardless of whether Smith entered the red zone on the day that Campbell spoke with him, the Judge correctly determined that Smith's hazardous actions and Campbell's request that Bronson watch him for similar conduct put Leeco on notice that Smith might enter the red zone in the future. The Secretary contends that there is no evidence that Leeco made any changes to its safety program, training methods, or the way it supervised Smith in response to his previous incident. As a result, the Secretary claims that Leeco did not take any steps that a reasonably prudent operator would have taken to ensure that Smith did not commit any future violations.

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 *Jim Walter Resources*, *Inc.*, the Commission applied the substantial evidence test to the Judge's conclusion about the operator's negligence. 36 FMSHRC 1972, 1976 (Aug. 2014) ("*JWR*").

[2] Although the Judge ultimately placed a great deal of weight on Smith's prior red zone-related incident, the Secretary was apparently reluctant to offer evidence concerning the prior incident, or even subpoena Smith's disciplinary records, out of concern that the response to Smith's previous incident would be viewed in the operator's favor. Tr. 61-63.

The operator has a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). To determine whether an operator has met its duty of care, the Commission considers what actions a reasonably prudent person who is familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *JWR*, 36 FMSHRC at 1975, *citing U.S. Steel Corp*., 6 FMSHRC 1908, 1910 (Aug. 1984). The Commission may evaluate the degree of negligence using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges need not apply, and in fact are not even required to consider, the negligence standards in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.

In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("*SOCCO*"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A. H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463-64; *Nacco*, 3 FMSHRC at 850-51.

The test for negligence under these circumstances is what a reasonably prudent operator, with knowledge of the goals of the Act, would have undertaken under similar circumstances. Commission Rule 63(b) states that the proponent of an order has the burden of proof. 29 C.F.R. § 2700.63(b). The key question here is whether, after Smith's previous red zone-related incident, the actions that Leeco took were those that a reasonably prudent operator would have employed to ensure that Smith would not enter the red zone in the future. The operator contends that its response—Superintendent Campbell's counseling of the miner, and instructing the foreman to watch the miner in the future—was adequate.

The Secretary was required to meet his burden of proof by showing what additional steps should have been taken. Because the record lacks any evidence about what more the operator should have done to meet the standard of care, we conclude that the Secretary failed to meet his burden and show that Leeco was negligent.

The Secretary's evidence as to what a reasonably prudent operator would have done in this situation was very limited. The inspector testified that the foreman "should have done better" at making sure Smith did not have a practice of approaching the red zone. Tr. 44. When asked how the foreman should make sure that the continuous miner operator is in a safe position, the inspector suggested watching the miner operator from time to time as he mines coal or changes places and discussing the red zone in safety meetings. Tr. 55-56. Campbell and Bronson took these actions. Tr. 102, 104, 111-13. Later, the inspector explained that if a foreman is aware of a miner who is positioning himself in the red zone, the foreman needs to "stop that from happening and just spend more time to see that he's not doing that." Tr. 58-59. The inspector's testimony

about Smith's previous incident was also weak in that it did not demonstrate that Smith had ever actually entered a red zone. The inspector testified that he believed that Smith had been disciplined for working in the red zone in the past, but testified that he was "not a hundred percent positive" of that. Tr. 59-61.

As a result of the Secretary's limited evidence, the Judge's decision that Smith's actions on the day of the fatal accident were foreseeable is not supported by substantial evidence. Although the Judge placed a great deal of weight on Smith's previous red zone incident, he did not make a clear factual determination that Smith had entered the red zone. In fact, the record suggests that Smith did not actually enter the red zone during the incident in which Campbell pulled him aside and counseled him.[3] Therefore, Smith's behavior, while a cause for concern, may not have amounted to a violation of the roof control plan. This fact is important because Leeco had to decide, after the first incident occurred, what actions to take to prevent Smith from placing himself in harm's way, without the benefit of hindsight.

Leeco did not fail to act in response to Smith's prior incident. Having the mine superintendent pull a miner off of his machine for a counseling session is a significant event that could be expected to get a miner's attention. The counseling that Smith received from Campbell is something that should be encouraged. While it could show that Smith had some tendency to approach the red zone, it also shows diligent efforts by Leeco's management in attempting to actively prevent red zone violations.

Asking the foreman to keep an eye on a miner was also a reasonable response to the situation. The Judge stressed that Bronson admitted to not observing Smith tramming the machine very often. 36 FMSHRC at 1872. However, Bronson did observe Smith, and he never observed Smith enter or approach the red zone again after Campbell spoke with him. Tr. 111-13.

We also note that, prior to Smith's incident, the operator already had several measures in place to prevent red zone-related injuries. Posters explaining the dangers of the red zone were hung in Leeco's mine foreman's office, changing rooms, light house, and warehouse. 36 FMSHRC at 1870; Tr. 103-04. Leeco held weekly safety meetings, in which it discussed red zone issues about once a month. 36 FMSHRC at 1870; Tr. 102. Leeco's miners also received annual training, which included discussions of red zone issues. *Id.*

Where the operator has taken significant, specific steps to prevent violations, the Secretary must establish that a reasonably prudent operator would have done more under the circumstances to meet its duty of care. Simply arguing that the operator "should have done more" is not a satisfactory standard. *See JWR*, 36 FMSHRC at 1977.

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[3] Throughout the hearing, Campbell consistently testified that he did not see Smith in the red zone when he pulled Smith off the continuous mining machine and counseled him. Campbell stated that he saw Smith in the "area around the red zone," and that Smith was "approaching the red zone." Tr. 79, 88, 90. Bronson also testified that Campbell told him that Smith was "not in the red zone but he was borderline." Tr. 111.

The Judge's reliance on certain "best practices" was inappropriate. 36 FMSHRC at 1872. Although there was very little testimony or evidence from the Secretary about how to meet the standard of care, the Judge listed certain measures that the operator could have taken in response to Smith's actions.[4] Because Leeco did not take any of these steps, the Judge found that the operator did not meet the standard of what a reasonably prudent mine operator would have done under similar circumstances. The Judge characterized several of these measures as "best practices promulgated by MSHA." *Id.* However, these measures were not presented as "best practices" by the Secretary. The only possible source of these measures in the record is the Action Plan that was put in place to abate the violation. This plan is set out in the citation and MSHA's Accident Summary Report. Sec'y Ex. 1, Sec'y Ex. 3 at 6.

Using these measures as the yardstick by which the operator's actions should be measured is problematic. Abatement plans are, by nature, subsequent remedial measures. Under Rule 407 of the Federal Rules of Evidence, remedial measures taken after the fact cannot be used to show negligence before the fact.[5] Fed. R. Evid. 407. Rule 407 is based in part on "a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee's note to 1972 proposed rules. Although the Federal Rules of Evidence do not directly apply to Commission proceedings, we believe that the same policy makes the use of measures set out in the post-accident Action Plan inappropriate as proof of "best practices" that the operator should have had in place. This is especially true in this case because they were presented without additional evidence that they are in fact MSHA's best practices.

In light of the foregoing discussion, we conclude that the Judge's decision is not supported by substantial evidence. Without evidence that a reasonably prudent operator would have done more under the circumstances, it was error for the Judge to conclude that Leeco's response to Smith's previous incident was insufficient. Because the Secretary did not explain what a reasonably prudent operator would have done under these circumstances, we cannot find the operator to be negligent.

[4] For example, the Judge noted that the operator did not put engineering controls in place to prevent red zone fatalities. 36 FMSHRC at 1872.

[5] Rule 407 states in part that "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . negligence . . . ." Fed. R. Evid. 407.

III.

Conclusion

For the foregoing reasons, we reverse the Judge's finding of moderate negligence and remand the case so that a new penalty can be assessed for the citation.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Cohen, dissenting:

On June 24, 2010, a continuous mining machine fatally crushed operator Bobby Smith, a miner at Leeco's Mine No. 68 with 12 years of experience. Sec'y Ex. 3. As recently as two months prior to the fatal accident, the mine's superintendent noticed Smith standing too close to the continuous miner. Tr. 80.[1] In reversing the Judge's decision and finding no negligence as a matter of law, my colleagues have set a dangerous precedent. In the future, the Commission will be at pains to distinguish this decision.

Under the Mine Act, operators have a duty to provide supervision, training, and discipline to employees to prevent rank-and-file miners from violating safety regulations. *See Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). 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). An operator is negligent when it fails to take such steps as a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the safety standard would have taken under the same circumstances. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) ("*JWR*"), *citing U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

When reviewing an Administrative Law Judge's factual determinations, the Commission applies 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)). The Commission has similarly applied the substantial evidence test in reviewing the Judge's conclusion regarding an operator's negligence. *See JWR*, 36 FMSHRC at 1976. The judge's credibility determinations are entitled to great weight and may not be overturned lightly. *See, e.g.*, *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (citation omitted). I believe that my colleagues have failed to properly apply these principles in this case.

After considering the evidence presented at hearing, the Judge concluded that Leeco did not satisfy its duty of care to avoid a violation by ensuring that miners remained a safe distance

[1] My colleagues place great emphasis on the fact that the Judge "did not make a clear factual determination that Smith [previously] had entered the red zone" and that "the record suggests that Smith did not actually enter the red zone during the incident in which Campbell pulled him aside and counseled him". Slip op. at 5. Given that Campbell was not sure whether or not Smith was actually in the red zone, it is hardly surprising that the Judge did not make a "clear factual determination." More importantly, however, it does not matter whether Smith was actually in the red zone during the previous incident. The fact is, as Mine Superintendent Campbell recognized, Smith was too close to a very dangerous piece of equipment. He needed to be cautioned, and later, his work tramming the continuous miner needed to be monitored.

from the mining machines. 36 FMSHRC at 1872.[2] The Judge found that Smith's prior incident gave Leeco notice that the company needed to take additional steps to prevent Smith from again infringing upon the continuous miner's safety zone. *Id.* In so finding, the Judge discounted the testimony of the section foreman, Harry Bronson, who averred that he had no reason to believe Smith would again get dangerously close to the continuous miner. *Id.* at 1871. The Judge determined that the operator's general safety efforts did not satisfy the operator's heightened burden. *Id.* at 1872. Rather, the operator needed to take specific steps to retrain miners on avoiding red zones, increase monitoring and oversight of miners, or install improved safety equipment on the mining machinery. *Id.*

My colleagues overturn the Judge's factual findings, asserting that the Secretary has failed to explain what a reasonably prudent mine operator should have done.[3] Slip op. at 5-6. However, the question is not whether the Secretary correctly articulated what would comprise the operator's duty of care under the circumstances (including the fact that Smith had recently put himself into a dangerous position near a continuous miner) but whether the Judge's decision that the operator failed to exercise the required standard of care is supported by substantial evidence. *See JWR*, 36 FMSHRC at 1975 n.4 (Aug. 2014) (rejecting the Secretary's argument that the Commission must apply the standard of care defined by the Secretary when considering whether the operator was negligent).

Moreover, it is a well-accepted legal principle that the duty owed is proportional to the danger of the hazardous practice. *See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("[t]he risk reasonably to be perceived defines the duty to be obeyed").

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[2] Earlier in his decision, the Judge quoted the Secretary's definitions relative to negligence from 30 C.F.R. § 100.3(d). 36 FMSHRC at 1870-71. I agree with my colleagues that an operator's duty of care is not defined by the Secretary's Part 100 regulations but rather by traditional negligence principles. Slip op. at 4. *Brody Mining,* 37 FMSHRC at 1702*; Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). In this case, although the Judge quoted the Secretary's Part 100 definitions, he actually applied traditional negligence principles to find ordinary (i.e., "moderate") negligence. 36 FMSHRC at 1872.

[3] The majority relies on *JWR* for support. Slip op. at 3-5. In that case, the Judge determined that the mine operator (Jim Walter) had met its duty of care by providing additional fall training and safety measures as directed by MSHA following a similar accident just one month earlier. *JWR*, 36 FMSHRC at 1978, *citing Jim Walter Res., Inc.*, 33 FMSHRC 362, 370 (Feb. 2011) (ALJ). The Judge credited the operator's witnesses and found that Jim Walter was not on heightened notice that it needed to take further steps. 33 FMSHRC at 370. On appeal, a majority of the Commissioners declined to disturb the Judge's factual findings and, applying the substantial evidence test, upheld his negligence determination. 36 FMSHRC at 1976-77. In contrast, the Judge here discounted the operator's witnesses, found that the mine was on notice that it needed to enhance safety precautions around Smith, and determined that the mine had not taken any specific steps to meet that duty following Smith's encroachment just a few months prior. 36 FMSHRC at 1871-72. Another distinction is that in *JWR*, the injury was to an employee of a contractor. The Judge's finding of no negligence in that case related to the supervision of the contractor by Jim Walter, a far different situation than here, where Leeco's own employee was killed.

Accordingly, a reasonably prudent mine operator is required to exercise an especially high degree of care when miners are at high risk of a fatal accident. Here, working in close proximity to the continuous miner is one of the most dangerous practices in underground mining. *See* www.arlweb.msha.gov/REGS/fedreg/final/2015/proximity-detection/ ("Since 1984, there have been 35 deaths where miners have been pinned, crushed, or struck by continuous mining machines in underground coal mines."). In recognition of this hazard, MSHA recently promulgated a rule requiring mine operators to install proximity detection systems on continuous mining machines. *See* 30 C.F.R. § 75.1732; 80 Fed. Reg. 2188, 2199 (Jan. 15, 2015) (projecting that requiring proximity detectors will prevent approximately nine deaths and another 49 non-fatal crushing or pinning injuries over 10 years.)

To reach its conclusion, the majority determines that the Judge improperly considered Leeco's efforts to abate the MSHA citation, in contrast to Rule 407 of the Federal Rules of Evidence. Slip op. at 6. My colleagues' reliance on Rule 407 of the Federal Rules of Evidence is misplaced. Rule 407 reflects a public policy encouraging potential defendants to fix hazardous conditions without fearing that those actions will be used as evidence against them. Fed. R. Evid. 407 advisory committee's note to 1972 proposed rules ("ground for exclusion rests on a social policy of encouraging people to take . . . steps in furtherance of added safety."). That policy goal is not present where MSHA has directed the abatement actions. The Mine Act mandates abatement of safety violations. *See* 30 U.S.C. § 814(b). Moreover, Congress chose not to apply the Federal Rules of Evidence to Commission proceedings. Commission Judges are amply capable of weighing the probative value of such evidence.

Smith, an experienced miner, previously had disregarded substantial safety training and improperly approached active mining machinery. Tr. 80. Leeco had numerous avenues available to help prevent such a hazard from reoccurring, including mandatory retraining, improved oversight, and additional safety measures. Sec'y Ex. 3 at 6. The Judge weighed the evidence before him and the testimony at hearing and concluded that Leeco did not satisfy the rigorous duty to ensure miner safety imposed by the Mine Act. 36 FMSHRC 1872. Considering the record, I find that substantial evidence supports the Judge's findings and conclusion that Leeco demonstrated ordinary negligence.

Accordingly, I dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NALLY & HAMILTON ENTERPRISES	Docket No. KENT 2011-434

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

In 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"), the Administrative Law Judge vacated a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Nally & Hamilton Enterprises ("Nally & Hamilton") and dismissed the pending penalty proceeding. 35 FMSHRC 2198 (July 2013) (ALJ).[1] At issue is the regulatory interpretation of 30 C.F.R. § 77.1710(i), which states, in relevant part, that miners "shall be required to wear" seatbelts in certain vehicles where conditions pose a danger of overturning. For the reasons that follow, we vacate and remand the Judge's decision.

I.

Facts and Proceedings Below

A. Factual Background

The citation at issue arose out of an accident on April 21, 2010, in which a rock truck overturned at Nally & Hamilton's Chestnut Flats Mine in Kentucky. 35 FMSHRC at 2199. James Patterson, the driver of the truck, was not wearing a seatbelt at the time of the accident and sustained injuries that resulted in lost work days. *Id.* at 2199-200.

Patterson was not at the mine during MSHA Inspector Arthur Smith's April 29 investigation because he was under doctor's orders at the time not to return to work. *Id.* at 2200. On May 3, 2010, Inspector Smith visited Patterson at his home. Smith testified that he "asked [Patterson] about the accident, and we discussed . . . when it happened and why it happened, how

[1] We are deciding this case in conjunction with our consideration of *Lewis-Goetz & Co.*, 38 FMSHRC __, No. WEVA 2012-1821 (July __, 2016), which also involves the interpretation of 30 C.F.R. § 77.1710. Therefore, we are issuing the decisions in both cases on this date.

it happened. And I asked him, I said, were you wearing a seatbelt? He said, well, I won't lie to you. He said, no, I was not." Tr. 40.

Two days later, Inspector Smith returned to the Chestnut Flats Mine to continue his investigation. 35 FMSHRC at 2200. Smith spoke with Mine Foreman Michael Lewis and informed him that he was going to issue a citation because the victim was not wearing a seatbelt at the time of the accident. Smith testified that Lewis then told him that company policy required miners to wear seatbelts at all times while riding in mobile equipment. *Id.*

Inspector Smith also spoke with a grader operator about the company's policy and was informed that "if they were found operating mobile equipment without a seatbelt, that they had to spend eight hours in a classroom after that. The company gave them the class. They couldn't work. They had to attend a class concerning seatbelts." Tr. 70. Inspector Smith also testified that, during his previous inspections at the Chestnut Flats Mine, he had seen miners wear seatbelts while operating mobile machinery such as bulldozers, loaders, and rock trucks. Tr. 71, 81. When asked about negligence, Smith testified that it was Patterson who was negligent. Tr. 90.

As a result of this investigation, Inspector Smith issued Citation No. 8362516, which alleged that Nally & Hamilton violated 30 C.F.R. § 77.1710(i). Smith characterized the alleged violation as "significant and substantial" ("S&S").[2] Smith indicated on the citation that an injury had already occurred, that the injury resulted in lost workdays or restricted duty, and that one miner was affected. Smith also alleged that the violation was the result of Nally & Hamilton's moderate negligence. MSHA later proposed a penalty of $52,500, and Nally & Hamilton timely filed a notice of contest.

At the hearing before the Judge, the Secretary of Labor presented evidence that Patterson was not wearing a seatbelt when the accident occurred and that the vehicle was equipped with rollover protection. Tr. 26, 40. The parties stipulated that the truck had overturned. Nally & Hamilton did not dispute that Patterson failed to wear a seatbelt or that the standard covered the vehicle Patterson was driving at the time of the accident. Nally & Hamilton instead presented evidence of its safety policy requiring employees to wear seatbelts and evidence of its enforcement of that policy. 35 FMSHRC at 2201-02.

Before the Judge, the parties agreed that the crux of their dispute was the proper interpretation of the standard. The Secretary advocated a strict liability interpretation, whereas Nally & Hamilton argued for the Judge to apply the Commission's interpretation of section 77.1710 (as applied to safety belts and lines) announced in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672, 1674-77 (Oct. 1983) ("*Southwestern I*"). 35 FMSHRC at 2203-04; *see also Southwestern Illinois Coal Corp.*, 7 FMSHRC 610, 612-13 (May 1985) ("*Southwestern II*") (applying *Southwestern I*'s interpretation of § 77.1710).

[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."

B. The Judge's Decision

The Judge analyzed 30 C.F.R. § 77.1710(i) and concluded that under the plain language of the standard and the Commission's precedent in *Southwestern I*, the standard's language "imposes upon the operator a *duty to require*, *not a duty to guarantee*." 35 FMSHRC at 2205 (citing 5 FMSHRC at 1675). The Judge noted that the Commission has interpreted section 77.1710's phrase "shall be required to wear" to mean that "operators must (1) establish a safety system requiring the wearing of the clothing or equipment and (2) enforce the system diligently." *Id.* at 2204 (citing *Southwestern I*, 5 FMSHRC at 1674-75).

The Judge further concluded that Nally & Hamilton's policies and enforcement satisfied the Commission's interpretation of the standard. 35 FMSHRC at 2205-06. The Judge noted that Nally & Hamilton maintains a safety policy that requires miners to wear seatbelts where equipment is equipped with roll-over protection systems and that it requires employees to sign a statement agreeing to the safety policies before beginning employment. *Id.* at 2205. Further, the operator has each miner revisit the safety policy every year at the company's annual retraining. *Id.* Finally, Patterson signed off on the policy before starting employment and every subsequent year at the annual retraining. *Id.* at 2201.

The Judge found it "noteworthy" that both MSHA Inspector Smith and Nally & Hamilton Safety Coordinator Creech "agreed that it was not possible for a mine foreman or other supervisor, standing at ground level, to see whether a truck operator is wearing a seatbelt while sitting in the truck cab, which rises nearly 10 feet above ground level." *Id.* at 2205. The Judge concluded from that testimony that Nally & Hamilton had taken reasonable steps to require Patterson to wear his seatbelt. *Id.* The Judge also noted that the testimony showed one instance in which a miner was disciplined for failing to wear a seatbelt and one instance in which an employee had an accident similar to Patterson's, but was wearing a seatbelt and suffered no injuries. *Id.* at 2206. The Judge concluded that those facts supported a finding that Nally & Hamilton diligently enforced its safety policy. *Id.* Accordingly, he vacated the citation. *Id.*

Though the Judge vacated the citation, he also made alternative findings in the event that the Commission were to depart from its existing precedent, i.e., that the operator was not negligent and that the Secretary had failed to establish that the violation was S&S. *Id.* at 2206 n.10. He also stated that if the Commission determined that a violation occurred, he would assess a civil penalty of $100, rather than the $52,500 penalty proposed by the Secretary after a special assessment. *Id.*

II.

Disposition

This case presents competing interpretations of 30 C.F.R. § 77.1710(i).[3] Does section 77.1710(i) require that miners use the seat belts in vehicles where there is a danger of overturning and rollover protection is provided, or does the section merely require that operators institute procedures (training, education, discipline, etc.) to require miners to wear seat belts?

We find the only sensible reading of the regulation is that it requires that miners use seat belts. That reading is consistent with the language of the regulation, the requirements of other regulations in 30 C.F.R. Part 77, case law governing the interpretation of regulations, and the purpose of the Mine Act. Therefore, for the reasons set forth below, we overrule *Southwestern I* and *II*.

The failure of a miner to use a seat belt in operating a vehicle defined in section 77.1710(i) is a violation. The operator, in turn, is strictly liable for such violation without regard to the diligence with which it has trained and required miners to use seat belts. Therefore, we vacate and reverse the decision below and find the operator committed a violation of section 77.1710(i). We remand the case to the Administrative Law Judge for further proceedings consistent with this decision.

A. Interpretation of Section 77.1710

In *Southwestern I*, a majority of three Commissioners held that "when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation." 5 FMSHRC at 1675. In reaching this conclusion, the majority relied exclusively on its reading of the words "shall be required" and a prior decision of the Interior Board of Mine Operation Appeals ("IBMA") in *North American*

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[3] In relevant part, section 77.1710 provides:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
>
> . . . .
>
> (i) Seatbelts in a vehicle where there is a danger of overturning and where rollover protection is provided.

Coal Corp., 3 IBMA 93 (1974). In turn, in *North American*, the IBMA summarily concluded that the regulation did not actually require that the relevant protective apparatus be worn.[4] *Id.* at 107.

We do not lightly overrule previous Commission holdings.[5] However, in light of the compelling reasons for the interpretation we adopt today, we cannot prefer adherence to precedent over the language and purpose of the standard. The standard mandates an important measure of protection for miners operating vehicles where there is a danger of overturning. It achieves that purpose if and only if miners wear seat belts, and such obligation is manifest in the wording of the regulation.

Therefore, we do not read section 77.1710 as imposing an obligation only upon the operator to train and discipline miners. The section compels the wearing of the prescribed protective clothing and devices. The language of the standard, other standards related to use of protective gear, Commission precedent, and the purpose of the Mine Act underscore our interpretation.

First, the language of the standard supports our view. When a federal regulation "requires" that something be done, the regulation is an authoritative demand that the action be taken. Indeed, the word "require" means "to ask for authoritatively or imperatively," "claim by right and authority," "insist upon usu[ally] with certainty or urgency," or "demand." *Webster's Third New International Dictionary* 1929 (1993). It would be wholly incongruent with the language of the regulation to construe a mandate that miners must be required to wear protective clothing and equipment as merely compelling an effort by operators to achieve the important protective purposes of the regulation.

In a thoughtful concurrence and dissent in *Southwestern I*, Commissioner Lawson effectively refuted the Commission's reliance upon *North American* and elaborated on what is meant by the word "required" in the regulations. As he stated:

> The core sense of "require" is to mandate, not exhort–that which is required, shall be done. *See Mississippi River Fuel Corp.*

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[4] *North American* involved the use of safety goggles, and *Southwestern I* involved the use of fall protection. However, both cases turn upon the interpretation of the language of the opening paragraph of section 77.1710 that miners "shall be required" to wear the protective clothing and devices identified in the following subsections.

[5] The Supreme Court has explained that "[a]dhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). However, the Court also has stated that adherence to precedent "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The Court has recognized that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt restrained to follow precedent.'" *Payne*, 501 U.S. at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

> *v. Slayton et al*, 359 F.2d 106, 119 (8th Cir. 1966): "Required" implies something mandatory, not something permitted by agreement."
>
> . . . Although it appears unnecessary of repetition, regardless of the existence of even a diligently enforced company rule, a miner is not protected from the danger of falling unless he is actually wearing a safety belt. There is no meaningful, nor even semantically persuasive distinction, between "shall be required to wear" and "shall be worn."

Southwestern I, 5 FMSHRC at 1681 (Lawson, Comm'r, concurring and dissenting).[6]

Second, safety standards "must be interpreted so as to harmonize with and further . . . the objective[s] of" the Mine Act. *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Our interpretation of section 77.1710(i) harmonizes it with other sections of 30 C.F.R. Part 77 and other mandatory safety standards.

For example, section 77.1710(g) is worded in a manner similar to section 77.1710(i)—namely, miners "shall be required to wear . . . (g) Safety belts and lines where there is a danger of falling." However, due to the unique uses of fall protection, section 77.1710(g) contains an additional proviso: "a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." Obviously, this mandate is only meaningful if the miner entering the dangerous area is wearing a lifeline. Certainly, therefore, the purpose is to compel use of lifelines when there is a danger of falling. We apply the same rationale to section 77.1710(i).

In addition, section 77.403-1(g) appears in the provision listing the safeguards for mechanical equipment applicable to surface mines. It provides: "Seat belts required by § 77.1710(i) shall be worn by the operator of mobile equipment . . . ." This language identifies the seat belt requirement contained in section 77.1710(i) and unquestionably contemplates that miners must wear seat belts under section 77.1710(i). Section 77.403-1(g) is in textual harmony with a finding that the standard at section 77.1710(i) mandates the use of seat belts. The wording of section 77.1710 does not permit avoidance of operator liability when a miner negligently endangers himself by failing to wear a seat belt.

Third, in parallel regulations affecting metal/non-metal mines, the mandate is that seat belts must be worn. For example, 30 C.F.R. § 57.14131(a) provides, "Seat belts shall be provided and worn in haulage trucks." 30 C.F.R. § 56.14131(a) contains the identical requirement. These regulations point to and support an interpretation of section 77.1710(i) in a manner that provides equivalent and harmonized safety protection across different types of mining ventures.

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[6] Commissioner Lawson further correctly observed that this "interpretation [operator liability] is congruent with those final—and absolute—responsibilities placed upon the operator by the Act to prevent safety and health hazards to miners, including forestalling employees from engaging in unsafe and unhealthful activities." *Southwestern I*, 5 FMSHRC at 1682.

Commission case law supports, indeed dictates, such a parallel construction of coal and metal/non-metal regulations. The Commission has found that "[t]here is no logical reason why coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *see also Solar Sources, Inc.*, 37 FMSHRC 218, 221 (Feb. 2015).

The legislative history of the Mine Act further confirms this approach. A fundamental purpose of the Act was to provide a standard for safety for metal/non-metal miners as comprehensive and protective as the standards provided for coal miners. The Senate Report on the Mine Act notes that the Coal Act[7] was more comprehensive in scope and reach than the Metal Act.[8] It states that one reason why enactment of the Mine Act was an absolute necessity was that there would be "one statute for both coal and metal/nonmetal mines, affording equal protection for all miners and a common regulatory program for all operators." S. Rep. No. 95-181, at 9 (1977), *reprinted in* S. Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Fed. Mine Safety and Health Act of 1977*, at 597 (1978). Consequently, it would be illogical and at odds with the purpose of the Mine Act to construe coal regulations in a manner achieving less protection for coal miners than the protection afforded metal/nonmetal miners.

Fourth, if a violation is dependent upon the training regimen and enforcement practices of the operator, it is difficult to see how an inspector observing a driver not wearing a seat belt could know whether that failure constituted a violation. The inspector would have little or no information about training or enforcement of the seat belt requirement. Therefore, the inspector arguably would need to forego issuance of a citation, commence an investigation of the operator's practices before issuance, or issue a citation thereby touching off a further inquiry to determine if the citation is valid. Such a process is not consistent with the enforcement procedures of the Mine Act and regulations.

Fifth, the Secretary's interpretation is also consistent with the Mine Act's scheme of strict liability. Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault. *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009) (stating that strict liability "means liability without fault[;] [i]t does not mean liability for things that occur outside one's control or supervision" (citation omitted)); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The ultimate responsibility for compliance lies with the operator. Moreover, imposing strict liability on the operator for a miner's failure to comply with the regulatory requirements promotes safety in furtherance of the Mine Act's purpose.

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[7] Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977).

[8] Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977).

Consequently, when a miner fails to wear a seat belt when operating a vehicle covered by section 77.1710(i), he violates the standard. Then, as required by law, the operator is liable for the violation. *See Sewell Coal Co.*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Prods. Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). Of course, the operator's fault or lack of fault goes to the issue of negligence and, thus, is considered in assessing a civil penalty. *Asarco, Inc.-Nw. Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); *Sewell Coal Co.*, 686 F.2d at 1071; *W. Fuels-Utah, Inc.*, 10 FMSHRC 256, 259 (Mar. 1988). In this regard, the standard set forth for liability in *Southwestern II* may provide an appropriate test for operator negligence that depends upon whether the operator has undertaken appropriate training and enforcement to show "diligence in site-oriented enforcement" of section 77.1710(i). *Southwestern II*, 7 FMSHRC at 612.

Sixth, this interpretation best achieves the purpose of the Mine Act and regulations issued under it—namely, protection of the health and safety of miners. *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); 30 U.S.C. § 801(g). Viewed from this perspective, it is plainly evident that section 77.1710(i) requires miners to wear seat belts.

Even if we harbored doubts about the proper interpretation of section 77.1710, we necessarily would find section 77.1710(i) to be ambiguous, and would defer to the Secretary's interpretation as a reasonable and persuasive construction of the regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997).

For these reasons, we vacate and reverse the finding of no violation by the Administrative Law Judge. We conclude that the operator violated section 77.1710(i) because of the miner's failure to utilize seat belt protection in operating a vehicle where there was a danger of overturning and rollover protection was provided.

B. Alternative Findings

As set forth above, anticipating the possibility of the overruling of *Southwestern I*, the Judge made two alternative findings. He found that if a violation occurred, the operator was not negligent and that the violation was not significant and substantial. We look first at negligence and then at the S&S issue.[9]

[9] The operator also raised due process considerations on the basis that it relied upon the *Southwestern I* decision and, therefore, would have had no notice of a possible violation notwithstanding compliance with the protective measures prescribed in *Southwestern I*. However, the operator does not provide any cogent explanation of any prejudice from the alleged lack of notice. It does not assert that it would have, or could have, done more to assure usage of seat belts or otherwise acted differently based upon an understanding of our current decision. Indeed, such assertions might well have undercut its basic defense. Further, as the Secretary pointed out, S. Reply Br. at 12, he has made it abundantly clear that he would continue to cite operators notwithstanding *Southwestern I*. Therefore, we do not find the operator was prejudiced or denied due process by the decision we reach today.

We affirm the finding of no negligence. The Judge found that the operator established and conducted a sufficient training and enforcement program to avoid liability under *Southwestern I*. The Judge found, "that the rock truck was not defective at the time of the accident, that Nally & Hamilton did not know (and could not reasonably determine for this truck) that Patterson was not wearing his safety belt, and that the mine had, and enforced, a policy regarding the wearing of safety belts." 35 FMSHRC at 2206. Substantial evidence supports that finding. That finding, in turn, supports the Judge's finding of no negligence.[10]

Regarding the issue of whether the violation was significant and substantial, the Judge did not engage in sufficient analysis to permit action by the Commission. Because a finding on the issue of whether the violation was significant and substantial could affect the gravity element of the penalty assessment, we remand the case to the Administrative Law Judge for further consideration of whether the violation was significant and substantial and assessment of a penalty.

III.

Conclusion

For the foregoing reasons, we vacate the Judge's decision and remand the case for further action consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[10] Commissioner Cohen would impose a duty upon operators to "monitor" for seatbelt usage under section 77.1710(i). This would be a significant obligation, not sought by the enforcement agency in this case as a requirement to meet the standard of a reasonably prudent operator. Based on this record, we do not adopt Commissioner Cohen's position.

Commissioner Young, dissenting:

The majority claims that "we do not lightly overrule previous Commission holdings." Slip op. at 5. The decision then cites Supreme Court cases which solemnly intone the preference for the principle "that the applicable rule of law be settled," before getting to the point that the Court should not be constrained by precedent, and has not been, when confronted by decisions that are "unworkable or are badly reasoned." *Id.* at 5 n.5 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).[1]

In fact, though, the majority hardly makes the case that *Southwestern Illinois Coal Corporation*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), or *North American Coal Corporation*, 3 IBMA 93 (1974), are "unworkable or are badly reasoned." Rather, the majority simply doesn't like the conclusion compelled by those decisions in this case. While the majority's intentions are good, the actual effect on mine safety may not be, and the unsettling effect on our precedents certainly is not.

The standard at issue provides that "[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine *shall be required* to wear protective clothing and devices," including, inter alia, fall protection devices where there is a danger of falling and seatbelts when in vehicles which present a danger of rolling over. 30 C.F.R. § 77.1710 (emphasis added). As always, when reviewing a standard, we must first examine its language and determine if it is plain or ambiguous.

The Commission held, in *Southwestern I*, that the language was plain. There is no basis in law—no overriding precedent, no change in the wording of the standard—to justify the majority's reconsideration of this point. While the Secretary, as the prevailing party in *Southwestern I*, was precluded from challenging the Commission's interpretation in that case, it has been binding precedent before us for decades. Nothing precluded the Secretary from revising the regulation if he disagreed with our decision to acknowledge its plain meaning. Where, then, is the recognition of the intrinsic value of settled law?

The understanding affixed to the standard, in fact, predates the adoption of the Mine Act. Our decision in *Southwestern I* relied on the decision of the Interior Board of Mine Operation Appeals ("IBMA") in *North American*, 3 IBMA at 107, involving a similarly-worded standard, employing the same phrase—"shall be required to wear"—to support its interpretation of the standard. Consistent with *North American*, the Commission explained:

> The intended effect of [the Interior Board's] construction was that if a failure to wear the protective clothing and equipment was "entirely the result of the employee's disobedience or negligence

[1] In this context, citation to *Payne v. Tennessee* is archly ironic. In that very decision, there is a lively debate about the role of stare decisis, in which Justice Scalia noted that Justice Marshall's vigorous dissent against that principle could be rebutted by opinions authored by Justice Marshall himself. 501 U.S. at 833-35 (Scalia, J., concurring).

> rather than a lack of requirement by the operator to wear them, then a violation has not occurred." . . . .
>
> The regulation does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them. The plain meaning of "require" is to ask for, call for, or demand that something be done. Accordingly, when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation. We respectfully disagree with our dissenting colleagues that "shall be required to wear" means "shall be worn." The two phrases are not the same, and we do not find persuasive a reading that converts a duty to require into a duty to guarantee. Certainly, the purpose of the standard is to protect miners, but the standard as written provides for that protection by directing that operators require the belts to be worn.

Southwestern I, 5 FMSHRC at 1675 (emphasis and citations omitted). The Commission rejected the Secretary's argument that "shall be required" means "shall be worn," stating that the two phrases carried different meanings and that if the Secretary intended the latter, he should have promulgated the regulation accordingly. *Id.* Ultimately, the Commission reversed the Judge and reinstated the citation because they found that the record did not show "sufficiently specific and diligent enforcement."[2] *Id.* at 1676. The Commission noted that use of the safety belt and line was left to the discretion of the miner and no direction was provided as to specific work situations where belts should be worn. *Id.*

Beyond the command of stare decisis, the outcome of this case should recognize *Southwestern I*'s legal and logical underpinnings as a plain language case. Thus, 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).

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[2] Likewise, in *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), the Commission reversed the Judge and entered summary decision in the Secretary's favor, again finding that the operator had failed to prove its affirmative defense. *Id.* at 612-13. Because the Secretary received favorable rulings on liability in both cases, the Secretary had no standing to challenge the Commission's contrary interpretation of section 77.1710 in a court of appeals. *See Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam) ("As a general *rule*, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." (emphasis added)).

The applicable subsection provides that each employee "*shall be required to wear* . . . [s]eatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." 30 C.F.R. § 77.1710(i) (emphasis added). Based on this plain language, the Commission has interpreted section 77.1710 to create a limited exception to the Mine Act's strict liability scheme. Under the Commission's interpretation of the standard, an operator avoids liability if it proves that (1) it has a safety system in place requiring miners to use protective gear and (2) it adequately enforces the system. *Southwestern I*, 5 FMSHRC at 1674-77; *Southwestern II*, 7 FMSHRC at 612-13.

This interpretation of the standard has hardly served as an escape hatch for operators. In *Southwestern I*, the Commission ultimately ruled in the Secretary's favor on liability and concluded that the operator had failed to prove that its safety policies and enforcement were adequate. 5 FMSHRC at 1676. Further, the Commission noted that the operator must take "specific enforcement actions" that show "diligence in site-oriented enforcement" of its policy. *Southwestern II*, 7 FMSHRC at 612. Thus, the operator must prove that it is affirmatively acting to ensure that miners wear or use the required protective equipment, consistent with the standard's plain meaning.

In this case, the Judge correctly applied the interpretation set forth in *Southwestern I*. *See* 35 FMSHRC at 2204-06. This would rightly raise the next issue: whether the record provides substantial evidentiary support for the decision below.[3]

Contrary to the Secretary's contention, substantial evidence supports the Judge. As the Judge noted:

> Both Inspector Smith and Safety Coordinator Creech specified the numerous safety measures that the mine routinely employed to enforce its seatbelt policy. Not only did Nally & Hamilton require its employees to sign off on agreeing to the mine's safety policies, including seatbelt usage, before beginning employment, but each miner also revisits this policy every year at the company's annual retraining. The truck's driver, James Patterson, was among the Nally & Hamilton employees who agreed to this safety policy before starting employment at the mine; he was further reminded of these rules every year at annual retraining. Tr. 115-116.

Id. at 2205. The Judge also noted that the fact that Nally & Hamilton had only one incident of discipline for violation of its seatbelt policy indicated that its enforcement measures were effective, as Inspector Smith also testified that he had witnessed miners in compliance with the

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

regulatory requirement on past inspections. *Id.* at 2205-06. In that instance, the violative conduct occurred on a public road. Thus, the mine's policy was enforced even where an employee was off Nally & Hamilton's property. Tr. 106, 125-26.

Unlike the circumstances in *Southwestern I*, the facts here indicate that Nally & Hamilton's policy on seatbelt use was explicitly clear and its training demonstrative of the safety hazards of noncompliance. Thus, the record supports the conclusion that Nally & Hamilton provided supervision and enforcement of its policy.

While I would hold that substantial evidence supports the Judge's finding that Nally & Hamilton sufficiently enforced its policy requiring miners to wear safety belts, I readily concede that a finding to the contrary on the operator's policy could also be sustained on substantial evidence grounds. The judge could have held that the fact of violation here indicated that the operator's policy was not fully effective, and that spot checks or other means should have been employed because whether vehicle operators are complying with company policy cannot always be determined by observation from outside the vehicle.[114]

This is a question of evidentiary weighing, within the Judge's province to make requisite findings and then apply the law to those findings. *See Martin Cty. Coal Corp.*, 28 FMSHRC 247, 261-62 (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." (citing *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994)). Where that analysis is not clearly erroneous, we are bound to respect it. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) ("[A]buse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law.") (citing *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)). There is no clear error here because the Commission in *Southwestern I* specifically rejected a guarantee of compliance. Here, the evidence supports that the operator had a policy in place, provided training to its miners on said policy, employed a system of progressive discipline to deter non-compliance, and actually imposed discipline on the one prior occasion where a miner was found to be in violation of the company's policy. Moreover, the inspector admitted that on past inspections, he witnessed miners complying with the seatbelt rule. Determining whether this was "enough" is a judicial function.[5]

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[4] Were we to apply *Southwestern I* and affirm the Judge in this case, the operator would nonetheless have notice that its enforcement program was not fully effective and that additional measures, such as spot checks, might be needed to ensure compliance with the standard.

[5] I would note that the occurrence of the accident here should put the operator on notice that greater efforts may be required in the future. If Nally & Hamilton had no reason to suspect its program may not be fully effective before the accident in this case, it has reason to question that assumption now. I would also point out that the Secretary may promulgate guidance on what it requires for compliance with the requirements of *Southwestern I*, but has not done so.

Finally, the majority's decision today is contrary to the intent of the Act and its safety purposes. The Act provides that mine operators, with the assistance of miners, "have the primary responsibility to prevent" the existence of hazardous conditions and practices. 30 U.S.C. § 801(e). *Southwestern I*'s imposition of a duty on operators to ensure seatbelts are worn is entirely consistent with this statutory command.

More importantly, the standard at issue applies only at surface mines. Such mines are inspected only once per year. Thus, the only ways to find a violation would be to have the inspector be present when it occurs, on the one inspector's single annual visit to the mine site, or to have the fact revealed as it was here, in the aftermath of an accident. Conversely, under *Southwestern I*, the agency could audit and review the operator's program for proactively and assertively requiring the use of appropriate protective clothing and devices, to ensure the operator is fulfilling its duties under the law. This seems more likely to have a beneficial and more consistent effect than the hope of a random encounter with a violator or, worse, an accident investigation.

Southwestern I rests on the plain language of a standard drafted by the Secretary and has served the interests of mine safety since we decided the case on those grounds. It is important, as the Supreme Court has noted, for settled law to remain settled. Accordingly, I dissent.

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

Commissioner Cohen, concurring in part and dissenting in part:

For the reasons that follow, I concur with the majority that the record evidence compels the conclusion that Nally & Hamilton violated the safety standard at 30 C.F.R. § 77.1710(i). However, I disagree with the majority's affirmance of the Judge's alternative finding of no negligence.

Although I agree with the finding of a violation in the majority's decision, I cannot join them in their rationale. Their conclusion that *Southwestern Illinois Coal Corp.,* 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I"*), was badly reasoned is not supported. In the absence of a compelling justification that the decision was wrongly decided, the Commission should abide by the doctrine of stare decisis. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of stare decisis demands special justification.").

The majority states that "the only sensible reading of the regulation is that it requires that miners use seat belts." Slip op. at 4. If this were simply a matter of a policy choice, I would agree with my colleagues. However, their legal analysis is fatally flawed. The majority's purported plain reading of the safety standard is inconsistent with the language of the safety standard. *See* 30 C.F.R. § 77.1710(i) ("Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: . . . (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.").

A. The Majority's Plain Reading of Section 77.1710(i) Fails to Give Effect to All the Words in the Safety Standard.

In *Southwestern I*, the Commission held that the language of section 77.1710(i) requires an operator to (1) "establish a safety system designed to assure that employees wear [the clothing or equipment] on appropriate occasions" and (2) "enforce such system with due diligence." *Southwestern I*, 5 FMSHRC at 1674-77 (quoting *N. Am. Coal Corp.*, 3 IBMA 93, 107 (1974)); *Southwestern Ill. Coal Corp.*, 7 FMSHRC 610, 612-13 (May 1985) (*Southwestern II*).[1] In so holding, the *Southwestern I* Commission gave effect to all the words of the safety standard.

Today, the majority does something different. They hold that the standard's direction that "each employee . . . *shall be required to wear* [seatbelts]," 30 C.F.R. § 77.1710 (emphasis added), means that seat belts shall be worn. Slip op. at 4. The majority has ignored the phrase "be required to" in the safety standard. Effectively, the majority concludes that the phrase is superfluous.

Reading words out of a regulation is not a proper approach to construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (stating that a cardinal principle of interpretation is to give effect, if possible, to every clause or word). The words "be required to" were deliberately chosen by the Secretary when he drafted section 77.1710(i). They provide meaning and context.

[1] The *Southwestern* cases, like the present case, arose in the context of a surface coal mine.

Those words inform mine operators that they are strictly liable for a failure to require their employees to wear seatbelts.

The *Southwestern I* Commission determined that a mine operator performs its duty when it establishes a safety system to require compliance and diligently enforces its safety system. I conclude that *Southwestern I* was correctly decided, because the Commission's interpretation gives effect to all the words in the safety standard.

Unquestionably, the Secretary knows how to write a regulation which provides that miners "shall wear" protective clothing or that protective clothing "shall be worn." A search of the Secretary's regulations containing mine safety and health standards (30 C.F.R. Parts 56, 57, 75 and 77) reveals 35 separate regulations where the Secretary directly and unquestionably requires that miners shall wear protective clothing such as gloves, face-shields or goggles, hard hats, suitable protective footwear, seat belts, safety lines, self-rescue devices, respirators, etc.[2] The fact that section 77.1710 uses the language "shall be required to wear" indicates that the Secretary meant something different.

B. The Majority Has Not Demonstrated that *Southwestern I* is Badly Reasoned.

My colleagues' asserted rationale for overruling *Southwestern I* fails when closely examined.

For example, my colleagues state that the reinterpretation of the safety standard is necessary so that the standard better conforms with a similar regulation that governs haulage trucks operating at metal and non-metal mines. Slip op. at 7. The safety standard at 30 C.F.R. § 57.14131 requires that "[s]eat belts shall be provided and *worn* in haulage trucks." (emphasis added).

However, section 57.14131 was promulgated by the Secretary in August 1988, about five years *after* the Commission issued *Southwestern I*. 53 Fed. Reg. 32496, 32528 (Aug. 25, 1988). The Secretary's subsequent promulgation of a new regulation concerning seat belt use at metal and non-metal mines has no legal effect on the Commission's prior interpretation of section 77.1710(i) (governing surface mines).

My colleagues also suggest that *Southwestern I* was wrongly decided because it allegedly causes section 77.1710(i) to conflict with the safety standard at 30 C.F.R. § 77.403-1(g). Section 77.403-1(g) states that "[s]eat belts required by § 77.1710(i) *shall be worn* by the operator of mobile equipment required to be equipped with [rollover protective structures] by § 77.403-1." (emphasis added). The supposed conflict between the *Southwestern I* interpretation of section 77.1710(i) and section 77.403-1(g) is imagined by the majority. Section 77.1710(i) requires an

[2] *See* 30 C.F.R. §§ 56.14130, 56.15002, 56.15003, 56.15004, 56.15005, 56.15007, 56.15014, 56.15020, 56.16002; also 57.5044, 57.5045, 57.14130, 57.15002, 57.15003, 57.15004, 57.15005, 57.15007, 57.15014, 57.15020, 57.15031, 57.16002; also 75.705-6, 75.705-9, 75.1106-4, 75.1714-2, 75.1720-1, 75.1723; also 77.401, 77.403-1, 77.606-1, 77.704-6, 77.704-9, 77.1607, 77.1710-1, and 77.1908.

operator to establish a safety system and for the operator to enforce such system. It applies to all vehicles at surface coal mines where there is a danger of overturning and rollover protection has been provided. In contrast, section 77.403-1(g) applies only to the vehicles specifically listed in 30 C.F.R. § 77.403-1.[3] Therefore, section 77.403-1 adds an additional requirement for an operator, i.e., it must guarantee that the belts are worn when a miner operates vehicles listed in section 77.403-1, or be held strictly liable. The standards create different duties for a mine operator. The existence of separate duties does not cause conflict; it explains the Secretary's promulgation of different rules.

The majority suggests that section 77.1710(i) and section 77.403-1(g) should be interpreted functionally as requiring the same conduct; this is an odd result for sure. I suggest that the heightened requirements imposed on a mine operator by section 77.403-1(g) can only be understood by interpreting section 77.1710(i) as the *Southwestern I* Commission did.

For these reasons, as well as the reasons stated by Commissioner Young in his dissent, I find that the majority has failed to demonstrate that *Southwestern I* should be overturned. *See* slip op. at 10-12 (Young, Comm'r, dissenting).

C. Nally & Hamilton Violated Section 77.1710(i).

In *Southwestern I* and *II,* the Commission made clear that an operator's safety program requiring the wearing of seat belts coupled with discipline for violation of the requirement is not sufficient to comply with section 77.1710(i). The operator must also put in place a system of supervision to ensure compliance. 5 FMSHRC at 1676; 7 FMSHRC at 612.

The record evidence demonstrates that Nally & Hamilton established a safety system; it created a policy requiring the use of seatbelts, and provided annual refresher training. Miners were required to sign off on the policy prior to beginning employment and upon receipt of annual training. In addition, the mine foreman presented monthly safety talks. 35 FMSHRC at 2201-02. Sanctions for violating the policy included the issuance of a written warning or retraining, *id.* at 2201, 2205-06, but the system lacked a method for monitoring compliance.

The majority describes the operator's responsibility under section 77.1710 as limited to an obligation "to train and discipline miners." Slip op. at 5. The majority does not recognize that when the regulation states that an employee "shall be required to wear" protective clothing, the requirement includes a responsibility on the part of the operator to monitor the work rules it promulgates.

After considering the evidence, the Judge concluded that the policy was enforced diligently, stating that there were "no reasonable additional steps [that] could have been taken to assure that [the mine's] employee was wearing the seat belt for this vehicle, given the undisputed record that one could not tell from the ground if the lap belt was being worn." *Id.* at 2205. However, the Judge's conclusion that "no reasonable additional steps could have been taken to

[3] In this case, the driver was operating a rock truck, a type of vehicle not listed in section 77.403-1.

assure that [miners were] wearing the[ir] seat belt" lacks the support of substantial evidence in the record.[4] Nally & Hamilton Safety Coordinator Creech testified that a supervisor could have performed a periodic safety spot check by asking drivers to open their cab door to check for seat belt usage. Tr. 126. The Judge failed to consider the absence of this simple monitoring program suggested by the operator's own safety coordinator.

Enforcement with due diligence requires that mine operators take reasonable steps to conduct periodic spot checks for compliance. Certainly, requesting that a driver open his door as a safety spot check is a reasonable step. Such a practice is not an onerous burden, and need only be performed on an occasional basis to constitute the due diligence required by the safety standard. *See Southwestern I*, 5 FMSHRC at 1676 (holding that general guidance by the mine operator does not constitute diligence in enforcement; rather, reinforcement of safety considerations is necessary under the standard).

If a mine operator lacks a monitoring tool for compliance, then the safety system cannot be said to be enforced with "due diligence," and a violation of section 77.1710(i) is established. Because the evidence demonstrates that Nally & Hamilton lacked an appropriate monitoring tool to ensure compliance with their safety policy, the operator violated the safety standard.[5]

D. <u>The Operator Was Negligent in Violating the Standard.</u>

The majority affirmed the Judge's alternative finding that Nally & Hamilton was not negligent in its violation of the safety standard.

As previously stated, substantial evidence does not support the Judge's finding that no reasonable steps could have been taken by Nally & Hamilton to assure that its employees were wearing seatbelts. *See* 35 FMSHRC at 2205. The majority's negligence determination rests on that finding.

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[4] "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. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

[5] The majority contends that interpreting section 77.1710(i) to make it dependent on the training regimen and enforcement practices of the operator makes it difficult for an MSHA inspector who observes a driver not wearing a seat belt to determine whether to issue a citation. Slip op. at 7. The short answer is that this interpretation of the standard has been in effect for the more than 40 years since the *Southwestern* cases were decided. The Secretary could have eliminated any enforcement problem simply by re-writing section 77.1710 so as to eliminate the words "be required to." To enforce the standard as it actually was written, an inspector who observes a miner operating a vehicle without the required seat belt the inspector should (1) stop the driver, (2) question the driver about the training he has received and whether/how the operator enforces a seat belt requirement, (3) direct the driver to put on the seat belt before re-commencing work, and (4) if necessary, depending on his interview of the driver, conduct further investigation into whether the operator actually requires the drivers to wear seatbelts.

I conclude that the complete absence of a monitoring program compels the conclusion that the operator was at least moderately negligent in violating the safety standard.

E. Conclusion

For the reasons stated, I would reverse the Judge's findings, and find that the operator violated section 77.1710(i) and that the violation was moderately negligent. I would remand the case to the Judge for determinations of S&S and the penalty.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

July 19, 2016

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

v.

LEWIS-GOETZ AND COMPANY, INC.

Docket No. WEVA 2012-1821

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

In this simplified 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"), the Administrative Law Judge vacated a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Lewis-Goetz and Company, Inc. ("Lewis-Goetz"), and dismissed the pending penalty proceeding. 35 FMSHRC 2192 (July 2013) (ALJ).[1] At issue is the regulatory interpretation of 30 C.F.R. § 77.1710(g), which requires employees to use safety belts and lines when there is a danger of falling. For the reasons that follow, we reverse the Judge's decision, grant summary decision for the Secretary on the fact of violation, and remand for further proceedings.

I.

Facts and Proceedings Below

A. Factual Background

Lewis-Goetz is an independent contractor that offers conveyor belt fabrication and repair services to mines. On December 18, 2011, an MSHA Inspector was inspecting a prep plant in West Virginia. The inspector observed Lewis-Goetz hourly employee Jesse Brown performing belt splicing and vulcanizing services on the elevated No. 2 raw coal belt. The belt was approximately 30 inches wide, wet from the falling snow, and located approximately 10 to 12 feet above the ground. Brown was walking and squatting down on the wet, narrow, and elevated coal belt. He was not wearing a safety belt or tag line.

[1] We are deciding this case in conjunction with our consideration of *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), which also involves the interpretation of 30 C.F.R. § 77.1710, and are issuing the decisions in both cases on this date.

The inspector determined that Brown was in imminent danger of falling and issued an imminent danger order (which is not at issue in this case). He also issued a citation alleging that Brown had violated 30 C.F.R. § 77.1710(g),[2] which addresses miners' use of safety belts and lines where there is danger of falling. The citation also alleged that it was highly likely that a fatal injury would occur as a result of a fall; that the violation was "significant and substantial" ("S&S");[3] and that one miner was affected. The citation was initially issued with a designation of "high" negligence, but MSHA later modified the operator's negligence to moderate.

After the inspector ordered Brown to descend from the coal belt, Brown stated that he was aware he was supposed to wear a safety belt and tag line, but due to the severe cold weather, he was in a hurry to get the work done and decided not to wear the belt. After being removed from the elevated beltline, Brown retrieved a safety belt and tag line from a tool bag located in the maintenance truck. Brown told the inspector that the devices were available to him and that he had been trained in their use.

MSHA proposed a civil penalty of $971, and Lewis-Goetz filed a notice of contest challenging the citation.

B. The Judge's Decision

The Judge issued a Decision and Order on Cross Motions for Summary Decision. She denied the Secretary's motion for summary decision on the violation of section 77.1710, granted the operator's motion for summary decision, and vacated the citation. 35 FMSHRC at 2197. The decision did not revisit a previous determination by the Judge to reject the Secretary's filing of

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[2] Section 77.1710 provides:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R. § 77.1710.

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

an opposition to Lewis-Goetz's motion and did not refer to any of the arguments the Secretary had made in that filing.[4]

The Judge first concluded that the Secretary properly asserted MSHA jurisdiction over Lewis-Goetz. *Id.* at 2194-95. In effect, though not explicitly, the Judge therefore granted partial summary decision in the Secretary's favor on the jurisdictional issue.

The Judge then considered whether Lewis-Goetz violated 30 C.F.R. § 77.1710(g) when Brown worked without a safety belt or line. She concluded that the contractor had not violated the standard. *Id.* at 2195-97. The Judge noted the Secretary's position that a violation had occurred because section 77.1710(g) imposes strict liability on operators. *Id.* at 2196. The Judge also noted Lewis-Goetz's position that the standard only requires an operator to impose a requirement for employees to use fall protection and to take reasonable measures to ensure that the requirement is enforced. *Id.* at 2195-96. The Judge concluded, based on the Commission's decisions in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), that the duty the standard imposes on the operator is to "have a safety system in place requiring employees to use safety gear and that [the operator] diligently seek[s] to enforce that requirement through such avenues as training, supervision, and disciplinary measures for failure to comply." 35 FMSHRC at 2196.

The Judge summarized the evidence in the record, stating that the Secretary stipulated to the following facts: (l) Lewis-Goetz has a written policy that all miners must wear fall protection; (2) Lewis- Goetz offers at least yearly refresher training on the policy; 3) by company policy, a violation of the requirement to wear fall protection is subject to graduated disciplinary measures, including termination; and (4) Brown admitted to the inspector that he was "well aware of the requirement to wear the equipment but he intentionally ignored the policy" and that "[t]he gear was readily available to him in his tool bag." *Id.*

[4] Before the Judge, the Secretary submitted a document which was titled "Secretary's Reply Brief in Further Support of His Motion for Summary Decision and Determination of Penalty." The content of the filing was in essence an opposition to Lewis-Goetz's motion for summary decision, addressing the case law cited by Lewis-Goetz but not addressed by the Secretary's July 5, 2013 motion. The Judge rejected the Secretary's filing, informing the Secretary that she would not accept and consider any reply briefs.

On appeal, the Secretary argues that the Judge erred by excluding his responsive filing. The Commission's rule on summary decision contemplates that a party opposing the motion may have an opportunity to file an opposition. 29 C.F.R. § 2700.67(d). However, because the case was designated for simplified proceedings (29 C.F.R. § 2700, Subpart J), permitting the Judge an opportunity for greater involvement at an early stage of the proceeding, the Judge directed the parties to file cross motions for summary decision. Any error by the Judge in excluding the Secretary's opposition is non-material and harmless at this stage of the proceeding, especially in light of our holding on the merits of this case. Moreover, the arguments raised in the Secretary's opposition have been raised on appeal and are now being addressed. Thus, we find no prejudice to the Secretary as a result.

The Judge noted that if the parties disputed whether Lewis-Goetz's efforts to enforce its policy were adequate, then a material fact would be in dispute. *Id.* at 2196 n.3. The Judge concluded, however, that summary decision was appropriate because the parties "had stipulated to the contrary," after having noted the undisputed facts about the operator's policy and enforcement efforts. *Id.* Ultimately, the Judge concluded: "Based upon the facts mutually agreed upon, I find that Lewis-Goetz did have an adequate policy in place requiring employees to wear fall protection and [that it] took adequate measures to enforce that policy." *Id.* at 2196. After granting Lewis-Goetz's motion for summary decision and denying the Secretary's motion for summary decision, the Judge vacated the citation and dismissed the matter. *Id.* at 2197. The Commission granted the Secretary's petition for discretionary review.

II.

Disposition

A. Occurrence of a Violation

The Secretary argues that in denying his motion for summary decision and granting Lewis-Goetz's motion, the Judge misinterpreted section 77.1710 and committed several procedural errors. Specifically, the Secretary contends that the Judge misinterpreted the applicable regulatory standard by applying Commission precedent holding that an operator may escape liability for its rank-and-file miner's failure to comply with the standard. The Secretary argues that strict liability under the Mine Act mandates an alternative interpretation of the applicable standard.

Below, the Judge determined that the operator was entitled to summary decision as a matter of law. She based this decision on a plain interpretation of section 77.1710, controlled by Commission precedent set forth in *Southwestern I*. The Commission reviews the Judge's summary decision de novo. *See Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). As we concluded in *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), which was also issued on this date and addresses the interpretation of the same language in section 77.1710, section 77.1710(i) requires the use of seat belts. Similarly, section 77.1710(g) requires the use of fall protection where there is a danger of falling. Thus, the Judge erred in granting summary decision for Lewis-Goetz. Rather, the Secretary is entitled to summary decision that a violation occurred as a matter of law.

Consistent with *Nally*, the only sensible reading of the regulation is that it requires that miners use fall protection. As in *Nally*, we do not read section 77.1710 as imposing only an obligation upon the operator to train and discipline miners. The section compels the wearing of the prescribed protective clothing and devices.[5] Section 77.1710(g) achieves its purpose if and

[5] *Nally* involved wearing seat belts, and *Southwestern I* involved the use of fall protection. However, those cases, as does this case, turn upon the interpretation of the language of the opening paragraph of section 77.1710 that miners "shall be required" to wear the protective clothing and devices identified in the subsequent subsections.

only if miners wear fall protection, and not if they merely receive training on its use and suffer discipline for failing to use it. It is not necessary to repeat our analysis of the proper interpretation of section 77.1710 again here. As fully explained in *Nally*, we conclude that the language of the standard, other standards related to the use of protective gear, Commission precedent, and the purpose of the Mine Act underscore our interpretation of section 77.1710.[6]

Therefore, for the reasons set forth in *Nally*, we overrule *Southwestern I* and *II*. We find that the failure of a miner to use fall protection as defined in section 77.1710(g) is a violation. The operator, in turn, is strictly liable for such violation without regard to the diligence with which it has trained and required miners to use fall protection. Therefore, we vacate and reverse the decision below and find the operator committed a violation of section 77.1710(g).

B. Negligence, S&S, and Penalty

In granting summary decision for the operator, the Judge found that the Secretary had stipulated to facts demonstrating that the operator had adequate policies and enforcement measures in place to warrant summary judgment under the then-prevailing *Southwestern I* standard. On review, the Secretary asserts that it did not concede that the operator's enforcement actions were adequate and further asserts that the stipulations do not concede the adequacy of enforcement.

The Judge acknowledged that if the Secretary contested the operator's enforcement of its policy, a disputed issue of fact would exist. In light of our decision today finding a violation, these questions of enforcement actions become relevant to the Judge's negligence determination, which must be considered on remand. In addition, the Judge must make determinations regarding whether the violation was S&S and the penalty amount.

[6] Also as in *Nally*, even if we harbored doubts about the proper interpretation of section 77.1710, we necessarily would find section 77.1710(i) to be ambiguous, and would defer to the Secretary's interpretation as a reasonable and persuasive construction of the regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997).

We conclude that Lewis-Goetz violated section 77.1710(g) because of the miner's failure to use fall protection where there was a danger of falling. Because the Judge granted summary decision for the operator and dismissed the proceeding, the Judge did not make findings on the operator's level of negligence and whether the violation was S&S, and did not assess a penalty. Accordingly, we remand the case to the Judge for further proceedings in light of our decision.

III.

Conclusion

For the foregoing reasons, we reverse the Judge's decision, affirm Citation No. 8036268, and remand for further proceedings on S&S and negligence and for assessment of a penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioner Young, concurring:

I join my colleagues in reversing the Judge's decision and granting summary decision to the Secretary on the finding of a violation of 30 C.F.R. § 77.1710(g). I also agree with remanding the case back to the Judge to address negligence, the Secretary's S&S designation, and for assessment of a penalty. However, because I disagree with their decision to overturn the Commission's decisions in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), I write separately.

As I stated in my dissent in *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), also issued on this same date, I believe that the Commission should respect and follow its precedent. A decision to overturn precedent should not be made lightly and should be substantiated by ample reason based in law. In this circumstance, I believe that *Southwestern I* was rightly decided based on the plain language of section 77.1710 and the well-established principles of regulatory construction. However, applying *Southwestern I* to the facts of this case, substantial evidence supports that Lewis-Goetz failed to comply with the requirements of *Southwestern.* More specifically, the evidence does not demonstrate that Lewis-Goetz engaged in "sufficiently specific and diligent enforcement" of its policy regarding fall protection. *Southwestern I*, 5 FMSHRC at 1676. The record is devoid of evidence of any such program and enforcement by Lewis-Goetz. Thus, even applying *Southwestern I*, the Judge erred in granting summary decision for the operator.

The Commission reviews a Judge's summary decision de novo. *See Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). A Judge can enter summary decision only if there are no material facts in dispute and a party's position is entitled to judgment as a matter of law. *See* 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.24 (3d ed. 2015) (considering a motion for summary decision, Judge's role is limited to a determination of whether a case can be decided without the need to resolve any factual disputes).

The parties presented undisputed evidence that Lewis-Goetz had a policy concerning the use of fall protection and provided guidance (training) and enforcement (progressive disciplinary program); contrary to the Judge's statement, the parties did *not* stipulate as to the adequacy of Lewis-Goetz's enforcement efforts under the standard articulated in *Southwestern I*. 35 FMSHRC 2192, 2196 & n.3 (July 2013) (ALJ). Nor is there sufficient evidence in the record to support the Judge's conclusion that Lewis-Goetz adequately enforced its policy on fall protection.

The parties stipulated that Lewis-Goetz has a written policy that all miners must wear fall protection, that they offer at least yearly refresher training on it, and that by company policy a violation of the requirement to wear fall protection is subject to graduated disciplinary measures including termination. 35 FMSHRC at 2196; Jt. Stips. 13, 14, 22. The parties submitted copies of Brown's training records, indicating that he had been trained annually on the use of fall protection. Jt. Ex. C (attached to Jt. Stips.). Also submitted was a copy of Lewis-Goetz's Disciplinary Program. Jt. Ex. D (attached to Jt. Stips.). However, both Lewis-Goetz's safety policy and summary decision motion simply emphasize that its policy provided that it is each

employee's personal responsibility to "work in a safe and efficient manner." Jt. Ex. D; Resp't's Br. Supp. Contest 3.

Lewis-Goetz did not present any evidence detailing the training provided to its miners or evidence of enforcement and discipline for non-compliance with its safety program. Thus, given the evidence of the operator's sparse program and enforcement, I conclude that the record compels the conclusion that Lewis-Goetz did not undertake "sufficiently specific and diligent enforcement" of its policy about when miners must wear fall protection in satisfaction of *Southwestern I*. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (stating that remand is not necessary when the record supports no other conclusion).

Because I conclude that *Southwestern I* is controlling, I agree that the Judge erred in granting summary decision for the operator and conclude that the Secretary is entitled to summary decision based on the conclusion that the operator did not comply with *Southwestern I*. Accordingly, I agree with the majority that the case should be remanded to the Judge to address the operator's negligence and S&S and for assessment of a penalty.

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

Commissioner Cohen, dissenting:

I respectfully dissent in this case for two reasons.

First, I disagree with the majority that 30 C.F.R. § 77.1710(g) should be interpreted in a manner that overrules the Commission decisions in *Southwestern Illinois Coal Corp.,* 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.,* 7 FMSHRC 610 (May 1985) ("*Southwestern II"*). In a decision we are issuing simultaneously with this one, *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), a majority of the Commissioners have overruled *Southwestern I* and its progeny. I along with my colleague Commissioner Young authored opinions dissenting from the majority in that case, stating that the majority decision failed to provide a compelling justification to depart from established Commission precedent. I adopt that opinion here. As Commissioner Young states in his concurring opinion in this case, "*Southwestern I* was rightly decided based on the plain language of section 77.1710 and the well-established principles of statutory construction." Slip op. at 7 (Young, Comm'r, concurring).

Hence, I disagree with the majority's conclusion that the fact that Lewis-Goetz employee Jesse Brown was not wearing a safety belt or other fall protection while working on the elevated No. 2 raw coal belt by itself compels the conclusion that section 77.1710(g) was violated. The proper issues, as framed in *Southwestern I*, are whether Lewis-Goetz (1) "establish[ed] a safety system designed to assure that employees wear [the clothing or equipment] on appropriate occasions" and (2) "enforce[d] such system with due diligence." 5 FMSHRC at 1673 (quoting *N. Am. Coal Corp.*, 3 IBMA 93, 107 (1974)); *see also Southwestern II*, 7 FMSHRC at 612-13.

It is tempting to join with Commissioner Young in the finding that Lewis-Goetz was guilty of a violation because the record compels the conclusion that it failed to adequately enforce its policy on fall protection. Nevertheless, I must instead conclude that this is not an appropriate case for summary decision—my second reason for dissenting.

According to Commission Procedural Rule 67(b), 29 C.F.R. § 2700.67(b), a judge may only grant a motion for summary decision "if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." The Commission has noted that summary decision is an "extraordinary procedure" that should only be employed when the rule's exacting standards are satisfied by the moving party. *See Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (1994).

The Judge here granted summary decision for Lewis-Goetz, concluding that the Secretary's stipulations were sufficient to justify the findings that (1) Lewis-Goetz had "an adequate policy in place requiring employees to wear fall protection" and that (2) it "took adequate measures to enforce that policy." 35 FMSHRC at 2196. However, the Secretary did not stipulate either to the adequacy of Respondent's policy or to the adequacy of its efforts to enforce the policy. The Secretary's stipulations were limited to the facts that (1) the two employees of Lewis-Goetz who were working at the Dobbin Ridge Preparation Plant mine at the time of the MSHA inspection and issuance of the citation in question were both trained on fall protection devices, (2) Mr. Brown had received such training as recently as 13 days before the incident, (3)

Lewis-Goetz had a disciplinary policy, a copy of which was attached to the Joint Stipulations, (4) Mr. Brown had a safety belt and tagline available to him, and (5) Mr. Brown acknowledged to the MSHA inspector that he had been trained and that he should have been wearing the fall protection equipment available to him. Joint Stips. 11, 13-14, 21-24. These stipulations by the Secretary did not concede the adequacy of the safety program or Lewis-Goetz's diligence in enforcing it.

The Judge thus erred in finding that the Secretary had made stipulations which were sufficient to support her conclusions regarding the adequacy of the policy or Lewis-Goetz's enforcement of it. In considering a motion for summary decision, the judge must view the record in the light most favorable to the party opposing the motion, and all inferences must be drawn in favor of the non-moving party. *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Here, the Judge drew inferences regarding the adequacy of Lewis-Goetz's program against the non-moving party based on the Secretary's very limited stipulations.

The Judge further erred in excluding the Secretary's response to Lewis-Goetz's motion for summary decision.[1] After receipt of the Secretary's response, the Judge's Attorney-Advisor sent the parties an email, stating, "[The] Judge . . . did not authorize reply briefs and will not be accepting them." App. C to Br. for Sec'y 2. The Secretary's counsel then requested reconsideration of the ruling, pointing out that a responsive filing was contemplated by Commission Rules and did not require the Judge's authorization. *Id.* at 1. However, the Judge again indicated that she would not consider any reply briefs. *Id.*

In this exchange, the Secretary was correct. Commission Procedural Rule 67(d) plainly contemplates that parties may file an opposition to a motion for summary decision. 29 C.F.R. § 2700.67(d). Moreover, Commission Procedural Rule 10(d) states that "[a] statement in opposition to a written motion may be filed by any party within 8 days after service upon the party." 29 C.F.R. § 2700.10(d). Commission Procedural Rule 8(a) provides that when the "time prescribed for action is less than 11 days, Saturdays, Sundays and federal holidays shall be excluded in determining the due date." 29 C.F.R. § 2700.8(a). Hence, under the Commission Procedural Rules, the Secretary timely filed a response to Lewis-Goetz's motion for summary decision, which should have been considered by the Judge.

[1] This case was designated for simplified proceedings pursuant to Commission Procedural Rule 102, 29 C.F.R. § 2700.102. Following the parties' submission of joint exhibits, joint stipulations, and competing proposed findings of fact, the Judge requested the filing of motions for summary decision. App. A to Br. for Sec'y 1. The parties complied with the Judge's request. Eight business days after the filing of Lewis-Goetz's motion, the Secretary filed a response to the Lewis-Goetz motion. The Secretary's response analogized to the facts of *Southwestern I* and *Southwestern II*, and argued that Lewis-Goetz failed to provide site-specific guidelines or any supervision in fall protection.

The Judge's refusal to consider the Secretary's response had a significant effect.[2] The Judge stated in a footnote that "[i]f it were the Secretary's position that Lewis-Goetz does not make a diligent effort to enforce its policy regarding fall protection, a material issue of fact would be in contest making summary decision inappropriate in this case." 35 FMSHRC at 2196 n.3. The Secretary's response to Respondent's summary decision motion makes clear that the Secretary certainly did contest Lewis-Goetz's diligence in enforcing its fall protection policy. Thus, the Judge's refusal to consider the Secretary's response prevented the Judge from understanding that the grant of summary decision was inappropriate under her own formulation of the issues.

Accordingly, I conclude that the Judge erred in granting summary decision. Because there was a material fact at issue—whether the operator diligently enforced its safety program—the Judge should have denied the motions for summary decision and conducted an evidentiary hearing.[3]

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

[2] My colleagues in the majority say that "[a]ny error by the Judge in excluding the Secretary's opposition is non-material and harmless at this stage of the proceeding, especially in light of our holding on the merits of this case." Slip op. at 3 n.4. Of course, if the case were being considered under the now-overruled principles of the *Southwestern* decisions, the error could not be considered harmless. In any event, my colleagues recognize that the Secretary does not concede that Lewis-Goetz's enforcement of its policy was adequate and, on remand, direct the Judge to consider the adequacy of the enforcement actions on the issue of negligence.

[3] In *Nally & Hamilton*, issued simultaneously with this decision, the Judge conducted a full evidentiary hearing. Based on the record of that hearing, I concluded that the evidence demonstrated that the operator violated section 77.1710(i) under *Southwestern I* because it lacked an appropriate monitoring tool to ensure compliance with its safety policy. It may be true, as Commissioner Young has determined, that Lewis-Goetz likewise violated section 77.1710(g) because of a failure of diligent enforcement of its safety policy. However, I cannot reach such a conclusion based on the sparse factual record before us.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. WHITE OAK RESOURCES, LLC,	Docket No. LAKE 2015-532 A.C. No. 11-03203-374211

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 3, 2015, the Commission received from White Oak Resources, LLC ("White Oak") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On March 6, 2015, White Oak received a proposed penalty assessment from the Secretary. On April 6, 2015, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

White Oak asserts that it timely contested the penalty assessment at issue. The Secretary does not oppose the request to reopen, and admits that it received a timely contest of the penalty assessment at issue on March 12, 2015.

Having reviewed White Oak's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the ... proposed assessment of penalty, ... the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, White Oak notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ William I. Althen
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July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KLONDEX MIDAS OPERATION, INC.	Docket No. WEST 2015-607 M A.C. No. 26-02314-361821

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. YORK 2015-90-M A.C. No. 43-00717-368207
v.	Docket No. YORK 2015-82-M A.C. No. 43-00717-371000
MOUNTAIN ROAD FARM SAND & GRAVEL	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). [1] The Commission has received two motions from the operator seeking to reopen two penalty assessments which had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motions.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2015-90-M and YORK 2015-82-M, which are both captioned Mountain Road Farm Sand & Gravel and involve similar procedural issues. 29 C.F.R. § 2700.12.

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

The granting of these motions is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WHIBCO OF NEW JERSEY, INC.	Docket No. YORK 2015-113 M A.C. No. 28-00546-378789

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/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
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. NEW NGC, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2015-155 A.C. No. 41-02822-368186 Mine: Harper Quarry
NEW NGC, INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. CENT 2015-37-RM Citation No. 8854429; 10/08/2014 Harper Quarry Mine ID 41-02822

DECISION

Appearances: Maria C. Rich, Conference and Litigation Representative,
U.S. Department of Labor, 1100 Commerce Street, Room 462
Dallas, TX 75242

Mary Cobb, Solicitor,
U.S. Department of Labor, 525 South Griffin Street, Suite 501
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Justin Winter, Conn Maciel Carey PLLC
5335 Wisconsin Ave., NW, Suite 660
Washington, DC 20015

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor (Secretary), acting through the Mine Safety and Health Administration (MSHA), against New NGC, Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The single citation, contested at hearing, involves alleged uncontrolled ground control hazards on a gypsum highwall at the Respondent's Harper Quarry surface mine site.

At hearing, MSHA Inspector James Whetsell testified for the Secretary. New NGC Quarry Manager Henry Wilson testified for the Respondent. Professional Mining Engineer John Head also presented expert testimony for the Respondent. For the reasons that follow, Citation No. 8854429 is **AFFIRMED** in full with the exception of the assessed negligence level. Due to mitigating circumstances I find the negligence level to be low rather than moderate thus the civil monetary penalty shall be reduced from $138 to $100.

II. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

New NGC operates the Harper Quarry surface gypsum mine eighteen miles northwest of Harper, Texas. Sec'y Ex. 4-1. At the time of the inspection at issue Harper Quarry had six miners, including the quarry manager, working on 400 acres. Tr. 73. They were actively mining a 250 foot east-west cut on the north wall. Tr. 74. The mining process involves miners stripping overburden then blasting to extract gypsum from the cut. *Id*. The miners drive Cat 740 articulated haul trucks along a haul road at the base of the highwall to remove the gypsum to a processing area. Tr. 24, 37. The haul road at issue was 200 feet long and 15 feet wide in the north-east section of the Quarry. Tr. 24. It was abutted by a small island to the west and a 19-20 foot tall highwall to the east. *Id*; Sec'y Ex. 5.

On October 8, 2014, Inspector Whetsell conducted an inspection of the east highwall and determined that it posed a hazardous ground condition to people using the 15 foot wide haul road at the bottom of the highwall. Tr. 24; Sec'y Ex. 1-1, Resp. Ex. R-A. He made his determination based on seeing vertical and horizontal cracks in the rock. Tr. 17, 22; Sec'y Ex. 1-1. Both parties presented testimony stating that fractures like the ones here could be a sign of loose rock. Tr. 17, 107. Loose rocks are at risk of falling. Tr. 26, 108. Inspector Whetsell opined that the fractured rock he observed were in his estimation upwards of 600 lbs. Tr. 26. Falling rocks of that size can result in serious injury or a fatality. Tr. 40.

The east highwall at issue was approximately twenty feet in height. Tr. 18, 30 & 97. The parties disagree about the slope of the highwall. Tr. 44, 89; Resp. Ex. E. If the highwall is sufficiently sloped and low, then falling rocks are more likely to roll and "unlikely to impact the driver of the truck." Tr. 105; Resp. Ex. E. If the loose rocks are on a more vertical and tall face of the highwall, they are more likely to fall and bounce making their landing unpredictable. Tr. 27. Inspector Whetsell maintained sections of the wall in question were near vertical. Tr. 44, 52. He further testified that rocks on the highwall might either roll, or fall and bounce. Tr. 27. The Respondent's engineering expert Mr. Head testified that the angle of the slope was closer to 60-70 degrees. Resp. Ex. E. Mr. Head also submitted in his report that the rocks were at most fourteen feet from the ground. *Id.* Taking these two facts together, he concluded the rocks could

only roll down the wall, not fall or bounce. Tr. 96. Inspector Whetsell and Mr. Head both agree that no matter how a rock separates from the highwall, it could potentially pose an obstacle to a haul truck or be a serious hazard to a pick-up truck. Tr. 34, 41, 99, 110.

The Respondent contends that cracks in the rock at the Harper Quarry mine site are not indicative of loose rocks because it is a gypsum mine. Tr. 95-96. Quarry Manager Wilson and Mr. Head testified that large cracks are not unusual for gypsum and only if the cracks move or grow do they pose a potential hazard. Tr. 86, 96, 106. Mr. Wilson testified that in his observations he had not seen the cracks at issue grow any larger during the weeks before the citation was issued. Tr. 86. Furthermore, Mr. Wilson maintained that the time it took to perform the citation abatement is evidence that the rocks were not loose. Tr. 82. Inspector Whetsell testified that there are many factors, not just the looseness of the rock, that could affect how long it takes to scale a highwall, and the time between issuing and terminating the citation was not excessive. Tr. 33, 63. Based on Mr. Wilson's testimony, it took 30-45 minutes to scale the hazardous portions of the highwall. Tr. 81-82. According to Citation No. 8854429, two hours and twenty five minutes passed between issuance and termination of the citation. Tr. 32; Sec'y Ex. 1-1. Neither Mr. Wilson nor Inspector Whetsell were present at the time of abatement. Tr. 61-62, 86. Whether or not the abatement took an excessive amount of time depends on how much of the highwall was scaled. Tr. 33, 82.

The exact size and amount of highwall that needed to be scaled is indeterminable because the dimensions relied upon are based solely on photos, and visual inspection by the Quarry Manager and the Inspector. Tr. 29, 102. The Respondent contends the loose rocks were only 12-14 feet high up on the wall pursuant to Mr Head's estimation and only a 20 foot or so length needed to be scaled according to Quarry Manager Wilson. Tr. 87; Resp. Ex. E. The Secretary maintains the hazard consisted of loose rocks closer to 17-19 feet high up and extended for 30 feet or more. Tr. 45, 111; Sec'y Ex. 2-2. I would note here that Mr. Head did not personally observe the fractured rocks or their location on the highwall prior to abatement as did Inspector Whetsell and Quarry Manager Wilson did not offer testimony regarding how far up the wall the fractured rock was observed. Accordingly, I defer to Inspector Whetsell's direct observations in this regard.

The inspector was concerned about the hazard posed by this particular highwall in the quarry since Mr. Wilson stated haul trucks would take anywhere between 30-60 trips each day on the haul road below the highwall. Tr. 37, 75. Inspector Whetsell reported seeing vehicle tracks and black smudging on the sides of the haul road indicating where trucks had rubbed alongside the wall. Tr. 24; Sec'y Ex. 2-1, Ex. 2-2. The two parties disagree over what types of vehicles used the haul road. Tr. 22, 31, 75; Sec'y Ex. 1-1. Inspector Whetsell recorded in the citation that a Cat 740B haul truck, a Volvo EC210BLC, and a Cat 980 front end loader use the haul road. Sec'y Ex. 1-1, Resp. Ex. R-A. During testimony, Inspector Whetsell further identified tracks in Sec'y Ex. 2-1 that he believes are evidence of pick-up trucks using the haul road as well. Tr. 22, 31. Mr. Wilson maintained that haul trucks and other large machinery used the haul road and pick-up trucks did not. Tr. 31, 75. However, Mr. Wilson also testified he drove his own vehicle, a pick-up truck, presumably on the haul road to inspect the highwall the very morning of the inspection. Tr. 84-85. This is contrary to what Inspector Whetsell states Mr. Wilson told him in that pick-up trucks never travel on that haul road. Tr. 30. Also, based on his experience as a

miner and inspector, Whetsell speculated that the miners most likely used the haul road to enter and exit the quarry. Tr. 31, 38, 55.

The types of vehicles that use the road effects the level of danger the hazardous ground condition poses to miners. Tr. 99, 110. Loose rocks could cause damage by either rolling into the road or rolling directly into a vehicle. Tr. 29, 110. A haul truck being hit by a rock sliding from 14 feet off the highwall might not impact the operator. Tr. 99, Resp. Ex. E. However, if a pick-up truck was hit by a rock falling from 17 feet it would cause a serious hazard. Tr. 110. In addition, if any vehicle ran over, or attempted to avoid, a fallen rock it could pose a serious hazard. Tr. 29. Depending on the vehicle, damage could range from blowing out a tire, to losing control and flipping the truck over, to direct damage to the operator. Tr. 29, 40, 48, 99, 110.

MSHA issued a proposed penalty assessment of $138.00 for Citation No. 8854429. Sec'y Ex. 1-1. Respondent contested Citation No. 8854429 claiming the rocks on the highwall were not loose, and even if they were, did not present a danger to the miners who used the haul road. Tr. 13.

III. PARTY ARGUMENTS

The Secretary argues that the conditions in Harper Quarry violate 30 C.F.R. § 56.3200, the violations are significant and substantial, and the operator was moderately negligent. Sec'y Posthearing Brief 3. The Secretary maintains there was a violation because like *MSHA v. Hoover*, 33 FMSHRC 751 (ALJ, March 11, 2011), there was an identifiable hazardous ground condition above a haul road with tracks indicating vehicle passage. Sec'y Br. 4. The Secretary maintains the violation was significant and substantial because the hazard was reasonably likely to result in an injury or illness of a reasonably serious nature. Sec'y Br. 7. The Secretary's claim is based on the rock being sufficiently loose to be at risk of falling, and their assumption that not only haul trucks, but also pick-up trucks and miners on foot use the haul road as a means of ingress and egress from the pit. Sec'y Br. 9. Based on the Inspector's testimony at the hearing claiming light vehicles and pedestrians used the haul road, the Secretary requests the type of injury expected should be increased to fatal. Sec'y Br. 4. Lastly, the Secretary maintains the mine operator was moderately negligent because the Quarry Manager identified the potential hazard, but did not test it for stability. Sec'y Br. 12.

The Respondent, argues there is no violation of 30 C.F.R. § 56.3200 because 1) the rocks at issue were not loose and 2) the miners were never in danger. Respondent's Posthearing Brief 4. The first argument is premised on the fact that it took a Volvo excavator with a jackhammer attachment 30-45 minutes to scale the area in question. Resp. Br. 7. Had the rocks been loose, Respondent maintains they would have come off the wall much faster. *Id.* The second argument is premised on the assumption that only haul trucks and similarly large equipment use the haul road. Resp. Br. 10. According to the expert testimony provided by the respondent, a falling rock could not impact the operator of a haul truck. Resp. Br. 11. Should the violation stand, the Respondent requests the likelihood of injury be reduced to no injury, and the significant and substantial designation be removed. Resp. Br. 14. The request to lower the seriousness of the citation is premised on the assumption that a haul truck operator driving at 5 miles an hour could not be hurt by a rock rolling into the haul truck or road from a height of 14 feet. Resp. Br. 11.

IV. ANALYSIS

A. Citation No. 8854429

MSHA Inspector James Whetsell issued Citation No. 8854429 for an alleged violation of 30 CFR § 56.3200 on October 8, 2014. Whetsell alleged within the citation that:

> There is loose cracked (vertical and horizontal) overhanging rock about 20 feet up on the North East Highwall above the haul road with rubber tire tracks against the East highwall. This narrow haul road about fifteen feet wide with a small wall on the West side forces traffic to run parallel against the highwall. There are tracks rubber tired, and cat next to the wall. The Cat 740B haul truck makes over 30 trips a day past this material. Other traffic includes the Volvo EC210 BLC Excavator with hammer, and Cat 980 Front end loader. If this condition were to go uncorrected a serious rock fall accident could occur.

Sec'y Ex. 1, 1. Whetsell designated Citation No. 8854429 as a moderate negligence violation that was likely to contribute to the occurrence of a permanently disabling injury. *Id*. Whetsell determined that the failure to remove or otherwise control the loose rock was significant and substantial. *Id*.

A violation of § 56.3200 requires:

> 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. Standard § 56.3200 requires the Secretary to show that (1) a dangerous condition exists and (2) work or travel occurs in the affected area. The Respondent contends the first part is not satisfied because the cracked highwall was not in danger of falling, or alternatively, the miners operating vehicles on the haul road were not in danger.

The Mine Act imposes on the Secretary the burden of proving the alleged violation by a preponderance of the credible evidence that the ground conditions present on the highwall created a hazard. *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. cir. 1998). A standard must provide adequate notice of required or prohibited conduct. *Lanham Coal Company*, 13 FMSHRC 1341, 1343 (September 1991). The reasonably prudent person test is used to assess whether a standard provides adequate notice of required conduct. *Martin Marietta Aggregates,* 26 FMSHRC 847, 848 (Nov. 2004). The standard is: "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co*., 12 FMSHRC 2409, 2416 (Nov. 1990). Applied to standard §56.3200, the question is whether the "reasonably prudent person" would have recognized the

cracked highwall as a ground condition hazard and abated it. *Martin Marietta Aggregates,* 26 FMSHRC at 848. To determine whether the condition of a highwall presents a hazard, the testimony of "experienced observers" is relevant. *Id.* (*citing Ideal Cement Co.,* 12 FMSHRC 2409, 2416 (Nov. 1990)).

The first element of 30 C.F.R. § 56.3200 is to determine whether a dangerous condition exists. Whetsell observed the highwall first hand and determined it posed a hazard based on his 41 years of experience, MSHA training, and inspection of "thousands of highwalls." Tr. 16. Furthermore, based on a review of photos and conversations with the Quarry Manager, Respondent's expert witness testified that the cracks in question "very well may" have caused him concern. Tr. 107. Quarry Manager Wilson testified that because of the unique elastic qualities of gypsum, the cracks were not of concern to him. Tr. 85-86. In fact, he testified he had been inspecting the highwall regularly and had not seen any movement or expanding in the cracks in the past couple of weeks. *Id.* Also Mr. Wilson did not report any unplanned separation from the highwall face. Tr. 78. However, there is no documentation to corroborate Mr. Wilson's claims that the cracks have not widened or moved. Tr. 106-107. The only evidence that supports Mr. Wilson's statements is his testimony that alleged scaling the wall was difficult and time consuming. Tr. 82-83. Mr. Wilson was not present at the time of scaling and is basing his description of the scaling effort on a conversation with the excavator operator. Tr. 86. In addition, there are discrepancies in Mr. Wilson's testimony, denigrating his credibility.

When the citation was issued, Mr. Wilson told Inspector Whetsell that he only drove his pick-up truck on the secondary road. Tr. 30. However, during the hearing, he testified to driving his pick-up truck to visually inspect the highwall with a spotlight in the dark on the very morning the citation was issued. Tr. 84. Wilson also testified that only haul trucks use the haul road. Tr. 75. However, photo exhibits of the haul road show excavator and pick-up truck tracks as well. Sec'y Ex. 2-1. Lastly, according to Inspector Whetsell's testimony, when the citation was issued Mr. Wilson said there were about 30 trips on the haul road a day. Tr. 30. Yet at trial Mr. Wilson testified that there were between 50 and 60 trips on the haul road a day. Tr. 75. Weighing the opinion and testimony of Mr. Wilson and Respondent's expert, Mr. Head, who did not personally observe the hazardous condition against the opinion and testimony of Inspector Whetsell, I credit the testimony of the Inspector that a hazardous ground condition existed.

The Respondent further contends that even if the highwall was a hazardous ground condition, it was not dangerous to people because, it alleges, only large vehicles used the haul road. The Respondent's expert, Mr. Head convincingly demonstrated that there was little to no likelihood that a haul truck driver would be directly impacted by a rock. Resp. Ex. E. However, in his report Mr. Head does not address any of the other ways a falling rock could cause serious injury besides direct impact. *Id*. During the hearing, the Secretary established through Inspector Whetsell's testimony that a rock in the road way could still cause serious injury to a haul truck driver by potentially causing the driver to lose control and wreck his vehicle. Tr. 29. The Respondent's expert also corroborates the Inspector's conclusions by stating fallen rocks could very well "hit the side of the truck…hit the tire tracks…present themselves as obstacles in the middle of the road…". Tr. 99. If pick-up trucks used the haul road the likelihood falling rocks would cause serious injury is much greater. Tr. 34, 40. Inspector Whetsell pointed out tracks on the haul road that he identified as pick-up truck tracks. Tr. 37; Sec'y Ex. 2-1. In his testimony

Mr. Wilson admitted to driving his pick-up truck to perform a visual inspection with a spotlight the morning of the citation. Tr. 84. Based on exhibit 2-1, the testimony of Inspector Whetsell, and the testimony of Mr. Wilson, I find pick-up trucks did use the haul road.

The Secretary also alleges that pedestrians used the haul road. Sec'y Br. 4. However, there is not enough substantial evidence in the record to determine with certainty that pedestrians used the haul road. From his experience as a miner, Inspector Whetsell assumes pedestrians used the haul road. Tr. 31, 38, 40. Despite not having a company policy to the contrary, Quarry Manager Wilson testified they try not to use the haul road as a pedestrian path. Tr. 83. There is no concrete evidence of foot traffic on the haul road. Without more information, the assumption that there is foot traffic on the haul road is only speculation. Therefore, I deny the Secretary's request to increase the gravity of the injury to fatal.

The second element of 30 C.F.R. § 56.3200 is to show that either work or travel occurs in the affected area. There is undisputed evidence of vehicle tracks on the haul road indicating people travel through the hazardous condition. Sec'y Ex. 2-1, 2-2.

I have relied upon the exhibits, the hearing, and credibility assessments of the witnesses to reach my conclusions. Considering Inspector Whetsell has 41 years of experience with mining operations, he reviewed the highwall firsthand, his concern for the cracks was corroborated by the respondent's expert, and there is evidence people traveled in both large vehicles and pick-up trucks in the hazardous area, I affirm that 30 CFR §56.3200 was violated.

B. Significant and Substantial

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 an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984). An S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of ongoing mining operations. *Texasgulf Inc.,* 10 FMSHRC 498, 501 (Apr. 1988); *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). The absence of an injury producing event when the cited practice occurred does not preclude an S&S determination. *Elk Run Coal Co.,* 27 FMSHRC 899, 906 (Dec. 2005). The standard of review for the third prong requires some clarification. The third prong focuses on whether the hazard contributed to by the violation

will cause an injury. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (2010). For the third prong, the relevant hazard should be assumed. *Peabody Midwest Min., LLC v. Federal Mine Safety and Health Review Com'n*, 762 F.3d 611, 613 (7th Cir.) (Aug. 2014); *Knox Creek Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin.*, 811 F.3d 148, 164 (4th Cir.) (Jan. 2016).

The first prong is satisfied because I have found a violation occurred. The second prong is satisfied because the violation – failing to abate hazardous ground conditions – does contribute to a discrete safety hazard. In this case, the danger is loose rocks falling on the haul road where miners travel. A highwall is likely to crack when it is shot; exposed to weather such as humidity, freezing, or thawing; and exposed to vibrations from passing trucks. Tr. 27. The last time the wall was shot was a week or so prior to inspection. Tr. 53, 69. Inspector Whetsell testified that this is most likely when the cracks were formed. Tr. 69. Humidity and rain are potential destabilizing factors, but freezing and thawing likely were not because of the time of year. Tr. 27. Due to the proximity of the passing trucks to the highwall, approximately 18-24 inches, I credit Inspector Whetsell's testimony that vibrations from haul trucks making 30 to 60 trips per day could adversely affect the stability of the highwall. Tr. 27-28. The potential for future shooting as part of regular mining operations, normal weathering, the passage of time, vibrations from passing haul trucks, plus gravity mean the cracks on the highwall would reasonably be expected to result in falling rocks Tr. 27.

The third and fourth prongs are satisfied because falling rocks are reasonably likely to cause an injury, and that injury is reasonably likely to be serious. The potential serious injury is based on the fact that along with haul trucks and large machinery, there is evidence that pick-up trucks used the haul road as well. Sec'y Ex. 2-1, Tr. 84. While the injury to a haul truck driver may not assuredly constitute a serious injury, the potential damage to a person driving a pick-up truck would certainly constitute a serious injury. Tr. 34. A rock upwards of 600 lbs. falling from 19ft. could pulverize a passing pick-up truck. *Id.* I find all of the elements have been met to find the violation significant and substantial.

C. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X. These regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis. Under such an 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." *Brody*, 37 FMSHRC at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res*., 36 FMSHRC 1972, 1975 (Aug. 2014).

Quarry Manager Wilson acknowledged he had seen the cracks that worried Inspector Whetsell. Tr. 76. He did not think they were concerning, however, because the nature of Harper Quarry gypsum was to crack. *Id.* Despite the failure to scale a visibly cracked highwall, mine operations were consistent with what a reasonably prudent person would do. First, the miners at Harper Quarry scale the walls every time after they blast. Tr. 74. Second, Mr. Wilson inspects the mine every morning. Tr. 84. Third, Harper Quarry mine site has an excellent safety record in general with only three violations over the past two years, none of which involved loose ground conditions. Sec'y Ex 3-1. Taking these facts into consideration, I find that a low rather than a moderate negligence level is most appropriate.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assed penalty of $138.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec'y Petition, Ex. A.

The Respondent is a mid-size operator with low rate of total violations per inspection day and no recent history of prior ground control violations. I have found that the Respondent acted with low negligence. The parties have stipulated that the proposed penalty will not affect its ability to continue in business. Tr. 6. I have found that the violation was likely to result in a permanently disabling injury. The parties have stipulated that the Respondent promptly abated the violation by scaling down the loose overhanging material. Sec'y Ex. 1, 1; Tr. 6.

After considering this evidence in light of the six statutory factors and in consideration of the lowered negligence level I find a penalty amount of $100 to be appropriate.

VI. ORDER

The Respondent, New NGC, Inc., is **ORDERED** to pay the Secretary of Labor the sum of **$100.00** within 30 days of this order.[1] The associated notice of contest proceeding CENT 2015-37 is **DISMISSED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 15, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS DOCKET NO. LAKE 2012-0898 A.C. No. 11-03058-299585-01
v.	DOCKET NO. LAKE 2012-0899 A.C. No. 11-03058-200595-02
WHITE COUNTY COAL, LLC, Respondent	Mine: Pattiki Mine

DECISION AND ORDER

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Gary D. McCollum, Esq., White County Coal, LLC, Lexington, KY, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves two dockets with two citations each, all relating to the Respondent's Pattiki mine, which were litigated at a hearing held on February 4, 2014, in Henderson, Kentucky.[1] MSHA conducted two inspections, the first on June 12, 2012, and the second on July 30, 2012. These case dockets resulted from those inspections.

LAKE 2012-0898 originally comprised two 104(a) citations, one 104(d) citation, and three 104(d) orders. All but the 104(d) citation and one 104(d) order were settled by the

[1] The trial was scheduled for two days. Because of inclement weather, the trial was stopped at the end of the first day's presentation. The presentation of evidence was completed by written submission. MSHA witness, Rodney Adamson's testimony was submitted by affidavit. Ex. A.

parties, prior to the hearing.[2] At the hearing, LAKE 2012-0898 comprised Citation No. 8438790, a Section 104(d) citation, alleging a violation of 30 C.F.R. § 75.400, and Citation No. 8438791, a Section 104(d)(1) order, alleging a violation of 30 C.F.R. § 75.360(a)(1). LAKE 2012-0899 originally comprised three citations; one was settled prior to the hearing, leaving two 104(a) Citations: Citation No. 8447018, alleging a violation of 30 C.F.R. §75.1506(b)(2), and Citation No. 8447019, alleging a violation of 30 C.F.R. § 75.1506(a)(3).

STIPULATIONS

1. White County Coal was at all times relevant to these proceedings engaged in mining activities at the Pattiki Mine, in or near Carmi, Illinois.

2. White County's mining operations affect interstate commerce.

3. White County is subject to the jurisdiction of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. Section 801, *et seq*.

4. White County is an "operator" as that word is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 803(d), at the Pattiki Mine, Federal Mine ID No. 11-03068, where the contested citations in these proceedings were issued.

5. The administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act.

6. On June 12, 2012, MSHA Inspector Kenneth Benedict 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 LAKE 201-0898, at issue in these proceedings.

7. On July 30, 2012, MSHA Inspector Terry A. Hudson 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 LAKE 2012-0899, at issue in these proceedings.

[2] Three matters originally related to this case were settled prior to the hearing. Citation No. 8431484 was modified from Reasonably Likely/S&S to Unlikely/Non-S&S, Order No. 8431485 was modified from a Section 104(d)(1) order to a Section 104(a) citation, and Order 8431486 was modified from a Section 104(d)(1) order to a Section 104(a) citation. Section 104(a) Citation No. 8431486 is the only citation remaining unchanged as a result of the parties' partial settlement. These citations were dismissed in a Decision Approving Partial Settlement on October 30, 2013. *See* Dec. Approving Part. Settlement, Order to Modify, Order to Pay (Oct. 30, 2013).

8. The citations at issue in these proceedings were properly served upon White County as required by the Mine Act.

9. 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.

10. White County demonstrated good faith in abating the violations.

11. At all times relevant to these citations, White County produced in excess of two million tons of coal annually.

12. Without White County 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 White County to continue in business.

Tr. 8-9; Jt. Pre-Hearing Report.

Basic Legal Principles

Significant and Substantial

One of the citations in dispute and discussed below has been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

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.

Mathies Coal Co., 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,* 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." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (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.*; *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)). 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).

Unwarrantable Failure

A violation of a standard is an unwarrantable failure if it demonstrates "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp*., 9 FMSHRC 1997, 2004 (1987). A violation is also an unwarrantable failure if it demonstrates the operator's "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). A court must examine all relevant facts and circumstances to determine whether an operator's conduct is aggravated or whether mitigation is present. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Specific factors to consider to determine whether a violation constitutes an unwarrantable failure include: 1) the length of time that the violation has existed, 2) the extent of the violative condition, 3) whether the operator has been placed on notice that greater efforts were necessary for compliance, 4) the operator's efforts in abating the violative condition, 5) whether the violation was obvious or posed a high degree of danger and 6) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

Burden of Proof

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,* 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878

(Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

Negligence

Negligence is relevant in cases under the Mine Act, but since the Act creates a strict liability enforcement model[3], negligence is not an essential part of the calculus to determine whether an operator is at fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required; irrespective of fault.[4] Negligence is, however, central to the assessment of civil penalties and to the evaluation of the enhanced enforcement elements of S&S-unwarrantable failure, and flagrant violation.

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

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

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the

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[3] "*If, upon inspection or investigation, the Secretary* or his authorized representative *believes that an operator* of a coal or other mine subject to this chapter *has violated* this chapter, or *any mandatory health or safety standard, rule, order, or regulation* promulgated pursuant to this chapter, *he shall, with reasonable promptness, issue a citation to the operator*." 30 U.S.C.A. § 814(a) (emphasis added). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc*., 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636.

> appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

A. H. Smith Stone Co., 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

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

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); *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). 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 assessed assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Penalty

The principles governing the authority of Commission 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 also American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ)(explaining that based upon the statutory language, the Commission alone is tasked with assessing final penalties).

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 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). 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 Eng'g*, 32 FMSHRC 1257, 1289 (Oct. 2010)(holding that the judge was justified in relying on utmost gravity and gross negligence in imposing a penalty substantially higher than that proposed by the Secretary); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (finding it appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that the 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* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592-01, 13,621(Mar. 22, 2007)(codified at 30 C.F.R. pt. 100).

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

> 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.

Sellersburg Stone, 5 FMSHRC at 293.

Special Assessment

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

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[5] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id*. The narrative findings for special assessments are typically brief and conclusory. The Secretary's proposed special assessment is not binding on the Commission; the Commission imposes civil penalties *de novo*.

DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

LAKE 2012-0898: Citation No. 8438790

In Citation No. 8438790, the Secretary alleged that White County Coal ("WCC") violated 30 C.F.R. §75.400[6] because of material accumulations observed by MSHA Inspector Benedict in three areas near Unit No. 2's third belt line during his E01 inspection of the Pattiki Mine on June 12, 2012. Benedict testified that he observed fine coal accumulations: (1) on the outby side of the takeup roller; (2) along the walkway on both sides of the belt extending the full length of the drive and the takeup assembly; and (3)

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

[6] Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein. 30 C.F.R. § 75.400.

under the bottom rollers of the drive two crosscuts inby the belt header. Tr. 51-52. The citation text described the following violating conditions:

> Coal, coal fines, and coal dust (dark in color) has been allowed to accumulate on the mine floor along the Unit #2's 3rd belt from the head roller to 2 crosscuts inby. The accumulations of coal fines on the outby side of the take-up roller measured 18 inches by 4 feet wide by 3 feet in length and the rotating belt conveyor was rubbing the packed coal fines. The walkway on both sides of the belt has 2 inches to 4 inches of coal accumulated along it for the full length of the drive and take-up assembly and has been rock dusted over. There are fine coal piles 4 to 12 inches in depth under the bottom rollers from the drive 2 crosscuts inby. Standard 75.400 was cited 110 times in two years at mine 1103058 (110 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-3.

The parties agree that there were material accumulations in the three locations relevant to this dispute, and WCC admits that these accumulations violated the relevant standard. However, WCC challenges the "reasonably likely" gravity designation, the S&S designation, the unwarrantable failure charge, and the penalty assessment. Resp. Post-Hearing Br. p. 11. Inspector Benedict testified that the large collection of coal fines on the outby side of the take-up roller (the third listed location) was the impetus for the enhanced enforcement order he wrote. Tr. 64, 124-25, 145.[7] Therefore, this discussion focuses on the third location.

Inspectors Kenneth Benedict and Phillip Stanley presented notably synoptic versions of what they saw, albeit lacking in documentary confirmation. Tr. 89-90, 152, 154-155, 158, 161. WCC's witnesses relayed a version that casts doubt on the inspectors' testimony, is functionally more consistent with normal mining operations, and is supported by contemporaneous notes.

Of greatest importance to the outcome of this decision is whether the accumulations were combustible. "Combustible" is defined at 30 C.F.R. § 57.2 as "capable of being ignited and consumed by fire." *FMC Corp*., 6 FMSHRC 1566, 1567 n. 4 (July 1984). It is the Secretary's burden to convince the court that the accumulations were combustible. The Secretary failed to do this. For the reasons developed below, I conclude that the accumulations were not combustible. As a result, the S&S charge fails. It is not reasonably likely that non-combustible material will cause an event that is, in turn, reasonably likely to result in serious injury.

Of similar import is my decision that the level of negligence attributable to the buildup of accumulations is no more than "moderate." The Secretary's claim that this violation arose as a result of an unwarrantable failure on WCC's part, requires a finding of at least "high" negligence and a constellation of aggravating factors. Without "high"

negligence or a sufficiently convincing list of elements which show "aggravated conduct constituting more than ordinary negligence," the Secretary has not proved an unwarrantable failure. *Emery Mining Corp.,*1997, 2001, 2003-04 (Dec. 1987).

What remains is a simple violation of 30 C.F.R. §75.400.

Discussion

Belt Friction

According to the inspectors' testimony, the accumulations had to be in friction contact with the belt in order to create a fire hazard. Tr. 36. Both inspectors testified that the belt made contact with the accumulations (Tr. 23-24, 89), however, WCC showed that Benedict did not remember many of the details surrounding this issuance because more than two years had passed (Tr. 55), and his field notes were silent about some of the accumulations being in contact with the belt (Tr. 55-56), implying that he would have noted it if it had been true. Ex. S-5.[8] One of WCC's witnesses, Lonnie Garrett, denied at one point (Tr. 108) and then conceded at another (Tr. 130) that there was friction contact. Finally, Thomas Smith admitted that there was friction contact. Tr. 140. I find that the moving belt line rubbed across the accumulations. I find further that this constituted a hazard and should have been regarded as such by WCC.

Composition of the accumulations

The fire hazard Benedict had in mind when he wrote this order requires that the accumulated material be combustible. Tr. 21. This is consistent with the wording of the standard 30 C.F.R. §75.400. *See supra* note 6. He testified that the accumulations at the friction point were dry and that dry coal dust can be as volatile as gun powder. Tr. 22. He described the accumulations as generally dark-to-black in color. Tr. 21-22, 157. Both Benedict and Stanley testified that the material they observed consisted predominately of pulverized coal fines which had changed color where it had been heated by friction from the belt line. Tr. 151. The citation narrative alleges that the accumulations consisted of "coal fines." Ex. S-3. Benedict's field notes mention "coal, coal dust, and coal fines." Ex. S-5, pp. 3 - 4. Significantly, Benedict did not test the accumulations to determine if they were combustible. Tr. 54.

In contrast, WCC's witnesses Garrett and Smith testified that the accumulated material was an amalgam of bottom clay (Tr. 109,146), coal fines (Tr.146), water (Tr. 140,146), and rock dust (Tr.147), all of which affect the combustibility of the accumulations. Tr.111, 146. The less coal dust and the more non-combustible material in the mixture, the less combustible it is. Tr. 23, 146. The less combustible the mélange, the less likely it is that the proposed gravity, S&S, and unwarrantable failure elements are justified.

The testimony about the amount of water in the accumulations is particularly important. The belt line above the contested accumulations was fitted with a water spray

system that operated whenever the belt line was moving. Tr. 113, 141. The belt line had been running at least from the beginning of the shift[9] to the moment it was shut down to facilitate the abatement clean up. Tr. 63. The MSHA inspectors testified that they did not notice the spray system (Tr. 115), but WCC's witnesses stated that not only was the spray system in place and operating, the accumulated material at issue here was wet -- so wet that Tom Smith said he saw Lonnie Garrett form a handful of it into a ball. Tr.109,146.[10]

S&S requires a reasonable likelihood that the violating condition will result in an injury and that such injury be reasonably likely to be serious in nature. The Secretary has the burden to prove that the accumulations were combustible. *The Pittsburg and Midway Coal Mining Co.*, 2 FMSHRC 3049, 3050-51 (Oct. 1980) (ALJ). The preponderance of evidence supports a finding that the material was wet, composed of an undetermined mixture of coal fines and non-combustible material, and not easily combustible. Therefore, the belt friction found in the previous section does not support a conclusion of S&S or unwarrantable failure.

Gravity

Wet accumulations of mixed materials in the presence of a friction source – the only source of serious injury identified by Benedict – are not likely to result in an injury, even assuming the violation persists as a part of normal continued mining operations, which would presume the conditions extant at the time and place of the violation, i.e., wet material, would remain until a cleanup was done. If they did contribute to the likelihood of an injury, the injury would not be combustion related and would not be reasonably likely to be serious in nature. The appropriate gravity designation for this violation is "unlikely" to cause injury or illness. I will not speculate about serious injury attributable to other theoretical possibilities.

Negligence

WCC allowed accumulations to build up over a period of days and several work shifts. It was also aware of the buildup as it happened. It argues that its awareness of the buildup and failure to clean up before the inspection were consistent with its view that the accumulations did not present a hazard. Given the fact that the accumulations consisted of a mixture of coal fines, rock dust, and other non-combustible elements and they were too wet to allow friction combustion, the urgency of performing a cleanup before the inspection was low in both WCC's and court's opinion. This is a significant mitigating factor which prompts me to characterize WCC's negligence as "moderate."

[9] The shift began at 7:30 a.m., and the inspection was done at 8:00 a.m. Tr.119.

[10] The Secretary's witness, Kenneth Benedict, denied seeing Garrett make a ball out of the wet material. Tr. 160.

Unwarrantable failure

Unwarrantable failure requires a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Relevant factors to consider in determining whether the operator is guilty of aggravated conduct include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Benedict alleged that WCC unwarrantably failed to comply with the mandatory standard based on: (1) the amount of accumulations (Tr. 34-35); (2) their obviousness (Tr. 29); (3) the presence of mine examiners in the area (Tr. 37); (4) WCC's repeated failure to note a hazard (Tr. 34-36); (5) the high degree of danger inherent in the belt rubbing on accumulated coal fines (Tr. 36); and (6) WCC's probable knowledge of the violating condition based on their having applied rock dust to some parts of the area. Tr.36-37.[11]

Since there was not a high degree of danger that the wet accumulations would cause a fire, the unwarrantable failure analysis must focus on evidence showing aggravated conduct. Although under Section 814(d) of the Mine Act a finding of unwarrantable failure requires more than ordinary negligence, the Commission and relevant federal appeals courts have found that the 30 C.F.R. § 100(3)(d) negligence terms used for calculating monetary penalties should not be directly linked with the unwarrantable failure analysis. A finding of "moderate negligence" does not necessarily preclude a finding of unwarrantable failure any more than a finding of "high negligence" or greater requires it. *See Excel Mining, LLC v. Dep't of Labor*, 497 F. App'x 78, 79 (D.C. Cir. 2013), and cases cited therein.

Extent and Obviousness of the Accumulations

Without a fire danger, the extent of the accumulations becomes the focus for evaluating whether the violation was the result of aggravated conduct and justifies a finding of unwarrantable failure.

The shift just before Benedict's inspection was non-production. Tr. 19, 76-77, 143. Garrett argued that in the course of normal start-up following a non-production shift, it was possible that a volume of material consistent with what the witnesses saw under and around the belt line could have fallen or been scraped off the belt line. Tr. 119. In his experience, belts are most likely to experience spillage at the time they are restarted. Tr. 121.

[11] Benedict did not sample the rock dust on the coal accumulation to see if it was combustible. Tr. 54.

The Secretary contended that the amount of accumulated material was more consistent with a gradual buildup spanning several shifts, including the non-production shift.[12] Inspector Benedict believed that in order for so much material to accumulate, it would require much more time for the material to pulverize than the few hours since the belt line was started up again after the non-production shift (Tr. 159), although he agreed it was theoretically possible. Tr. 162.

On balance, I find that the accumulations accrued over a period of several work shifts.

WCC Knew That Material Was Accumulating

Benedict testified that WCC was on notice of belt line accumulation problems. Benedict was at the mine the day before and wrote another citation for coal accumulations along a different belt line. Tr. 68-69. Garrett testified that Benedict did not tell management that another citation for the same violation would result in a 104(d) order and elevated enforcement. Tr. 69-70, 126-127. Benedict may have warned them in general that they had to do a better job of keeping the belt lines clean, but he went from not issuing an elevated citation the day before to writing a 104(d) on June 12. Tr. 70.

The Secretary points out that the pre-shift examination records show that WCC was aware that accumulations were building for at least two days and multiple work shifts, but did nothing about them until this order was issued. WCC counters that although they were aware of some accumulations, they were neither extensive nor obvious enough to be considered a hazard needing immediate attention.

Inspector Stanley characterized the accumulations as obvious and so extensive that anyone in the area would have been able to see them. Tr. 89. Tom Smith, Safety Assistant for WCC (Tr. 135), accompanied Stanley to the belt area described in the order (Tr.139; Ex. S-3 and S-4) and observed material accumulations under the bottom rollers inby the head roller, as alleged in Ex. S-3.[13]

I find that WCC was aware that the accumulations were building up.

Existence of a Hazard

Lonnie Garrett testified that he did not consider these accumulations to be a hazard. In his opinion, the belt scraper had scraped material off the belt line onto the ground in the period between when the belt line started that morning and the inspection. Tr. 112-119. He saw no sign of friction heat in the area, therefore there was no hazard. Tr. 120.

[13] Smith testified, contrary to the two inspectors, that the accumulations were not in contact with the belt. He noted more than three feet of clearance from the belt to the material. Tr. 147-48.

WCC argued that there is a difference between their noting the presence of some accumulations over a period of time and the accumulations being so extensive and obvious as to require a finding of unwarrantable failure. In other words, WCC argued that it was only required to take action if the accumulations were so extensive and persistent as to constitute a hazard, *in its opinion*. This misses the point of the reasonable person test so broadly applied in Commission decisions.

The reasonable person test requires that an operator take action if a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have acted to provide the protection intended by the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). This objective test requires the court to weigh the evidence and apply reasonable inferences rather than merely accept the testimony of the operator.

WCC mingles its argument about the non-combustibility of the accumulations with its claim that it did not consider the building accumulations a hazard and therefore did nothing to deal with them prior to this inspection. It argues that because the accumulations were not combustible – primarily because of the presence of the water spray system – it was justified in not removing them although it was aware for some time that they were present and growing.

I find that WCC was on notice that it needed to remove the accumulations.

In summary, the accumulated material was extensive, and WCC knew that it needed attention; the material accumulation was noted in the DTI records. However, the material was wet and non-combustible under normal mining operations, and the level of negligence attributable to WCC's violation was no greater than "moderate." Some factors support a finding of aggravated conduct; others do not. On balance, I conclude that WCC's failure to remove the accumulations prior to the inspection does not rise to the level of aggravated conduct and does not support a finding of unwarrantable failure.[14]

Penalty

The Secretary proposed a specially assessed penalty of $38,000.00 for this violation (Citation No. 8438790). WCC asked the court to reject the Secretary's special

[14] WCC claimed that Inspector Benedict's issuance of a 104(d) citation for these accumulations was inconsistent with the way in which he handled the abatement. It argued that Benedict's decision to designate this violation as S&S and unwarrantable was inconsistent with his apparent impatience to get the situation cleaned up just enough to restore coal production. It claimed that a team of a few workers cleared enough of the accumulations away from the belt line in only a few minutes to prevent any further friction contact (Tr. 23-24, 63-64), and that Benedict was notably preoccupied with restoring coal production as soon as possible so that his respirable dust sampling – the primary reason for his being at the Patiki mine that day (Tr. 13, 16, 86, 105,135-136) – could continue and would produce reliable readings. Tr.123, 145.

assessment request. Resp. Post-hearing Br., p. 20. The exhibits supporting Secretary's recommended special assessment, Exhibits S-1, S-2 and S-3, show nothing out of the ordinary to warrant a penalty of $38,000.00. The special assessment narrative form merely recites the basic allegations regarding gravity, negligence, and prompt abatement. It makes reference to the violation history (Ex. S-1), number of inspection days, and mine and company size shown on the standard penalty worksheet (submitted with the Secretary's Petition for Assessment of Civil Penalty) used for all violations. Of that, the only data possibly bearing on whether a penalty should be specially assessed are the number of inspection days (588) and the related number of violations (550).

Turning to the testimony offered at trial, there is nothing specifically relevant to the proposed special penalty assessment. The trial evidence pertains only to the basic elements of gravity, negligence, S&S, and unwarrantable failure discussed above.

The Secretary has given the court no evidence above or beyond that relating to the basic and standard elements of the violation on which to evaluate whether the proposed special assessment should be sustained. It is the Secretary's burden to support his request for special assessment with competent evidence. Failing that, the court has no choice but to reject the special assessment.

What remains are findings of "unlikely" gravity, "moderate" negligence, non-S&S, and no aggravated conduct to support an unwarrantable failure finding. According to the penalty packet submitted with the Petition, the mine produces over 2,000,000 tons of coal per year. The penalty I assess here is appropriate to the size of WCC's business.

The parties stipulated that the proposed penalty ($38,000.00) would not affect WCC's ability to stay in business (Jt. Pre-Hearing Report, Stip. 12), and that WCC exercised reasonable diligence in abating the citation. Jt. Pre-Hearing Report, Stip. 10.

Roughly applying the calculus set out in 30 CFR §100.3 to the findings relevant to the regular assessment of penalties, I conclude that a penalty of $165.00 is appropriate for this violation.

Order No. 8438791

Inspector Benedict issued the 104(d)(1) Order No. 8438791 (Ex. S-4) on June 12, 2012, alleging that WCC violated 30 CFR § 75.360(a)(1)[16] by failing to perform an adequate pre-shift examination relating to the same material accumulations and area of the mine discussed above. Tr. 40. Because the belts in question had not been in operation during the preceding maintenance shift (Tr. 142-43), Benedict concluded that the accumulations had to have been present and discoverable for at least two production shifts prior to his inspection. Tr. 27. He believed WCC's management knew about the accumulations because anyone performing a pre-shift exam would document the exam on the DTI board[17] located in the immediate area of the accumulations. Tr. 25-29, 41. Benedict also believed that the DTI records were silent about the accumulations. Tr. 37-38, 46; Ex. S-7, S-8, S-9, S-10, and S-11. He was convinced that WCC did not perform a competent or adequate pre-shift examination.[18]

Benedict's citation narrative described the following conditions:

> An adequate pre-shift examination has not been performed at the Unit #2's second belt conveyor tail piece area and the Unit #2's 3rd belt drive / take-up transfer areas due to the following reasons: These two conveyor belts have accumulations that were quite obvious to the most casual observer when checked by MSHA at 0800. The belts had not been running on the previous shift so the accumulations would have been present for at least two production shifts prior. Citation #8438789 was written on the Unit #2 second belt and Citation #8438790 was written on the Unit #2 third belt drive and take-up area. The DTI board in this area had been dated 6/12 @ 4:55 a.m.

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[16] 30 CFR § 75.360(a)(1):

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

[17] DTI is the acronym for "Dates, Times, and Initials."

[18] Lonnie Garrett testified that he made a DTI entry on June 10, 2012, for which corrective action was taken on June 11 and 12, even though he did not consider the conditions to be hazards. Tr. 133-34.

> by M.P. and was 6/11 @ 12:50 by J.H. There were not [sic.] hazards listed in the examiner's books for this purpose on the surface. Standard 75.360 (a) (1) was cited 2 times in two years at mine 1103058 (2 to the operator, 0 to a contractor). This violation was an unwarrantable failure to comply with a mandatory standard.

Ex. S-4.

Discussion

There is no question that a WCC agent had been in the area to conduct a pre-shift examination. Lonnie Garrett made a notation in the DTI records for the area in question at 4:55 a.m. on June 12, 2012. Ex. S-4). He wrote "OK" in the area of the DTI record book (right side) where hazards or violations were to be documented. Ex. S-8, S-9, S-10, and S-11. WCC's exhibits R-16 and R-17 show the opposite (left) side of the oversized DTI record book (Tr.94), a section Benedict did not note when he issued this order. Tr.60-62. Benedict attended only to the right side page of the record book where the "OK" notation was made. Tr. 37. It is reasonably clear that the "OK" notation is related to the detail on the left side of the DTI record pages. Ex. R-16, R-17. It is also sufficiently clear that, although there is little detail about the violating condition, corrective (mitigating) action was taken to remedy the condition. The left side records show a pre-shift examination entry made on June 10 (also not considered by Benedict) and that "cleaning and dusting" was needed and was apparently done on June 11 and 12. Tr. 60-61. Despite questioning and argument by the Secretary suggesting that R-16 and R-17 had been falsified after-the-fact (Tr. 61-62), they are reliable enough to establish that WCC's examination agent observed and noted a condition that in his view needed corrective attention, and that "cleaning and dusting" was done in the area prior to Benedict's inspection.[19] A pre-shift examination was performed. The question remains whether it was meaningful or effective.

If the conditions observed by Garrett and noted on the right side of the DTI record page as "OK" describe the conditions existing at the time of the pre-shift examination, there was no violation, and the order should be vacated as WCC urges. Also, if the conditions observed by Benedict – which WCC admits constituted a violation of the related regulation (Tr. 108, 110, 120, 125-126, 146) – accreted between 4:55 a.m. and 8:10 a.m. as the belt line was being transitioned from maintenance to production (Tr. 116, 143), the examination was effective and the order should be vacated. But, if they were present in sufficient volume to have been an unaddressed violation at the time of the pre-shift examination, the pre-shift examination was ineffective and nugatory. *See Energy Fuels Coal, Inc*., 18 FMSHRC 171, 176 (Feb. 1996) (ALJ); *see also Enlow ForkMining Co.*, 19 FMSHRC 5, 12-13 (Jan. 1997); *Shelby Mining Co.*, LLC, 31 FMSHRC 1501, 1510 (Dec.

[19] This is consistent with the evidence about there being rock dust in the accumulations that are the subject of Citation No. 8438790. Ex. S-3; Tr. 36-37,147.

2009) (ALJ) ("The critical question is whether the conditions existed at the time of the preshift examination.").

Violation

The pro-forma pre-shift examination was ineffective due to: (1) the amount of material accumulated at the time of the pre-shift exam; and, (2) the failure of the "OK" notation in the DTI records to trigger an effective clean-up before the inspection. For the reasons that follow, I find that the material observed by Benedict was present in sufficient quantity at the time of the pre-shift examination to render Garrett's pre-shift examination functionally and legally ineffective.

Inspector Benedict saw the accumulations in the area of the DTI board, inspected the DTI records, and reviewed the pre-shift book at the surface. Tr. 37. The DTI records showed that a pre-shift examiner (Lonnie Garrett) had been in the immediate area of the accumulations shortly before Benedict's inspection. Tr. 37-38. The DTI records that Benedict reviewed did not specifically note any hazards (or violations) in the area. Tr. 38; Ex. S-7, S-8, S-9, S-10, and S-11. However, Garrett did write "OK", showing that he had been in the area for pre-shift examination purposes. Tr.42; Ex. S-7, S-8, S-9, S-10, and S-11. Garrett did not document the fact that there were at least 10 inches of accumulations under the belt line in some places. Tr. 131. Garret explained that even with 10 inches of accumulations, he did not consider the conditions serious enough to document in the DTI records as a violation or hazard. Tr.131-32. On further questioning, he testified that it would be unusual for an examiner to find 10 inches of material and not note it in the DTI records. Tr. 132.

WCC argued that there was no violation because an effective pre-shift exam must only be done prior to a shift, but not at any specific time. Inspector Benedict observed the accumulations at 8:10 a.m. WCC argued that it was not obligated to revisit the area again after the 4:55 a.m. examination, and the Secretary has the burden to prove the existence of violating conditions at the time of the pre-shift. Resp. Reply Br., p. 9-10.

It is not clear from the examination record exhibits alone how much accumulated material was present during the pre-shift exam or how long it took for it to build up. WCC claimed that the accumulations were the result of belt spillage that happened between 4:55 a.m. and 8:10 a.m. Tr. 119. The belt was not running at 4:55 a.m., the time of the last exam. The preceding shift was a non-production, maintenance shift. Tr. 142-43. The normal startup time for the belt was 6:00 a.m. Tr. 143. According to Exhibits R-16 and 17, WCC took some action on June 11 and 12 in response to the buildup of accumulations in the same area. The area was cleaned and rock dusted during the third (maintenance) shift from June 11 to June 12. Tr. 59-60. The Secretary argued that WCC's DTI notes (Ex. R-16 and R-17) deserve little weight because: (1) Benedict did not see them; (2) they may have been added after-the-fact (Tr. 60-62); and, (3) WCC did not raise the mitigating issue of having done the rock dusting and cleaning shown in Exhibits R-16 and R-17 during the close-out meeting with Inspector Benedict. Tr. 79.

The record contains convincing evidence of significant accumulations present when the examiner looked at the area. For example, in addition to the 10 inches of accumulations discussed above, Benedict testified that he observed two distinct types of material under and along the belt lines, spillage and "powdery, ground up stuff was stuff that had spilled and been run through. It takes a long time to get those type of accumulations. It doesn't happen quickly." Tr.74. Benedict testified that the coal would not have been ground up if it were a recent spill. Tr.151. This is enough to call into question the efficacy of the pre-shift exam.

The existence of a hazard or violating condition, specifically a coal accumulation, at the time of a pre-shift examination may properly be made by inference based on the extent of the accumulation at the time it is observed by the inspector. *Enlow Fork Mining Company,* 19 FMSHRC 5, 15-16 (Jan. 1997). There were extensive material accumulations in the area, observable (if not actually observed) by the pre-shift examiner at 4:55 a.m. It is improbable that the amount of material accumulation found by the inspector at 8:10 a.m. could build up in the interval after the 4:55 a.m. pre-shift record was made. Tr.162-63. A violation of 30 C.F.R. § 75.360(a) can be upheld if the inspector finds violating conditions that were present when the pre-shift examination was conducted, but were not noted on the pre-shift inspection. *Remington, LLC*, 36 FMSHRC 491, 510 (Feb. 2014) (ALJ). These accumulations should have been documented in the pre-shift examination (DTI) records as a violating condition needing at least clean-up attention.

WCC's argument that it did not take further action because it did not consider the accumulations hazardous is unconvincing and would undercut the strict liability character of these regulations by making the ultimate determination about the existence of a violation a matter of the operator's agent's subjective assessment. *Brody Mining*, LLC, 33 FMSHRC 1329 (May 23, 2011) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco*, Inc., 8 FMSHRC 1631, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989); *Rock of Ages Corp.,* 20 FMSHRC 106, 115 (1998)). WCC's failure to document the condition defeated the pre-shift examination process and was a violation of 30 C.F.R. § 75.360.

WCC pointed out in its post-hearing brief that the language of certain subsections of 30 C.F.R.§ 75.360 was changed shortly after this order was issued. The new language was broadened to require a pre-shift examiner to look for and document both hazards and violations of certain enumerated mandatory items, whereas at the time of this order, only hazards were covered. WCC argued that its examiner fully complied with the regulatory requirement in place at the time by noting "OK" for the locations where these accumulations were found because: (1) he was not obligated by the language of the regulation to note conditions that were merely non-hazardous violations; and (2) he did not deem the accumulations to be a hazard.

The language changes in parts of 30 C.F.R. §75.360 do not excuse WCC's failure to note these violating conditions as part of its pre-shift process. The new language in §75.360(a)(2) requires examination for *hazards and violations* now, but only spoke of

examination for *hazards* prior to the change. Yet the subject matter of §75.360(a)(2), the so-called "pumper's exception," is so specific and different in purpose, a change in the language there does not apply to the language in the more general §75.360(a)(1), the section under which this order was issued. There is nothing in the language itself, its context, or the legislative history that supports WCC's claim that the amendatory language justifies WCC's failure to document non-hazard violations in its pre-shift examinations.[20] The attempt to limit the coverage of 30 C.F.R. § 75.360(a)(1) to the reporting of hazards to the exclusion of violations by reference forward in time and across regulatory topics to the more specific coverage language of 30 C.F.R. § 75.360(a)(2), which came into effect *after* this violation was written, violates logic, context, and syntax. I reject the argument that an amendment to the more specific portion of the regulation should be read into the more general portion. As a result, WCC's pre-shift examiner was obligated to look for and record violating conditions, even if he did not deem them to be hazards. WCC's interpretation of the regulatory language and history does not shield it from liability for this violation.

Negligence

The Secretary based his negligence allegation on the same theory presented in relation to Citation 8438790, i.e., that the material accumulations were extensive and combustible. He did not present an alternate theory of negligence. I determined that the accumulations were not proved to be combustible and therefore did not create the hazardous conditions on which the Secretary based his claim of negligence and S&S for Citation 8438790. Failing proof of some other hazard arising from these accumulations or from the fact that no meaningful pre-shift examination was performed, all that has been proved is a bare violation of the pre-shift examination requirement.

The question here is what degree of negligence inheres in the failure to perform a meaningful pre-shift examination, not what negligence level is appropriate for the existence of the accumulations themselves. Inspector Benedict considered the negligence for this violation to be high. Under Commission precedent, high negligence entails actual or putative knowledge of the violating condition and a lack of mitigating circumstances.

Two points must be resolved: (1) was WCC aware of the violation; and, (2) were there any mitigating circumstances? WCC's excuse for failing to perform a meaningful pre-shift examination was semantic – it did not consider the accumulations a hazard and was under no obligation to document and remedy. This argument has no traction. 30 C.F.R. § 75.360(a)(1) required WCC to examine for violations, not just hazards, and appropriately note its findings.

WCC knew of the material accumulation violation but its pre-shift examination failed to note it in a manner that would provide notice to miners of the existence of the accumulations, their magnitude, or the need to effectively clean them up. A considerable

[20] *See generally*, *Spartan Mining Co.,* 415 F.3d 82, 83 (D.C. Cir. 2005); *Cannelton Industries, Inc.,* 26 FMSHRC 146 (Mar. 2004).

period of time elapsed while these accumulations built up and existed before Benedict's inspection (Tr. 47), which supports a finding of high negligence. Nonetheless, there were documented efforts to clean up and rock dust the area. Given the fact that the accumulations consisted of a mixture of coal fines, rock dust, and other non-combustible elements which were too wet to allow friction combustion, the urgency of performing a cleanup before the inspection was low in both WCC's and court's opinion. These are mitigating factors which weigh in favor of a finding of moderate negligence.

Gravity / Severity

The Secretary presented the same scenario in support of his claim that this violation presented a reasonable likelihood of lost workdays or restricted duty as he did for the negligence element. That scenario assumes dry coal dust rubbing on the belt lines causing a fire which would cause smoke inhalation and burns. Tr. 46-47. However, that assumption is unsupported due to the Secretary's failure to prove combustibility. The only other evidence in the record addressing likelihood of injury or the severity of such injury arising from WCC's failure to perform a meaningful pre-shift examination is an inference drawn from the volume of accumulated material and the length of time the accumulations existed (discussed above). From that, I conclude that it was unlikely that an injury would occur as a result of this failed pre-shift examination. In reaching this conclusion, I assume that the conditions extant at the time of Benedict's inspection (continuing operating conditions) would continue, which in turn assumes that the accumulations would continue to be incombustible due to the effects of the operational water spray system. If an injury were to occur, the Secretary's suggestion that it would result in lost work days is reasonable.

Significant & Substantial

In dealing with the previous citation, I determined that the Secretary failed to prove that the accumulations in question were combustible, therefore the violation was not S&S. The Secretary now seeks confirmation that this pre-shift exam violation was S&S based on the same evidence that failed to prove the hazard above. Tr.47-48. The Secretary points out in his post-hearing brief, "the existence of the accumulations presented a discrete safety hazard, that is, they contribute to a measure of danger to miner safety caused by the violation." Sec'y. Post-hearing Br. p. 17. This can be parsed into two elements: (1) any amount or type of accumulation is a violation (strict liability); and (2) if the violating condition creates a measure of danger to miner safety, it is a hazard. In order for a violation to be a candidate for enhanced enforcement (S&S), it must present a danger to miner safety. The *sine qua non* of an S&S determination is the existence of a hazard, not just a violating condition. It is feasible, subject to appropriate proof, that non-combustible accumulations such as these could create a hazard, however the Secretary put all of his proverbial eggs in the combustibility basket, and failed to give the court any evidence of an alternate hazard, such as trip-and-fall, for instance. For failure of proof, I conclude that the pre-shift examination violation was not S&S.

Unwarrantable Failure

In order to establish unwarrantable failure under the Commission's case law, the Secretary must prove aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp*., 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Other relevant factors to consider include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation poses a high degree of danger. See *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

This violation involved moderate negligence. Although unusual, moderate negligence can support a finding of unwarrantable failure. *Eagle Energy Inc*., 23 FMSHRC 829, 839 (Aug. 2001). WCC's failure to perform a compliant pre-shift examination was based, at least arguably, on its non-frivolous though unconvincing two-prong theory that: (1) it did not consider the accumulations in question to be a hazard; and, (2) it interpreted the language of the regulation to required only that its agents document and remedy hazards, not mere violations. Though rejected for purposes of liability and negligence analysis, these theories have enough plausibility and substance to keep WCC's violation from rising to the level of aggravated conduct.

Otherwise, WCC was on notice that it needed to better attend to material accumulations along its belt lines. Tr. 30. It was cited for similar violations multiple times during the preceding 24 months (Ex. S-1), although 30 C.F.R. §75.400 is one of the most frequently cited standards of all. Resp. Reply Br., p. 9. WCC was aware and documented that material was accumulating, (Ex. R-16 and R-17) and once cited, WCC took immediate steps to abate the violation. Stip. No. 10; Tr.124, 144.

The balance of relevant factors tips away from a finding of unwarrantable failure.

Penalty

MSHA specially assessed this violation and proposed a penalty of $23,800.00. Applying the regular assessment paradigm of 30 CFR §100.3, I assess a penalty of $264.00.

In determining penalties, the Commission and its ALJs make penalty determinations *de novo*, and neither the ALJ nor the Commission is bound by the penalties proposed by the Secretary. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); *Cantera Green*, 22 FMSHRC 616, 622 (May 2000); 30 U.S.C. § 820(i); *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). Yet, the Commission has held that, when a judge determines penalties that "substantially diverge from those originally proposed [by the Secretary], it behooves the Commission and its judges to provide a sufficient

explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Court is required to consider the following specific criteria in order to determine the appropriate 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;
>
> 6. The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Section 110(i) of the Mine Act; 30 U.S.C. § 820(i).

Special assessment is appropriate for enhanced enforcement but not for ordinary violations such as this with negligence and gravity findings of "moderate" and "unlikely," respectively. I have assessed a penalty using the point values for the various standard criteria summarized above. The size and history numbers were provided by the Secretary to support his Petition for Assessment in this case. The negligence and gravity points come from the point table in Section 100.3. The adjustment for prompt abatement is supported by the parties' stipulations. I assess a penalty of $264.00, as summarized in the following table.

Criterion	Date / Finding	Points
Size of mine	(From Pleadings)	15
Size of operator	(From Pleadings)	10
Number of violations	550	
Number of inspection days	588	10
Negligence	Moderate	20
Likelihood	Unlikely	10
Severity	Lost work days	5
Number of persons affected	2	2
	Total Points	**72**
Good faith abatement	-10%	-$29.00
	Penalty From Points	**$293**
	Final Net Penalty	**$293 - $29 = $264**

LAKE 2012-0899: Citation Nos. 8447018 and 8447019

Citation No. 8447018

MSHA Inspector Terry A. Hudson inspected the Pattiki mine on July 30, 2012. Tr.168. He issued a 104(a) Citation, No. 8447018 (Ex. S-12), alleging that WCC violated 30 C.F.R. §75.1506(b)(2)[21] by not having sufficient emergency refuge capacity for all the miners in the area of the No. 7 crosscut, Unit No. 3, Travelway No. 4 ("the working section"), during the shift change on July 27, 2012. Tr.171,190-191. The citation alleges high negligence, that an event would be unlikely, but that such an event could cause a fatal injury, and that five miners would be affected. It is not alleged to be significant and substantial (S&S) nor to involve an unwarrantable failure to comply with regulations.

[21] 30 C.F.R. §75.1506(b)(2): Refuge alternatives for working sections shall accommodate the maximum number of persons that can be expected on or near the section at any time.

This violation depends on the evidentiary weight of the method used by Hudson to determine the lack of refuge capacity. For the reasons that follow, I find that his methodology does not support the conclusions asserted here and I vacate the citation. I do not address the issues of negligence, gravity, or penalty.

Instead of going to the working section to visually count how many miners were present (Tr.176; 190-191), Hudson based his decision to write this citation solely on a review of selected data from Pattiki's Matrix METS 2.1 Miner and Equipment Tracking System (Tr. 173, 192, 198, 205, 210), a method he had never before used to determine lack of refuge capacity. Tr. 199. The data Hudson reviewed shows[22] that the tracking signals from twenty-nine miners (Ex. S-15; Tr. 174-175,197) -- five more than the twenty-four person refuge capacity Pattiki maintained (Tr. 172,191) -- were received and registered by the METS systems at *one* of the antenna locations in the Pattiki mine close to the working section during a forty-four minute period on July 27, 2012. Tr. 197-198, 207.[23] Of the twenty-nine miners Hudson alleged were in the unit (Tr.197), he was able to verify a time for only twenty of them; the other nine were unaccounted for. Tr. 197. There is no evidence about when these nine miners were picked up by a reader. Tr. 197.

Moreover, it is impossible to tell a miner's exact location without determining which antenna responded at a given time. Since there are no time records for the nine miners, it is not possible to determine where they were with any confidence. Tr. 217-18. As such, the information Hudson relied on is nearly meaningless. The data does not show which miners were in the area, whether or when each miner left the area during the 44 minutes, or most importantly, whether all 29 miners were in the area at the same time.

I find the testimony of Tracy Hayford, the director of development and chief architect for Matrix, more convincing. Hayford designed both the hardware and software for the METS 2.1 tracking system. Tr. 209-11. He explained how Hudson's conclusion about the number of miners in the section at the time of the shift change was at best unreliable and more likely meaningless and misleading. According to Hayford, the METS data could not yield reliable information about how many miners were in any given area, what area the miners were in, or even when the miners were in the area – all irrespective of how Hudson used the data.

The METS system tracks miners and equipment using antennae and signal tags. Tr. 211. METS can locate a tag with an accuracy of several hundred feet only. It is not able to pinpoint locations like a global positioning satellite (GPS) system. Tr.211-12. According to Hayford, METS data was not intended nor is it useful to determine how

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[22] I am aware that "data" is a plural noun and technically should be used with a corresponding plural verb form. But, since it still sounds odd to say "data are" as opposed to "data is", I opt for the less jarring but grammatically incorrect version.

[23] WCC used a "hot seat" method for its shift changes at the Pattiki mine. Miners from the outgoing and incoming shifts were in the section at the same time, which effectively doubled the number of miners for a short time. Tr. 196.

many people were present in a given location. It registers every tracking tag that passes by it. It does not identify individual miners when they come within range of one of the antennae. As a result, it is possible that some miners passed back-and-forth by an antenna and generated data which could be interpreted (wrongly) that more individuals were in the area than was actually true. Tr. 212-13.

The METS antennae will detect a signal both inby and outby for several hundred feet. Tr. 211-12. The system is not sufficiently accurate to determine who is inby or outby a given antenna. Tr. 213-14. To tell where a miner is located, it is necessary to track his tag signal as it passes by more than one antenna. Tr. 213. Until a miner is within range of another antenna, he is shown in the area of the last one he registered on. Tr. 214. Without input from more than one antenna, it is impossible to tell whether a miner is several hundred feet outby or inby the antenna location. Tr. 214.

According to Hayford, it is unlikely that Hudson could determine how many miners were on the working unit using the METS data the way he did. A bigger picture is needed to tell where a miner has been over a period of time. Tr. 214-15. Data from at least two antennae must be triangulated to get an accurate idea of where a miner is at any given time. Tr. 215-16. As a minimum, Hudson would need to look at a relatively long period of time to increase the accuracy. Tr. 216-17. He would also have to compare data from more than one antenna to see if, when, and how miners moved from one area to another. Tr. 217. For example, a miner might be walking along a belt line, be picked up by an antenna that is more inby, but keep walking outby. Within the time frame reflected in the records Hudson reviewed, a miner could be as much as a mile away. Tr. 215-19. While traveling that distance, a miner would pass by several antennae (and presumably several refuge locations). Tr. 219.

The METS system works by placing antennas throughout the mine in accordance with distances set forth under the WCC's Emergency Response Plan ("ERP"). Tr. 211. Hudson did verify that the tracking system worked by having the system track him as he did his inspection (Tr. 207). But, he did not note the location of the tracking system antennae when he went underground. Tr. 193-94. More specifically, he did not know or verify the location of the closest tracking system antenna outby the loading point (Tr. 191,194)[24], he did not have a list of antenna locations in the No. 3 unit (Tr.194), nor did he know if he was looking at the antenna data for Unit 3, or any other specific antenna, when he reviewed the records he requested. Tr. 195-196, 206). Hudson did not request records for any antenna outby the working section to see if any of the miners had been picked up by them. Tr. 196-97. As a result, the Secretary: (1) could not document the location or name of the tracking system antenna for the loading point of the No. 3 Unit (Tr. 193); (2) did not document the location of the closest tracking system antenna outby the loading point for the No. 3 Unit (Tr. 191, 194); (3) did not create or maintain a list of antenna locations across the working faces of the No. 3 Unit (Tr. 194); (4) did not provide

[24] Pattiki maintained another refuge for miners outby and farther from the working section. It was not considered close to the working section. Tr. 191. Pattiki was not short of refuge space for miners when other refuge locations are considered. Tr.191-92)

the Court with a copy of the actual tracking system records requested on July 30, 2012; (5) produced no inspection note evidence of obtaining such tracking system records (Tr. 194); (6) did not identify the specific tracking system antenna record reviewed; (Tr. 194-95); (7) did not show whether wired or wireless tracking records were reviewed (Tr. 195-96); and, (8) did not request to review any outby antenna records, located off the No. 3 Unit, to determine when any individuals in the Secretary's list were picked up by antenna outby the No. 3 Unit (Tr. 196-97). In short, the Secretary failed to demonstrate the presence of miners on the No. 3 Unit in excess of the refuge alternative limit.

It is not that the tracking data is irrelevant or inaccurate; it is so incomplete and unfocused that the Secretary did not prove the presence of twenty-nine miners on Unit 3 at the same time as alleged. (Tr. 220) Citation No. 8447018 is vacated.

Citation No. 8447019

On July 30, 2012, MSHA Inspector Hudson issued a 104(a) Citation, No. 8447019 (Ex. S-14; Tr.177-78), alleging that WCC violated 30 C.F.R. §75.1506(b)(3) by not having a type "A" refuge alternative in service at crosscut #3 in the 4th 48 primary escapeway. The citation alleges high negligence, that an event would be unlikely, but that such an event could cause a fatal injury, and that three miners would be affected. It is not alleged to be significant and substantial (S&S) nor to involve an unwarrantable failure to comply with regulations. WCC acknowledges a "fact of violation" with regard to this citation (Resp. Post-Hearing Br., p. 11), however, it contests the high negligence determination and the Secretary's proposed civil penalty assessment. (Resp. Br., p.43)

Changes made to 30 C.F.R. §75.1506(b)(3) required WCC to upgrade its existing stacked wall and curtain refuge structures by December 31, 2010.[25] Tr. 204,229,234.

[25] 30 C.F.R. §75.1506(b)(3):

> Prefabricated refuge alternative structures that states have approved and those that MSHA has accepted in approved Emergency Response Plans (ERPs) that are in service prior to March 2, 2009 are permitted until December 31, 2018, or until replaced, whichever comes first. Breathable air, air-monitoring, and harmful gas removal components of either a prefabricated self-contained unit or a unit consisting of 15 psi stoppings constructed prior to an event in a secure space and an isolated atmosphere that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2013, or until replaced, whichever comes first. Refuge alternatives consisting of materials pre-positioned for miners to deploy in a secure space with an isolated atmosphere that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2010, or until replaced, whichever comes first.

WCC was aware of this requirement well in advance of the due date. Tr. 178-179, 243. WCC's existing refuges consisted of skids with supplies behind a wall accessible by a man door. Tr. 179-81. The man doors had been manufactured by Matrix (Tr. 228-29) and MineArc (Tr. 244-45) and were approved by MSHA as part of WCC's existing emergency response plan (Tr. 199-200) which had been in place since March 15, 2010. (Tr.226-27; Ex. R-5; Ex. R-6).

WCC proposed to retrofit its Matrix refuge units with 15 psi pressure resistant stoppings,[26] which its engineers indicated would comply with 30 C.F.R. §75.1506(b)(3).[27] WCC needed MSHA approval (Tr.229, 232-233) for the proposed 15 psi stoppings.[28]

On November 22, 2010, (Tr. 200-201;231) WCC submitted to MSHA the first of three ERP change proposals (Tr. 231) that would have allowed it to upgrade its existing outby refuge units with 15 psi stoppings. (Tr.232). MSHA did not respond to this proposed ERP revision until July 7, 2011, when it sent WCC a denial letter. (Tr.234-236). The denial letter contained a list of alleged deficiencies, none of which, as Chris Russell testified (Tr. 228-229), had anything to do with WCC's request to upgrade with 15 psi stoppings. Russell also stated he gained no insight or understanding from MSHA why it had not approved WCC's stoppings upgrade request. (Tr. 236).

WCC submitted the second of its three ERP change proposals on September 2, 2011, (Tr. 237; Ex. R-9) and repeated its request for approval of its use of 15 psi stoppings. MSHA responded to the second request on December 20, 2011, when it rejected the revised ERP and provided a new list of alleged deficiencies. (Tr.237-238; Ex. R-10). As before, none of the alleged deficiencies related to WCC's request to install the 15 psi stoppings. In the meantime, the deadline for the refuge changes came and went,

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[26] A 15 psi stopping is a concrete wall designed to handle 15 psi of pressure-a blast. (Tr. 231).

[27] WCC focused on one of the two alternatives in 30 CFR § 75.1506(a)(3):

> "Each operator shall provide refuge alternatives and components as follows: . . . Breathable air, air monitoring, and harmful gas removal components of either a prefabricated self-contained unit ***or*** *a unit consisting of 15 psi stoppings constructed prior to an event in a secure space and an isolated atmosphere that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009, are permitted until December 31, 2013*."

Resp. Post-Hearing Br., p.45 (emphasis added).

[28] The lack of an approved 15 psi stopping was ultimately the basis for this citation. Tr. 178, Ex S-14. Hudson wrote the citation because the existing man door was not able to withstand pressure of a mine explosion, 15 psi. Tr. 181-82.

WCC waited for MSHA approval (Tr.237-239; Ex. R-6; Ex. R-10), and MSHA took no action during any of its ongoing mine inspections to indicate that WCC's change request would not be approved. (Tr.234).

Anticipating MSHA's ultimate approval of its stoppings proposal, WCC contacted Micon, a seal manufacturer. WCC understood that Micon was the only manufacturer that made NIOSH-approved 15 psi stoppings for use in underground coal mines at the time. (Tr.232) Micon visited the Pattiki mine, and worked with Chris Russell (Tr.228-229) to evaluate potential sites to install the 15 psi seals, and to insure the mine was correctly preparing the sites for installation. (Tr. 232-233) WCC started the recommended site preparation but did not complete it because it had not received approval from MSHA to use 15 psi stoppings. *Id.*

Following the December 20, 2011 denial letter, WCC requested a face-to-face meeting with MSHA, which did not occur until May 2012. (Tr. 239-240). At the meeting, Pattiki asked for guidance. Russell understood that WCC was to submit a third ERP proposal with some changes and MSHA would approve the 15 psi stoppings – a meeting of the minds. Tr. 240-41. Accordingly, WCC submitted a third revised ERP, including 15 psi stoppings, on June 13, 2012. Tr. 241-42, Ex. R-11. WCC waited for a response from MSHA from June 13, 2012, through July 29, 2012. Tr.235,242. On July 30, 2012, MSHA issued Citation No. 8447019. Ex. S-14. Apparently, MSHA did not share WCC's belief that there was an agreement in principle after the May 2012 face-to-face meeting because it did not approve WCC's third ERP proposal.[29]

This chain of events cannot be construed as a mine operator attempting to skirt the provisions of the law or otherwise engaging in negligent behavior. WCC submitted ERP revisions to satisfy MSHA's demands, believing in good faith that doing so would allow it to install 15 psi stoppings to retrofit its Matrix refuge units. WCC attempted to discuss the issue with MSHA on multiple occasions, and as recently as June 13, 2012, submitted an ERP revision it believed would be approved. Tr. 241. In the end, WCC purchased new refuge units at great cost[30] to abate this citation, when other mines were allowed to merely issue purchase orders, which seemed to satisfy MSHA. Tr. 202, 228-29.

The equities of this event are dramatically in WCC's favor. Largely because of MSHA's failure to timely or substantively respond to WCC's repeated requests to modify its ERP (Tr. 234), WCC did not have compliant refuge alternatives in place at the time of Hudson's inspection. WCC relied on MSHA to its detriment. WCC's reluctance to spend

[29] Interestingly, Inspector Hudson testified that he had been prompted by his supervisor, Rodney Adamson, to issue a citation for this violation before even going to the mine. Tr. 203. Hudson was not aware of the content of the various proposed ERPs. Tr. 201-03.

[30] MSHA suggested to WCC that it purchase Strata tent chamber refuge units to abate the citation. (Tr.244). The Strata units cost $151,000 each. Tr. 245-46. The 15 psi stopping alternative would have cost only $50,000 each. Tr. 233.

a substantial sum for the Strata refuge units that MSHA eventually suggested it adopt (Tr. 245; Ex. A, Adamson Affidavit at ¶27) when it had no indication from MSHA that WCC's preferred, and apparently fully compliant (15 psi stoppings for its Matrix units) alternative would be rejected or ignored, is not negligent at all. There was no negligence on WCC's part and only a technical violation of 30 C.F.R. § 75.1506(a)(3).

WCC had no history of violations of 30 C.F.R. § 75.1506(a)(3) for the fifteen-month period prior to this citation. WCC exhibited good faith in its efforts to anticipate the need to upgrade its Matrix refuge units and to get MSHA approval of the 15 psi stopping option prior to the deadline. MSHA never gave WCC the go-ahead to install the 15 psi stoppings, never explained why it would not approve them, apparently never intended to approve them (per Adamson's after-the-fact affidavit), and never justified these delinquencies to the court. These factors constitute significant mitigation against any liability beyond what I order here.[31]

Citation No.8447019 is **modified** from "high negligence" to "no negligence." I impose a symbolic fine of $10.00 to reflect the imbalance of equities.

WHEREFORE, it is **ORDERED** that WCC pay a combined penalty of $439.00 within thirty (30) days of the filing of this decision.

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

[31] Estoppel defenses are not generally available against the federal government. *See, e.g., Knob Creek Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Inspectors' previous representations about compliance with a regulation do not estop MSHA from issuing future citations, but detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *Cf. Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *U.S. Steel Mining, Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (indicating that a local MSHA office's past approval of operator's transportation methods does not negate an S&S finding and noting that detrimental reliance may be considered in mitigation of penalty). *See also Mach Mining, LLC,* 36 FMSHRC 2533, 2536-37(Sept. 2014).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 18, 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

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for Petitioner;

Nicholas Scala, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, MD for Respondent.

Before: Judge L. Zane Gill

This proceeding, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), 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 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.[1] 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 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.

[1] 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.

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.[2] (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 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.

[2] 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.

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.[3] 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.

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.

[3] 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.

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.[4]

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

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[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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 20, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. ARNOLD STONE INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2016-0095-M A.C. No. 41-04473-396139 Mine: Arnold Stone Inc - Pit #2

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Attorney, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Jules P. Slim, Attorney, Irving, Texas, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves one citation issued on August 12, 2015, pursuant to Section 104(d)(1) of the Mine Act. The Secretary has proposed a penalty of $63,000.00. The parties presented testimony and evidence regarding the citation at a hearing held in Dallas, Texas, on June 1, 2016.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arnold Stone Pit #2, also known as the Tolar mine, is a surface limestone mine located in Hood County, Texas. The parties have stipulated that Arnold Stone at all relevant times was engaged in mining activities and is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 1, 3. The parties further stipulate that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips. ¶¶ 2, 4. The parties agree that the violation was abated in good faith. Jt. Stips. ¶ 6.

Citation No. 8858327 was issued for a violation of 30 C.F.R. § 56.14100(b) for a non-functioning safety lock-out on a skid-steer loader. The Secretary alleges that the violation was reasonably likely to cause a permanently disabling injury, was significant and substantial, was the result of reckless disregard for the safety of miners, and was an unwarrantable failure to comply with the relevant standard. The Secretary issued a special assessment, proposing a penalty of $63,000.00. For the reasons set forth below, I find that the Secretary has proven a

violation as alleged and that the violation was significant and substantial. However, I find that the violation was the result of high negligence rather than reckless disregard and that an unwarrantable failure has not been proven.

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 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).

MSHA's Inspection

Inspector Tommy Fitzgerald has worked for MSHA for seven years. He received the required training to become an inspector and receives periodic refresher training. He has conducted several hundred mine inspections. Prior to becoming an inspector, he worked for fifteen years in the mining industry, beginning as a haul truck driver and later working as a safety and health coordinator.

On August 12, 2015, Fitzgerald traveled to the Tolar mine to conduct an inspection. The mine, along with several other pits, is operated by Arnold Stone, Inc., which is owned by Mike Arnold. Arnold visits the Tolar site approximately twice a month. Because Arnold was not on site on August 12, Fitzgerald was accompanied during the inspection by Dennis Sorrells, the site supervisor. Sorrells told the inspector that he was a lead man and the inspector took that to mean that he was not a supervisor. However, after the testimony at hearing, it is clear that Sorrells was the supervisor at the mine site.

As part of the inspection, Fitzgerald inspected a skid-steer loader being used to move stone for chopping. He also observed a second, old skid-steer loader that had been taken apart and was inoperable. Fitzgerald observed a miner operating the working loader and stopped him to do a safety inspection. The loader was equipped with a safety lockout and safety switch. When functioning, the safety lockout would prevent the machine from operating when the seat belt was disconnected. The safety switch would allow the driver to activate the same function when the seat belt was buckled. Fitzgerald explained that the purpose of the switch and lockout is to protect the driver if he exits the machine while it is running. The configuration of the loader is such that a driver entering or exiting the machine can easily hit the controls and activate the machine if it is not locked out.

The miner operating the machine, Marcus Sanchez, informed Fitzgerald that the machine often lurched forward when it was started up, even if the lockout switch was engaged and the seat belt unbuckled. Fitzgerald observed Sanchez test the function by unbuckling his seat belt and hitting the controls. The machine took off forward until Sanchez stopped it. The machine also moved forward a couple of feet when Sanchez touched the controls while the lockout switch was on. Fitzgerald believed the machine had the potential to injure the operator when he was

entering or exiting the machine, which he would do multiple times during a typical day. If someone were standing in front of the machine when the operator exited, that person could also be run into or run over and injured. Sanchez told Fitzgerald that workers were aware of the defect and kept their distance from the machine, and that Sanchez turned off the engine when he entered and exited it. While Arnold indicated that the area of the mine was flat, Fitzgerald responded that certain areas where the machine operated were not a level grade.

Sanchez informed the inspector that there had been an intermittent problem with the switch for several years, but that the defect had become permanent in the last few months. The machine was used daily. Sorrells, the site supervisor, confirmed that the defect had existed for approximately three years. He told Fitzgerald that the defect had been reported, but that management had told the miners to continue using the machine because it was too expensive to fix. However, no MSHA inspections in the past several years had detected the defect.

Records presented by Respondent at hearing indicate that the loader in question was brought to the site from another Arnold Stone location, the Santos mine, in early 2014. Resp. Ex. E. A miner from the Santos mine testified that he had regularly inspected the loader while it was at Santos, and that it was in good condition with no defects in the lockout or switch when it was brought to the Tolar site.

Sorrells testified that the skid-steer loader was subject to a pre-operation inspection before it was used each day. Arnold confirmed that miners were trained to conduct inspections before operating equipment. Fitzgerald examined the mine's inspection records for the loader, but there were only a few available on site, and none listed a defect. The mine produced further inspection records at hearing, none of which noted a problem with the lockout.[1] Resp. Ex D. However, the records for the weeks leading up to the MSHA inspection indicate multiple other issues, including oil leaks, hydraulic leaks, and forks in need of welding, and there is no indication that any of those issues were corrected. *Id*. Sorrells blamed Sanchez for failing to perform adequate inspections on the loader and terminated him from his employment for that reason, in addition to previous reprimands.

The mine argues that the information Fitzgerald received from Sanchez and Sorrells regarding the duration of the condition was inaccurate. Both men told the inspector at the time of the inspection that the safety switch had been defective for several years and Sorrells gave the inspector a written statement to that effect. But at hearing, Sorrells testified that his statement to the inspector was in reference to the loader that had been taken out of service, which had had the same defect. Sorrells testified that he had operated and inspected the cited machine a few weeks prior to the inspection and had not noticed anything wrong, and that he did not know about the condition until the inspection. Sorrells also claims that Sanchez was not truthful about the duration of the defect because he wanted to retaliate for a recent suspension. However, Sorrells made a written statement to MSHA at the time of the inspection in which he said that he had been telling Mike Arnold about the skid-steer defect for approximately three years. Gov't Ex. 5. It is difficult to interpret this statement as referring to the out-of-service skid-steer. Additionally,

[1] Arnold believed the lockout problem would have been marked as a brake problem on the mine's checklist, since the skid-steer did not have conventional brakes. No brake problems were noted in the mine's records.

Fitzgerald testified that the miners were standing near the operating loader when they talked about the machine, so it was unlikely that they would have been talking about a different machine. Sanchez was fired shortly after the inspection and did not testify at hearing, so could not corroborate either side. Given the testimony presented and the demeanors of the witnesses, I find Inspector Fitzgerald to be credible as well as thoughtful and thorough in his investigation. Thus, I credit his testimony and find that the safety switch and lockout had been inoperable for at least a year.

Sorrells notified Arnold about the citation after the inspection. Because there was no shop on the premises at the mine, Arnold arranged for the machine to be taken to a mechanic shop for repairs. The shop found that the problem was electrical and the mechanic was unable to repair the loader at a reasonable cost. The mine was also operating with a reduced staff and had a limited need for the loader. Arnold thus took the machine out of service.

A. The Violation

Based on his observations at the mine, Fitzgerald issued Citation No. 8858327 for a non-functioning safety lockout on the skid-steer loader. The Secretary alleges a violation of 30 C.F.R. § 56.14100(b), which requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987).

To establish a violation of § 56.14100(b), the Secretary must prove that there was a defect in the equipment, that the defect affected safety, and that it was not corrected in a timely manner. *See* 30 C.F.R. § 56.14100(b). Here, the parties do not dispute that the safety lockout was not working on the skid loader. The company agrees that the skid loader had a non-functioning safety lockout switch at the time of the inspection. This condition "affected safety," in that it was capable of causing or contributing to the cause of an injury-producing incident. The purpose of the safety lockout switch is to prevent the skid loader from inadvertent motion when the machine is manually started. It also prevents movement when the seat belt is not in place. A moving, uncontrolled skid loader poses a danger to miners working or traveling near it.

The main issue regarding the violation here is whether the mine failed to correct the defect "in a timely manner." The Commission addressed the timeliness requirement of § 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001), which involved a similar lockout device to the one in this case. The Commission determined that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id*. at 715. Here, the parties presented conflicting evidence as to when the defect arose. Based on my review of the record, I find that the defect had existed at least since the time the loader was first used at the mine, approximately 18 months prior to the inspection. The mine argues that because the defective lockout was not noted on pre-shift reports, there is no reason that the operator should have known about it. However, site supervisor Sorrells testified that he frequently operated the loader. While he denies having knowledge of the defective lockout prior to the inspection, I do

not credit his statement. I thus find that the operator knew of the defective lockout for at least 18 months but failed to repair it. Accordingly, the Secretary has proven a violation of § 56.14100(b).

B. Significant and Substantial

The inspector designated this violation as a "significant and substantial" ("S&S") violation, which is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is 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 second element of the *Mathies* test must be evaluated with respect to specific conditions in the mine. *See, e.g., McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991-92 (Aug. 2014) (finding that an accumulations violation contributed to a combustion hazard because of the extensiveness of the accumulations of coal, their highly combustible makeup, and the amount of methane liberated by the mine). With respect to the third element, the Commission has explained that the Secretary must "establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission has made clear that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *see also Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

Here, the Secretary has proven a violation of § 56.14100(b), satisfying the first element. The Secretary has also demonstrated a discrete safety hazard contributed to by the violation. The safety switch is an important part of the skid loader in that it prevents the machine from inadvertent movement, particularly as the operator is trying to exit or enter the machine. The inspector explained that the machine was used to move stone, and that the operator would enter

and exit the machine frequently to perform that operation. He also believed the machine was used in close proximity to other workers and in locations that were not completely flat. The operator and those around him were in danger of being hit by the skid steer if it was moved inadvertently. While employees at the mine were aware of the broken lockout and kept their distance from the loader, it nevertheless remained a hazard. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) The second *Mathies* element is therefore satisfied. A miner traveling on foot who was hit by the skid loader would be reasonably likely to be seriously injured or killed. Thus, the Secretary has proven the third and fourth elements of the *Mathies* test. Based on the testimony of the inspector and considering the *Mathies* criteria, I find that the violation was S&S.

C. Negligence and Unwarrantable Failure

In addressing the mine's negligence, it is first necessary to determine whether Dennis Sorrells was an agent of Arnold Stone. I find that Sorrells was a manager and his negligence is therefore imputable to the operator for purposes of penalty assessment and the unwarrantable failure determination. *Nelson Quarries, Inc*., 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co*., 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including "the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries*, 31 FMSHRC at 328.

Here, Sorrells was the person in charge at the Tolar site. Arnold testified that Sorrells was his "eyes and ears" at Tolar when he was not at the site, which was most of the time. Sorrells had responsibility for hiring, firing, and training miners at the site, though Arnold had the final word in questionable cases. While Sorrells did not have the authority to call a mechanic to repair equipment, he addressed basic safety and maintenance issues at the mine. For more complex repairs, it was his responsibility to inform Arnold of the issue. Although Sorrells told the inspector that he did not direct work at the mine but rather was told what to do each day, he was nevertheless the person in charge at the mine.

The Secretary categorizes negligence into five categories, from "no negligence" to "reckless disregard." 30 C.F.R. § 100.3, Table X. The Commission has emphasized, however, that these regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *see also Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an 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." *Brody*, 37 FMSHRC at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the

regulation." *Jim Walter Res*., 36 FMSHRC 1972, 1975 (Aug. 2014). High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1703.

Here, the inspector initially designated the citation as high negligence, but later modified the designation to reckless disregard. The Secretary also argues that the violation was the result of the operator's unwarrantable failure to comply with a mandatory standard. Based upon my review of all of the evidence, I find that the mine did not meet the required standard of care and therefore the operator's negligence should be designated as high. However, I cannot find that the violation was unwarrantable.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) (citations omitted) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol*., 22 FMSHRC at 353. Based upon the following analysis of the factors enumerated by the Commission, I find that there is inadequate evidence to support a finding of unwarrantable failure in this case.

Length of time that the violation has existed. In *IO Coal Co.*, the Commission emphasized that the length of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. 31 FMSHRC at 1352. The condition in *IO Coal* had existed for four or five days, and the Commission remanded to the judge to consider whether such a duration was an aggravating factor. *Id*. However, the Commission noted that analysis of the duration factor may be affected by the operator's good-faith, reasonable belief that the condition did not exist. *Id*. at 1352-53. Even where the record does not permit the judge to make a conclusive finding as to the duration of the condition, "imperfect evidence of duration in the record should be taken into account." *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010).

Here, there is some dispute as to how long the condition existed prior to the inspection. The skid loader had been at the mine for approximately 18 months, and the information gathered by the inspector indicated that the skid loader had a broken safety lockout the entire time. The inspector was also told that the lockout had been inoperable off and on for three years. The

mine, however, claims that the lockout only began malfunctioning shortly before the inspection. The site supervisor, Sorrells, testified that he had operated the machine a few weeks before the inspection and the lockout had been working. The mine also notes that the lockout had not been marked as defective in pre-shift inspection reports or cited in previous MSHA inspections. I credit the inspector's findings and agree that the lockout had been inoperable on an intermittent basis for at least the 18 months that the skid loader was at the Tolar pit.

Extent of the violative condition. The extent factor is intended to "account for the magnitude or scope of the violation" in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id*. at 3079-80. In *Dawes*, the Commission found that where only one miner endangered himself by walking under a suspended load, the violation was not extensive. *Id*. at 3080. Here, only one miner operated the skid loader at a time and there were only a handful of people working around the machine at any given time. Therefore the violation was not extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated similar violations and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal*, 31 FMSHRC at 1353-54. The prior violations need not have been the result of unwarrantable failure, nor must they have involved precisely the same activity, cited standard, or area of the mine. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consol. Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013); *IO Coal*, 31 FMSHRC at 1353-54. In the instant case, previous inspectors had not cited the faulty safety switch or given the mine any other indication that it was a problem. There is no basis, therefore, to find that the mine was placed on notice that greater efforts were required.

Operator's efforts in abating the violative condition. Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356. Where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *See Consol*., 35 FMSHRC at 2343. However, an operator's reasonable, good-faith belief that the condition did not exist may excuse a lack of abatement efforts. *See IO Coal*, 31 FMSHRC at 1356.

Here, the operator did nothing to mitigate the condition of the defective lockout. However, the person with authority to fix the lockout, Mike Arnold, was not aware of the problem. The lockout was not noted on pre-operational check lists. Sorrells told the inspector he had informed Arnold about the problem, but at hearing, Arnold credibly testified that he did not know about the defect. Further, Sorrells's testimony suggests that he believed a previous supervisor at the mine had notified Arnold about the defect, so he did not need to do so. Because the person with authority to repair the defect was not aware of it, I find that the lack of abatement efforts was not a significant aggravating factor in this case.

Whether the violation posed a high degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*,

31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition—that the absence of significant danger precludes a finding of unwarrantable failure—is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger increases when there is a chronic problem that is ignored. *Consol.*, 35 FMSHRC at 2343. As discussed in the S&S analysis above, I find that the inoperable safety lockout was reasonably likely to result in a serious injury. The equipment operator could easily have inadvertently hit the controls in the tight space, especially when climbing out of the machine, and moved the machine without warning. The driver of the skid loader or someone on the ground nearby could have been injured. While the violation was S&S, I do not find the degree of danger to be especially high given the small number of miners working at the mine.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. Lack of obviousness can be a mitigating factor in the analysis, but not when actions of the operator are the reason that the condition was not obvious. *Consol.*, 35 FMSHRC at 2343 (Aug. 2013) (upholding judge's unwarrantable failure finding where the operator deliberately ignored testing requirements in the mine's ventilation plan). In this case, the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury. I find that the violation was also obvious to the site supervisor, Sorrells, who regularly worked around the machine.

Operator's knowledge of the existence of the violation. In *IO Coal,* the Commission reiterated the well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-57. As discussed above, Sorrells, an agent of Arnold Stone, knew that the lockout was broken. I also find that Mike Arnold should have known about the broken lockout, given that it had been broken for at least 18 months, he arranged to transport the loader to the Tolar site after another loader had a similar defect, and he visited the mine several times a month.

While aggravating factors were present in that the condition existed for 18 months, was obvious, and an agent of the operator knew about it, there are a number of factors that weigh against a finding of unwarrantable failure. The length of time that the loader remained in an unsafe condition is certainly a problem, but is addressed by the finding of high negligence. The extent of the violation was limited and it did not pose a high degree of danger. Further, the person with authority to repair the defect, Mike Arnold, was not aware of it, and had no notice that greater efforts towards compliance were necessary. Based upon my review and consideration of all of the factors, I find that the negligence of the operator was high, but I do not find the violation to be a result of an unwarrantable failure to comply.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties

provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

As discussed above, I affirm the inspector's findings with regard to gravity. I find the negligence to be high rather than "reckless disregard" as it was assessed. There was limited evidence as to the size of the mine, but the operator asserts that it is a family-operated business with a number of pits located in Texas. The mine has little history of violations. Respondent indicated that it recently emerged from bankruptcy and is paying debts according to the bankruptcy plan, and that paying a penalty as high as suggested by the Secretary would therefore be a hardship for the mine. The parties stipulated that the citation was abated in good faith. After a careful review of the record and considering all of the penalty criteria, I assess a penalty of $10,000.00.

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $10,000.00 within 30 days of the date of this decision for the violation at issue here.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

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July 22, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-706 A.C. No. 15-18363-356746 Mine: Bevins Branch Surface Mine

DECISION AND ORDER

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for the Secretary

James F. Bowman, Representative, Midway, WV, for the Respondent

Before: Judge Steele

I. Statement of the Case

This proceeding is before me upon a petition for assessment of civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Following an inspection of Respondent's mine, an MSHA inspector issued Citation No. 8195668 for Respondent's failure to safely strip the highwall in violation of 30 C.F.R. § 77.1001. Additionally, the inspector issued Citation No. 8195670 for the Respondent's failure to follow a ground control plan for the safe control of a highwall in violation of 30 C.F.R. § 77.1000. A hearing was held in South Charleston, WV on March 14, 2016. At hearing, the Respondent contested both citations, all of the designations for the citations, and the special assessments.

This Court affirms Citation Nos. 8195668 and 8195670 in all respects, including the special assessment penalties totaling $15,400.00.

II. Procedural History

On March 17, 2014, a 104(d)(1) citation and a 104(a) citation were issued at Kentucky Fuel Corporation ("Respondent" or "Kentucky Fuel"), Bevins Branch Surface Mine. On March 14, 2016, a hearing was held in South Charleston, WV. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

III. Stipulations

The parties submitted stipulations in their prehearing reports. The following stipulations were submitted individually by both parties and will be treated as joint stipulations.

1. Jurisdiction exists because Kentucky Fuel is an operator of a mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(D), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.

2. The administrative law judge has authority to hear this case and issue a decision.

3. The proposed penalty will not affect Kentucky Fuel Corporation's ability to remain in business.[1]

4. A copy of Citations 8195668 and 8195670 were served on Kentucky Fuel Corporation, by a duly authorized representative of the Secretary.

5. Respondent operates Bevins Branch Surface mine, Mine Identification Number 15-18363.

6. Bevins Branch Surface Mine produced 366,025 tons of coal in 2013.

7. Respondent abated the citations involved herein in a timely manner and in good faith.

Sec'y Prehearing Rep. 1-2; Resp't Prehearing Rep. 3-4.[2]

IV. Findings of Fact and Conclusions of Law

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

On March 17, 2014, MSHA Inspector Brian K. Robinson arrived at Bevins Branch Surface Mine and notified the supervisor and foreman that he was on the job site to perform an inspection. (Tr. 27-28). While at the mine, Inspector Robinson drove into the mid-level right side contour pit area and made visual observation of the site. (Tr. 28-29). While there, he observed

[1] This stipulation was agreed to by both parties in their prehearing reports. Sec'y Prehearing Rep. 1-2; Resp't Prehearing Rep. 3-4.[1] Thus, the error in the transcript suggesting the proposed penalty might affect Kentucky Fuel's ability to remain in business will be disregarded. (*See* Tr. 5).

[2] Stipulations will hereinafter be cited to as Stip. followed by the stipulation number.

large boulders that were loose at the top of the highwall, in violation of § 77.1001. (Tr. 29). The wall was measured to be 70 feet at the highest point by a Trupulse Rangefinder, which Inspector Robinson calibrated and has used frequently in the past. (Tr. 45). Inspector Robinson further testified that two 993K end loaders were loading the 777 model rock trucks from underneath the highwall. (Tr. 29, 31). The end loaders had a reach of 30ft. (Tr. 66). The rock trucks transported material to a different location, where the trucks were emptied, to uncover the mined coal. (Tr. 29).

Subsequently, Inspector Robinson issued Citation No. 8195668 for a violation of § 77.1001. (Tr. 30). While conducting his inspection, Robinson spoke with a foreman, William Bevins, who indicated that he knew the inspector would not approve of the highwall condition and that he was planning to send over an excavator to fix the condition. (Tr. 38). This violation was designated as Significant and Substantial ("S&S") and reasonably likely to cause a permanently disabling injury to one miner, with high negligence.[3] (Tr. 39-41). A special assessment was also issued for this violation. (Sec'y Ex-P1).[4] This condition was terminated by the loose material being broken down with a bulldozer and an excavator. (Tr. 43).

After issuing Citation No. 8195668, Inspector Robinson continued his inspection by travelling to the lower active coal pit. (GX-P2, P3). There he saw the highwalls were shattered and cracked, exposing rocks that were not properly scaled.[5] (Tr. 93-94, 107-09). This condition was visible along the entire 300-foot length of the wall, and Inspector Robinson believed this created a risk of crushing injuries to miners. (Tr. 107-09; GX-P2, P3). Inspector Robinson testified that he observed miners on foot and miners working in end loaders directly next to the highwall. (Tr. 105-06). Inspector Robinson estimated this condition to have existed three to four days because of the extensive length of the condition across the wall. (Tr. 110-11).

Inspector Robinson also testified that he had a discussion with the only certified blaster at the mine, Josh Matheny.[6] (Tr. 90-92). During this conversation, Inspector Robinson asked Matheny if he knew that the wall was supposed to be pre-split according to the ground control plan. (Tr. 91-92; PX-6). According to Inspector Robinson, Matheny conceded that everyone knew that the wall needed to be pre-split, but that there were insufficient ammonium nitrate and fuel oil (ANFO) and gas bags for pre-splitting. (Tr. 92). Further, Inspector Robinson testified that

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[3] The Secretary's Post Hearing Brief and Citation No. 8195668 do not indicate this citation has an unwarrantable failure designation. Therefore, the Inspector's reference in his testimony to this citation being assessed with an unwarrantable failure and the Respondent's Post Hearing Brief opposing an unwarrantable failure designation appear to be in error. (*See* Tr. 40).

[4] The Secretary's exhibits will hereinafter be designated as GX followed by the exhibit number, which in this case is P followed by a number.

[5] The conditions for this citation were related to Citation No. 8195669 (not at issue in this proceeding), which involved the same 300-foot highwall. (Tr. 93).

[6] Inspector Robinson first testified that the blaster he spoke with was John Matheny, but subsequently stated that the blaster's name was Josh Matheny, and Josh was used in the rest of the testimony. (Tr. 91).

the ground control plan requires "[i]f highwalls are pre-split the slope will be greater than ninety degrees. If highwalls are not pre-split the slope will be one-hundred and ten degrees for cast blasting." (Tr. 100; GX-P6). No evidence was brought forward that cast blasting was used at the mine, and Inspector Robinson testified that "it was obvious [the highwall] was 90-plus" degrees. (Tr. 119).

As a result of this conversation with Matheny, his observations, and the ground control plan requirements, Inspector Robinson issued Citation No. 8195670 for failing to follow the ground control plan in violation of § 77.1000. (Tr. 91-92). This violation was designated Significant and Substantial ("S&S"), reasonably likely to cause a permanently disabling injury to one miner, with high negligence and an unwarrantable failure. (Tr. 106-12). This violation was also specially assessed because Inspector Robinson wanted to "get [Respondent's] attention", so that it would comply with highwall safety requirements. (Tr. 113-14).

Mark Wooten, a licensed professional engineer for Premium Coal Company, Inc, ("Premium Coal") testified about his knowledge of ground control plans.[7] (Tr. 148). He testified that he worked with Mr. Smith, who created the ground control plan at issue.[8] (Tr. 149). After reviewing the ground control plan, which has a blasting plan, Wooten testified that it wouldn't be possible to know whether to pre-split a highwall until after the production shots. (Tr. 159-60). He testified that pre-splitting was not required because on the blasting plan in the notes section it states that "[p]re-split holes are to be utilized as conditions dictate." (Tr. 158-60; GX-P6, 9). Additionally, Wooten testified that the blasting plan indicates the first step in production shot blasting was to pre-split. (Tr. 170; *See* GX-P5). Wooten testified that the blasting plan shows an example of the order in which production shots and pre-splitting may occur. (Tr. 179-181). He stated that the lines were not necessarily shot sequentially; however, the blasting plan was annotated sequentially, and "pre-split line" was labeled "1st." (Tr. 170-72; *See* GX-P6). He also testified that he was unaware if cast blasting was ever used at Bevins Branch Surface Mine as an alternative to production shot blasting. (173-74).

Wooten further testified that a jagged wall with protruding rocks does not necessarily indicate a highwall is unsafe. (Tr. 175). But Wooten did agree in his testimony that the ground control plan was developed to ensure safety while blasting. (Tr. 178).

Mark Huffman, the Director of Health Safety and Human Resources for Bluestone Industries, worked at Kentucky Fuel in March 2014, when the citations in this proceeding were issued.[9] (Tr. 181-84). He testified that pre-split shots could not be blasted after the production shots, and that cast blasting was not used at the time the citation was issued. (Tr. 198). When the citations were issued on March 17, 2014, he was not at Bevins Branch Surface Mine, and he did

[7] In January 2015, Wooten began working for Premium Coal, which was a subsidiary of the company that owns Kentucky Fuel Corporation and Bevins Branch Surface Mine. (Tr. 163).

[8] A ground control plan must be created by an operator and submitted to MSHA for acknowledgement. (Tr. 150-51).

[9] Bluestone Industries was an affiliated company of Kentucky Fuel Corporation. (Tr. 181).

not view the highwall until one or two days later. (Tr. 212-13). At that time, he believed the wall involved in Citation No. 8195668 to be approximately 50 feet high. (Tr. 191).

V. Contentions of the Parties

The Secretary contends that Respondent violated § 77.1001 in Citation No. 8195668 and that the citation was S&S, reasonably likely to result in a permanently disabling injury to one miner, and the operator acted with high negligence. (Sec'y Br. at 2). The Respondent argues that it did not violate § 77.1001 and contests all of the Secretary's designations and the special assessment. (Resp't Br. at 5-11). Respondent argues it did not violate § 77.1001 because there was no highwall, instead only shot overburden, and there was a bench, which it argues indicates that the wall was properly stripped for safety. (Resp't Br. at 5-8). Additionally, Respondent contends that the violation was not S&S because the boulders were not likely to reach the miners working in end loaders below and cause an injury. (*Id.* at 9-10). Respondent also argues that it was not highly negligent because the foreman's comments indicating he was directing a rock truck and excavator to fix the condition was not an admittance of aggravated conduct, but rather an additional precaution. (*Id.* at 10).

Further, the Secretary contends that Respondent violated § 77.1000 in Citation No. 8195670 and that the citation was S&S, reasonably likely to result in a permanently disabling injury to one miner, with an unwarrantable failure and high negligence. (Sec'y Br. at 3). Respondent argues that it did not violate § 77.1000 and disagrees with all of the designations and the special assessment. (Resp't Br. 11-16). Respondent contends that the ground control plan was open to interpretation and there was no evidence that the wall was not pre-split. (*Id.* at 11-13). Further, Respondent argues the violation was not S&S because the wall was not unsafe even if it was jagged. (*Id.* at 14). The Respondent argues the operator was not highly negligent because the blaster that the inspector spoke to was not an agent of the operator. (*Id.* at 14-15). Also, Respondent argues the special assessment is not appropriate because it was merely issued to be punitive, which is unreasonable and speculative. (*Id.* at 16).

VI. Discussion

A. Burden of Proof and Standard of Proof

The Secretary bears the burden of proof by a preponderance of the evidence for Mine Act violations.[10] *Jim Walter Res., 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). Each element of a citation must be proven by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has 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*

[10] Respondent incorrectly contends the Secretary's burden of proof is substantial evidence. (Resp't Br. at 8-14). The burden for violations is by a preponderance of the evidence.

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).

B. Citation No. 8195668

Citation No. 8195668 was issued for an alleged violation of § 77.1001 which requires: "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection." 30 C.F.R. § 77.1001

During Inspector Robinson's March 17, 2014, inspection at Bevins Branch Surface Mine, he observed two 993K end loaders working beneath a highwall at the mid-level right side contour pit.[11] (Tr. 29). Inspector Robinson observed the end loaders working beneath the highwall that had loose unconsolidated material and boulders on top. (Tr. 31). He wrote a § 77.1001 citation as a result of his observations of the highwall. In section 8 of the Citation, "Condition or Practice," Robinson wrote: "Loose Hazardous Material is not being stripped for a safe distance at the active Mid-Level Right Side of Contour breakdown Pit Area Highwall… Large Boulders rest atop of this material at the Highwall."[12] (GX-P1).

Inspector Robinson testified that he observed boulders and loose material that were not stripped from the highwall. (Tr. 31). The highwall was 70 feet high, as measured by a Trupulse

[11] Respondent makes the argument in its post hearing brief that this violation could not have occurred because there was no highwall. Respondent argues that the material at issue was shot overburden being removed. (Resp't Br. at 7-8). I find the distinction to be irrelevant as § 77.1001 requires loose material to be stripped for a safe distance from the top of a pit or a highwall. The material at issue appears to fall under either definition of being on top of the pit or highwall. Additionally, Inspector Robinson repeatedly testified that there was a highwall not properly stripped, and he was the only witness who was present on the day the violation. (Tr. 30-32). Inspector Robinson was the most credible witness as to the condition of the mine on the day this citation was issued. As a result, this argument that there was no violation because no highwall existed is not convincing.

[12] Respondent contends the material was kept at the angle of repose and that a bench was present, preventing a § 77.1001 hazard from existing. (Resp't Br. at 6-7). However, Inspector Robinson testified that this citation was issued because the highwall was not stripped for safety and that there were loose rocks that posed a hazard to miners below. As Inspector Robinson was the only witness present when the citation was issued, I find his testimony to be the most credible, and I find any argument concerning a bench or angle of repose by witnesses who were not present to observe the conditions that day to be unpersuasive.

Rangefinder.[13] (Tr. 44-46). He also observed two end loaders working beneath this highwall. (Tr. 29). The reach of the end loaders were likely only 30 feet, even though the Respondent suggested it could ramp up 70 feet, in its questioning of Inspector Robinson. (Tr. 66). There was no other testimony or evidence to support Respondent's claim regarding the reach of the end loaders. And it was clear that the highwall could not have been safely stripped by an end loader with only a 30-foot reach. (*See* Tr. 66). Inspector Robinson found this to be dangerous because it could have resulted in loose material falling on the miners working in the end loaders below, posing a risk of a crushing injury. Thus, Inspector Robinson's observation of the unsecured boulders on top of the highwall with end loaders working below demonstrated a § 77.1001 violation.

The Respondent's witness Wooten, a licensed professional engineer, never saw the conditions and has no direct knowledge to dispute Inspector Robinson's testimony. Huffman, the Director of Health Safety and Human Resources at the time, also did not observe the conditions of the highwall on the day this citation was issued. As a result, this Court finds that the Secretary has met its burden in proving that a § 77.1001 violation occurred.

1. The Violation was Significant and Substantial and Reasonably Likely to Result in a Permanently Disabling Injury to One (1) Person.

Section 104(d)(1) of the Mine Act defines Significant and Substantial ("S&S") as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). An S&S violation must be supported by the circumstances surrounding the violative condition. *Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007 (Dec. 1987).

In *Mathies* the Commission set forth a four-prong test to determine a S&S violation. *National Gypsum. Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). To prove an S&S violation, the Secretary must show: "(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.

Further, an S&S determination should be analyzed in the context of "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). When assuming continued mining operations, it must be considered without any assumption of 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).

[13] Huffman, the Director of Safety and Human Resources, estimated the highwall to be about 50 feet high, but as he did not view the highwall until a day or two after the citation was issued, Inspector Robinson's 70-foot finding with a Trupulse Rangefinder was more credible and relevant to the citation. Inspector Robinson was trained to use the Trupulse Rangefinder and he has successfully used it for measurement prior to these citations being issued. (Tr. 44-46).

In the instant case, the first prong has been satisfied as the Secretary has proven that a § 77.1001 violation occurred due to loose and unconsolidated boulders on the highwall. (Tr. 27).

Miners were also using end loaders at the bottom of the wall, which had loose boulders. These loose boulders posed a discrete safety hazard because the boulders could have fallen and caused a crushing injury, as there were no barriers to prevent the boulders from rolling off the wall. (*See* Tr. 29, 31). Therefore, the second prong has been met because the Respondent's failure to strip the highwall contributed to a discrete safety hazard of loose falling boulders.

The third prong of the test, which requires a reasonable likelihood that the hazard will result in an injury, was also satisfied. The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Musser Engineering, Inc*., 32 FMSHRC 1257, 1280-81 (Oct. 2010). Instead, it is only required that the hazard would be reasonably likely to contribute to an injury. *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984). [14] The hazard here was the presence of loose and falling boulders from the highwall. These loose boulders could easily have fallen onto a miner and cause a serious injury to miners working below.

The injury that could have occured from a rock or other material falling from a 70-foot highwall was a crushing injury. (Tr. 40). A crushing injury could permanently disable or even potentially kill an individual. Therefore, the fourth prong has been demonstrated because it was reasonably likely that a serious crushing injury could occur from a highwall with loose material that was not barricaded. Consequently, all four prongs of the *Mathies* test have been proven by the Secretary, and the S&S designation for Citation No. 8195668 is affirmed.

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. For Citation No. 8195668, the gravity was reasonably likely to result in a permanently disabling injury to one miner. (GX-P1). The injury to one miner has been demonstrated because Inspector Robinson testified that he saw miners working in end loaders below the highwall, where rocks could have fallen on them. (Tr. 29, 31). This violation involved a highwall with loose unconsolidated material that could have fallen on a miner below. (GX-P1). The wall was approximately 70 feet high, and a large boulder falling from that height could cause a serious crushing injury that could permanently disable an individual. (Tr. 40). Thus, the gravity of reasonably likely to result in a permanently disabling injury to one person is also affirmed.

2. The Violation was the Result of High Negligence.

Negligence is not defined in the Mine Act. MSHA regulations provide that violative conduct is properly designated as "high negligence" when "the operator knew or should have known of a violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d), Table X. The Commission has held that Administrative Law Judges are not required to apply the Part 100 negligence definition and may instead use a traditional negligence analysis. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015); *accord Mach Mining, LLC*, 809 F.3d

[14] Recent circuit court decisions have further discussed the importance of the third prong in the S&S analysis. *See Eagle Creek Mining, LLC*., 2016 WL 2956689 at *3-7 (May 2016)(ALJ)(discussing the traditional S&S analysis and the effect of recent Fourth and Seventh Circuit decisions).

1259, 1263-64 (D.C. Cir. 2016). Additionally, "Commission judges… may find 'high negligence' in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03; *Mach Mining*, 809 F.3d at 1263-64. High negligence is "'…an aggravated lack of care that is more than ordinary negligence.'" *Brody*, 37 FMSHRC at 1703, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Accordingly "a Commission judge… may consider the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702. An operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

The negligence for this citation was properly assessed as high. (Tr. 41; GX-P1). Section 77.1001 requires that loose and hazardous material be stripped from mine walls, sloped to the angle of repose or barricaded to protect miners from injury. Respondent did not meet this high standard of care by allowing loose unconsolidated material and boulders to remain unsecured on the highwall. (Tr. 29). This created a risk for any miner working underneath the highwall. Moreover, Inspector Robinson testified that the foreman admitted that he knew the highwall was not in good condition and that MSHA was not going to be satisfied with the safety measures implemented at the highwall. (Tr. 38). Additionally, there was no evidence of mitigating circumstances brought forth at hearing. The Respondent showed an aggravated lack of care when it knowingly allowed the condition to persist, but failed to abate it until an MSHA inspector was on site. (*See* Tr. 38). Consequently, the high negligence evaluation is affirmed.

C. Citation No. 8195670

Citation No. 8195670 was issued for a violation of § 77.1000. Under § 77.1000, it is required that "[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability." 30 C.F.R. § 77.1000.

This citation was issued by Inspector Robinson after he observed that a highwall in the lower active coal pit on the right contour was not pre-split as required by the Respondent's ground control plan. (GX-P3). Specifically, Inspector Robinson spoke with the certified mine blaster Matheny who said that the highwall was not pre-split because he did not have adequate materials. (Tr. 92). Neither party has disputed that the highwall was not pre-split at hearing.[15] The ground control plan on page nine shows the Blasting Plan, which lists the first blast as the pre-split line. (GX-P6). Additionally, page four of the Blasting Plan describes in the notes section that in the lower level coal seams, highwalls will be pre-split with a slope greater than 90

[15] While Respondent briefly suggested in its post hearing brief that the highwall could have been pre-split, Respondent failed to bring forward any evidence to support a finding that the wall was indeed pre-split. (Resp't Br. at 13). Accordingly, I find this argument unpersuasive.

degrees and do not need to be pre-split for cast blasting at 110 degrees.[16] (GX-P6). According to Inspector Robinson, the highwall was greater than 90 degrees, but not 110 degrees. (Tr. 100, 119). Inspector Robinson, Wooten, and Huffman all testified that the mine did not use cast blasting, or they were unaware that cast blasting was used, at the time the citation was issued. (Tr. 100, 173-74, 228). Thus, no evidence was brought forward that cast blasting was used on this highwall. Therefore, Inspector Robinson concluded that the wall was required to be pre-split, and it was evident to him via visual observation that it had not been pre-split as required. (GX-P 4). The certified blaster also agreed the wall was not pre-split. (Tr. 92).

Further, neither of the Respondent's witnesses was present when this citation was issued, so they did not have direct knowledge of whether or not the highwall was pre-split. Moreover, Huffman, the Director of Health Safety and Human Resources testified that pre-split shots could not be blasted after the production shots. (Tr. 198). Thus, any argument that the pre-splitting could have been performed after the production shots does not hold weight. Since pre-splitting was required by the ground control plan, and the operator failed to pre-split the highwall at issue, the Respondent failed to follow the ground control plan in violation of § 77.1000. (*See* GX-P3).

Due to the Inspector's observations, his testimony concerning his conversation with the certified blaster Matheny, and Huffman's testimony that pre-split shots must be performed first when blasting, I find that the Secretary has met its burden of proving a violation for Citation No. 8195670.

1. The Violation was S&S and Reasonably Likely to Result in a Permanently Disabling Injury to One (1) Person.

Inspector Robinson assessed this violation as S&S. (GX-P3). Under *Mathies*, the first prong was satisfied as there was a § 77.1000 violation when the Respondent failed to follow the ground control plan requirement of pre-splitting the highwall at issue. *See* discussion *supra*.

The second prong was also satisfied as the failure to follow the ground control plan for safety contributed to a discrete safety hazard of large rocks falling onto miners. The failure to pre-split as required by the ground control plan created cracks, and holes in the wall allowing for large rocks to protrude from the highwall. (Tr. 107-09).

Beneath the highwall, Inspector Robinson observed an end loader loading coal haulage trucks and blasters on foot loading holes for blasting along the wall. (Tr. 105-06). Therefore, the third prong has been met because there was a reasonable likelihood that a rock falling from a large 300-foot long highwall onto a blaster or a machine operator would have caused a crushing injury. (Tr. 105-06). The miners below were not adequately protected from the risk of rocks falling on them. This condition was reasonably likely to cause an injury of a reasonably serious nature as boulders falling from a highwall onto an individual's head, arms, or legs could crush

[16] On this same page there was a handwritten note about a fireclay highwall. (GX-P6). Both parties mention this highwall, but no evidence was brought forth as to who wrote this note or when it was written. Additionally, Respondent argues the Secretary does not prove the fireclay highwall was one of the walls involved in the violations. (Resp't Br. at 12). However, there was no consensus as to whether the highwall at issue was the fireclay highwall. As a result, the validity of this handwritten note is ultimately irrelevant.

organs and permanently disable someone, which satisfied the fourth prong. As a result, Inspector Robinson properly found Citation No. 8195670 to be S&S.

Respondent attempts to argue, with the support of Wooten's testimony, that a jagged wall that was not pre-split may be safe. (Tr. 175; Resp't Br. at 14). However, I find this testimony to lack credibility when there was a ground control plan that requires pre-splitting for safety. (GX-P6). Moreover, it is axiomatic that a wall with protruding rocks, whether loose or not, is more likely to cause an injury than a smooth wall.

The gravity assessed here was reasonably likely to cause a permanently disabling injury to one miner. Inspector Robinson testified that a highwall must be pre-split to make a safer smoother wall for miners who work in close proximity to the wall. (Tr. 103). Pre-splitting the wall was a safety mechanism that was required by the ground control plan. (GX-P6). Respondent's witness Wooten agreed in his testimony that the ground control plan was developed to ensure safety while blasting. (Tr. 178). Inspector Robinson testified that without pre-splitting, it was more likely that large rocks from the wall could fall and hit people working below. (Tr. 107). This could crush a miner's arm or leg, which could permanently disable an individual. (Tr. 107). At any time, there could be two blasters, a spotter, and coal loaders working beneath a highwall. (Tr. 107-08). Therefore, Inspector Robinson said the risk of injury could be to one person because the rocks would likely only be able to hit one person at a time. (Tr. 108). Due to the risk of a large rocks falling from a 300-foot long wall with cracks and holes in it, which could result in serious crushing injuries to an individual, I affirm the gravity of reasonably likely to result in a permanently disabling injury to one person.

2. The Violation was the Result of High Negligence.

Inspector Robinson determined that the negligence for this citation should be evaluated as high. (Tr. 111). The Respondent's ground control plan required a highwall to have a slope of 90-plus or 110 degrees. (GX-P6). In the notes on the ground control plan, it stated that highwalls greater than 90 degrees will be pre-split and highwalls greater than 110 degrees will be cast blasted. (*Id.*). Inspector Robinson testified that the wall was 90-plus degrees, not 110, and required pre-splitting. (Tr. 110, 19).

Furthermore, Inspector Robinson had a conversation with the Respondent's certified blaster Matheny who conceded that the wall should have been pre-split and that he did not have adequate materials to properly pre-split the wall.[17] (Tr. 111). This conversation with the blaster indicates that the Respondent knew the reasonable standard of care in highwall blasting to create the safest working environment for miners. (*See id.*). Hence, the Respondent failed to exercise the requisite high standard of care required under § 77.1001. This demonstrates an aggravated lack of care by the Respondent.

[17] Respondent attempted to put a burden on the inspector to check purchase orders or the blasting log to see if proper supplies existed for pre-splitting. (Tr. 135; Resp't Br. at 15.) This Court finds this argument unpersuasive as it was not significant whether the proper materials existed for this citation. Rather it is only relevant that the material was not used in compliance with the ground control plan and the operator was aware of it.

Respondent made an argument that Matheny was not an agent of the operator, and therefore, his negligence cannot be attributed to the Respondent. (Resp't Br. at 14-15). Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a … mine or the supervision of the miners in a … mine[.]" 30 U.S.C. § 802(e). The Commission has held that "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) *citing Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). The Commission has held that "[it] consider[s] factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) *citing Ambrosia*, 18 FMSHRC at 1553-54, 1560-61; *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints).

Matheny was the only person allowed to blast at the mine because he was the only certified blaster on site. (Tr. 90, 103-04). He directed the workforce in blasting, and his control over mine blasting had a direct impact on the safety at the mine. (Tr. 90-92). Therefore, he acted as an agent, and his knowledge of the condition can be imputed to Kentucky Fuel. Accordingly, Respondent's argument that the blaster's knowledge cannot be imputed on the Operator does not hold weight, and the high negligence evaluation is affirmed.

3. This Violation was the Result of an Unwarrantable Failure.

The Commission has determined that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). An unwarrantable failure can be demonstrated by a reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

> 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.

Manalapan Mining Co., 35 FMSHRC at 293. All of the relevant *Manalapan Mining* factors, the facts and circumstances of the case, and any mitigating circumstances must be considered by this Court. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

i. The Extent of the Violative Condition and the Length of the Time that the Violative Condition Existed

The highwall was hazardous, and it extended 300 feet. (Tr. 108-09). Inspector Robinson testified that the absence of pre-splitting at the highwall had existed three to four days. (Tr.110-11). He made this finding based on the holes and the size of the area that had been drilled. (Tr. 110-11). Thus, the loose material along the 300-foot wall and the length of time the condition existed weigh against the Respondent.

ii. The Obviousness of the Condition and Whether the Condition Posed a High Degree of Danger

The inspector observed that there were holes drilled and that the wall was not pre-split, which demonstrate the obviousness of the condition. (Tr. 109). This posed a high degree of danger because the failure to pre-split the wall resulted in loose material, which could have created the risk of crushing injuries. (Tr. 107). There were loose rocks, holes in the wall, and cracks which could have easily created a hazard of a rock or other debris falling from a highwall onto a miner working in an end loader below. (Tr. 93-94, 107-09). Therefore, the condition was obvious, and it posed a high risk to miners working below.

iii. The Operator's Knowledge of the Condition

Inspector Robinson spoke with the certified blaster Matheny who conceded that everyone knew that pre-splitting was required. (Tr. 91-92). Additionally, the ground control plan, which the operator was required to create and submit to MSHA for acknowledgement, requires pre-splitting. (*See* Tr. 150-51). Therefore, I find that the Respondent knew or should have known that pre-splitting was not being used according to the ground control plan because the condition could have been readily observed. (*See* Tr. 109).

iv. The Operator's Efforts in Abating the Condition

Respondent did not attempt to abate the condition until after it knew the MSHA inspector was on site. (Tr. 91-92; GX-P3). There was no evidence brought forward by the Respondent demonstrating an attempt to correct condition prior to issuance of the violation.

v. The Operator's Notice that Greater Efforts were Necessary for Compliance

The certified blaster admitted that everyone knew the highwalls were meant to be pre-split. (Tr. 91-92). However, he stated he did not have the proper materials to properly blast the highwall. (*See id.*). The Operator also had the ground control plan, which provides notice of blasting requirements. (GX-P6). As a result, the Operator had notice that there should have been greater efforts to comply with the ground control plan.

Consequently, when considering all of the *Manalapan Mining* factors, the operator demonstrated the requisite aggravated conduct for an unwarrantable failure. All of the factors weigh against the Operator and demonstrate a serious lack of reasonable care to comply with the pre-splitting requirement in the ground control plan. (*See* GX-P6). Therefore, I affirm the unwarrantable failure designation for Citation No. 8195670.

VII. Special Assessments

Under 30 C.F.R. § 100.5 "(a) MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment. (b) when 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 civil penalty under § 100.3 is based on the criteria set for the in § 110(i) of the Mine Act. This section provides:

> 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 chapter, 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. § 802(i).

The Respondent was a large operator that produced 366,025 tons of coal in 2013 and had four § 77.1001 violations in the 18 months preceding the issuance of Citation No. 8195668. (Stip. 6). For this citation, Respondent was highly negligent as the highwall was not properly stripped, and the foreman told Inspector Robinson that he knew about the condition, but nothing was done to abate it. The parties stipulated that these penalties will not affect the Operator's ability to remain in business. (Stip. 3). This citation was hazardous because of the loose unconsolidated material on the highwalls. Therefore, this Court affirmed the designations of S&S and reasonably likely to cause a permanently disabling injury to one miner. While there was good-faith abatement in a reasonable amount of time, the remaining statutory criteria weigh heavily against the Respondent. (Stip. 7). Accordingly, the Secretary's special assessment of $6,800.00 is affirmed.

Given that the violative conduct in Citation No. 8195670 has been assessed as S&S and reasonably likely to result in a permanently disabling injury to one miner, and the high negligence and unwarrantable failure findings, and having considered all of the statutory criteria in § 110(i), this Court finds the Secretary's originally assessed penalty to be appropriate. (GX-P3). Additionally, as the same circumstances involving the mine size, ability to remain in business, gravity, and compliance apply to this order, the proposed civil penalty of $8,600.00 is affirmed.

Inspector Robinson issued these special assessments to deter the Respondent from continuing to knowingly violate highwall safety standards. The admission of knowledge by a foreman and the certified blaster of the respective violations at issue demonstrate an aggravated lack of care. This knowledge of wrongdoing, yet indifference to safety standards, poses a high risk of injury to miners, especially because the violations at issue involve extensive safety standards.

VIII. Conclusion

For the foregoing reasons Citation No. 8195668 and Citation No. 8195670 will be affirmed with all proposed designations. Consequently, it is **ORDERED** that Respondent pay the Secretary of Labor the sum of $15,400.00 within 30 days of the date of this Decision.[18] Upon receipt of payment, this case is hereby **DISMISSED**.

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

Distribution: (Certified Mail)

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James F. Bowman, Kentucky Fuel Corporation, P.O. Box 99, Midway, WV 25878

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. RIVER VIEW COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-782 A.C. No. 15-19374-358607 Mine: River View Mine

DECISION

Appearances: Hanah Harris-Yager, U.S. Department of Labor, Office of the Solicitor
1244 Speer Boulevard, Suite 216, Denver, Colorado 80204

Gary D. McCollum
1146 Monarch Street, 3rd Floor, Lexington, Kentucky 40513

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against River View Coal, LLC, at the River View Mine, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801. This case involves one citation, number 8506100, issued on October 23, 2013 as a 104(d)(1) violation for an assessed penalty of **$5,961.00**. The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on May 3, 2016.

MSHA Inspector Matthew Stone testified for the Secretary. River View Mine Unit 7 Foreman Michael Duckworth and Safety Department Manager Gerome Thomas testified for River View Coal (Respondent). After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden in establishing a violation of the cited standard. All elements of the citation with the exception of the unwarrantable failure aspect are upheld. After considering the necessary criteria for penalty assessments, I find that a penalty of **$4,500.00** is appropriate.

II. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Inspector Stone alleged that there was an inadequate on-shift examination for the 8157 roof bolting machine in violation of 30 CFR §75.362(a)(2), leading him to issue citation number

8506100. The gravity was marked as reasonably likely, permanently disabling, and significant and substantial with four miners affected. Ex A. Stone found Respondent to be highly negligent and designated the violation as an unwarrantable failure on the part of the Respondent's management. *Id.* The §75.362(a)(2) standard states "persons designated by the operator shall conduct an examination to ensure compliance with the respirable dust control parameters specified in the mine ventilation plan." Tr. 17, 39-40.

On October 23, 2013 Inspector Stone traveled to the mine to collect respirable dust samples on the Number 7 Unit. Tr. 26, 36. Section Foreman Michael Duckworth entered the mine around 6:15 that morning, while Inspector Stone waited outside for the Unit to get started. Tr. 138-139. Prior to Inspector Stone entering the mine, the scoop operator radioed Duckworth informing him that the on-shift dust parameter exam for the 8157 roof bolter was good. Tr. 154. Foreman Duckworth was given the suction rating and told everything else was good. *Id.* Three roof bolting machines were located in the unit at the time, however only two were typically used. Tr. 152-153. The 8157 roof bolter was an extra machine and did not need to be run that day. Tr. 160. Standard §75.363(g) states "The certified person directing the on-shift examination to ensure compliance in respirable dust control parameters specified in the mine ventilation plan shall certify, by initials, date and time that the examination was made." Tr. 38. A certified machine should be ready for operation even if currently idle. Tr. 120-121.

Upon entering the mine, Inspector Stone travelled underground and arrived at the power center where the DTI board was located. Tr. 37. The DTI board is where examinations are posted with the day/time and initials to signify the exam is complete. *Id.*. Inspector Stone observed the date and initials on the DTI board for the 8157 on-shift examination, indicating it had been completed. Tr. 37-39, 49, 60, 64, 114-115. During his testimony at hearing, Section Foreman Duckworth did not recall certifying that the examination was completed on the DTI board. Tr 155. However, Inspector Stone recalled that during his inspection Duckworth acknowledged he had signed the DTI board indicating the examination of the 8157 roof bolter was complete. Tr. 65. Stone also noted he was told by Duckworth and the roof bolters that they had completed an examination of the 8157 roof bolting machine. Tr. 115. Inspector Stone approached and conducted his inspection of the machine. Tr. 40. The roof bolter operator informed Stone that he had checked the vacuum and the machine had good suction. Tr. 49-50. Stone noted in his testimony that it is necessary to check both the suction and the dust filter because there may still be an issue with the dust box even with adequate vacuum pressure. Tr. 41. Inspector Stone noticed dust accumulation on the mufflers coming from the dust collection system. Tr. 45-46. After opening the collection box, Stone found a damaged filter and rock drill dust accumulation on the clean side of both filters. Tr. 45-47. It is not possible for dust to have gone backwards through the muffler because a great amount of pressure would be required for dust to enter the wrong end of the machine. Tr. 117. There were small dents to the outer ring of the filter, which could have been caused by banging the filter, creating damage and allowing dust to bypass. Tr. 195, 47-48. Inspector Stone concluded from the dust build up that the condition of the dust box existed for more than one shift. Tr. 71-72. At the time, there were four miners working down wind of the machine. Ex. A, Tr. 70.

Inspector Stone then issued the 8506100 citation. Tr. 56-57. He concluded that the Respondent had violated the standard because they did not adequately examine the entire system

as specified in the ventilation plan. Tr. 63. The inspection of the collection box only included the vacuum suction test, not a visual check inside the box and filter. Tr. 59-60. On the day of the inspection no replacement dust filters were located at Unit 7, however additional filters were available from other units at the mine. Tr. 182-183. If an additional filter were requested, Foreman Duckworth would have been informed. Tr. 182-183. Duckworth acknowledged that all steps for the on-shift examination need to be conducted prior to the examination being certified. Tr. 171. Inspector Stone noted that if a full examination had been conducted, the issue would have been found and resolved. Tr. 124.

Inspector Stone testified that on-shift examinations are important because they eliminate hazards and exposure to respirable dust for miners. Tr. 64. Drill dust can cause silica to enter the surrounding air and lead to a permanently disabling disease, silicosis. Tr. 69, 72. Silicosis is caused when silica particles, similar to glass or sand, enter the lungs and cut the tissue. Tr. 72-73, 207. Persons affected by silicosis will never get better, even if the individual is removed from the environment. Tr. 72-73, 207.

Section Foreman Duckworth testified that since the 8157 roof bolter was the extra machine at the unit, it was not in operation at the time of the inspection. Tr. 79. The 8157 roof bolter was located in an area that would not have allowed for dumping of the dust box because the air for that day flowed through the section and could have exposed workers on the left side to harmful dust. Tr. 177, 206-207. However, according to Inspector Stone the box could have been opened with minimal dust release to check the filter without dumping the dust inside. Tr. 60-62, 116. Additionally, there were acceptable areas the machine could have been moved to conduct the full inspection. Tr. 61-63.

The roof bolter standard in the Respondent's mine standard book number 8 states "dust boxes should be cleaned at the beginning of each shift and at mid-shift. Boxes should only be emptied as close to the face as possible so they can be loaded out in the loading cycle wall, wearing a dust mask." Tr. 146. Foreman Duckworth further testified that it was standard procedure at the River View Mine for the roof bolter operators to wait until they reached the face to open the box because each time the box is opened there is a chance for dust to enter the air. Tr. 175. The roof bolters operating the 8157 roof bolter were proficient in MSHA training and the River View Mine's expectations training. Tr. 148-150. The Respondent requires the filters in the box to be changed on Mondays, Wednesdays and Fridays or as needed. Tr. 163. When roof bolters are in use, boxes will typically be dumped three or four times per shift, and the roof bolter operators conduct a visual inspection of the filter during each dump. Tr. 175-176, 214. There were no restrictions preventing the roof bolter operators from conducting another exam once they pulled up to the face. Tr. 166, 174, 210.

Prior to the inspection in question, Respondent had not been cited under this particular standard in the 15 months prior to the citation at issue. Ex A, Tr. 158. Between April 23, 2013 and October 23, 2013 MSHA and mine operator respirable dust samples were taken from the River View Mine. Tr. 159-160. Of the total 525 dust samples, two exceeded the 2-milligram standard for respirable dust. Tr. 159-160. All of the samples taken on the working sections of the mine were compliant with the standard. Tr. 195-196.

Respondent contested the citation, claiming their inspection of the dust box was not inadequate.

III. PARTY ARGUMENTS

The Secretary argues that in order for the Respondent to comply with Standard 30 C.F.R Section 75.362(a)(2), an on-shift examination must be conducted to determine whether the dust collection system is in operational condition. Sec'y Br., 14. Foreman Duckworth certified the on-shift exam for the roof bolter was complete. Sec'y Br. 18, Tr. 37-39, 49, 60, 64, 114-115. However, since dust was found on the clean side of the filter, the Respondent did not check the interior of the box, and therefore did not complete the on-shift examination. Sec'y Br., 16. The Secretary states the Respondent accepted the dust collection system was not maintained in operative condition and the condition was a significant and substantial violation of the standard. Tr. 16. The Secretary argues the violation should remain designated as high negligence since there were no mitigating factors. Sec'y Br., 25. Although the machine was located in an area not adequate for dumping, the box could have been opened to check the filter with minimal dust release. Sec'y Br., 28-29, Tr. 177, 60-62. In addition, there were other acceptable areas the machine could have been moved to conduct a full examination. Sec'y Br. 28-29, Tr. 61-63. The Secretary argues the violation was an unwarrantable failure as the condition was visibly obvious and the Respondent was aware of the hazard, it was common practice at the mine, and posed a high degree of danger. Sec'y Br., 25-26, Tr. 15-16. The Secretary contends that since Foreman Duckworth was aware that the roof bolter operators usually wait to reach the face before dumping the drill dust box, he also knew or should have known the dust filter had not been examined as part of the on-shift examination when he certified it complete. Sec'y Br., 26, Tr. 15-16.

The Respondent argues the citation should be vacated because it was premature and speculative. Resp. Br., 15, 20. The Respondent asserts the No. 8157 roof bolting machine was not engaged in production at the time of the inspection and according to the plain language of 30 C.F.R. Section 75.362(a)(2) "…The examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes." Resp. Br., 16, 19. The Respondent argues they still had time to conduct the examination and therefore no violation occurred. Resp. Br., 19. In the alternative, the Respondent argues the negligence level should be reduced from high negligence to a lower level given the presence of mitigating factors. Resp. Br., 26, Tr. 24. The Respondent contends that the Secretary failed to demonstrate an unwarrantable failure on the part of the River View Mine. Resp. Br., 20-21. The Respondent argues that the situation did not result from aggravated conduct but rather demonstrated poor communication and a difference in opinion on rock drill dust safety practices. Resp. Br., 21.

IV. ANALYSIS

A. Citation No. 8506100

Inspector Stone alleged in part with Citation No. 8506100 that:

> An inadequate examination was conducted on the CO#8157 roof bolter operating on the #7 unit (MMU 011-0/012-0) to assure the compliance of the respirable dust control parameters specified in the approved mine ventilation plan. The operator had conducted the examination prior to the MSHA inspection and no deficiencies were found by the operator. An MSHA inspection was conducted on the CO#8157 roof bolter and the following deficiencies were found. The opposite operator side dust filter was damaged from being beat out, accumulations of rock drill dust were found on the clean side of both the operator side and opposite operator side dust filters and dust has accumulated on the machine frame from dust blowing from the exhaust mufflers. These deficiencies were obvious to the most casual observer and should have been found by a person who is trained to conduct these exams.

Inspector Stone went on to state that:

> The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Stone found that the condition of the filter violated 30 C.F.R. §75.362(a)(2) which requires:

> A mine operator to conduct an examination of the mine's respirable dust control parameters specified in the mine ventilation plan and correct any deficiencies in the dust controls before production begins or resumes.

The Secretary may demonstrate a violation of §75.362(a)(2) by proving the operator either did not examine a dust suppression measure required in the ventilation plan or did not correct a problem with a dust suppression measure. *GMS Mine Repair*, 37 FMSHRC 2841 (Dec. 2015) (ALJ).

Inspector Stone determined that the violation was reasonably likely to result in injury, that injury was likely to be serious, and the violation was significant and substantial (S&S) and affected four people. Ex. A. Inspector Stone alleged the violation was the result of high negligence with no mitigating factors and an unwarrantable failure on the part of the respondent's management. *Id.*.

There is no dispute among the parties that there was dust located on the clean side of the filter. Tr. 45-47, 157. While examining the machine, the roof bolter operator informed Inspector Stone that he had checked the vacuum and the machine had good suction. Tr. 49-50. Inspector

Stone observed the date and initials on the DTI board indicating the exam was completed. Tr. 37-39, 49, 60, 64, 114-115. Section Foreman Duckworth acknowledged in his testimony that all steps for the on-shift examination need to be conducted prior to the examination being certified. Tr. 171. Finally, Inspector Stone testified that if a full examination had been conducted the issue would have been found and resolved. Tr. 124-125.

Based on the testimony and entered exhibits, I find that the Secretary presented sufficient evidence to show that a violation of 30 CFR §75.362(a)(2) occurred at Unit 7 of the River View Mine. I affirm Citation No. 8506100 but, as explained below, do not find the violation to be an unwarrantable failure on the part of Respondent.

B. Significant and Substantial

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 an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

The Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010).

I have already held that a violation of 30 CFR §75.362(a)(2) occurred at Unit 7 of the River View Mine. Secondly, since dents were found in the filter and rock drill dust on the clean side of the filter, the violation contributed to the discrete safety hazard of silica particles in the air. Tr. 45-48. If the machine was in use it is reasonably likely that silica particles would have entered the air contributing to an injury. Tr. 69, 72. Silica particles in the air can cause silicosis, a permanently disabling condition. Tr. 69, 72.

Because the examination of the roof bolting machine was certified as complete, it was available and ready to be placed into production with the defective filter. And at no time prior to his decision to issue a citation was Inspector Stone notified by the roof bolt operators or Foreman Duckworth that further inspection was necessary or going to take place prior to the machine going into production. To the contrary he was also told by Duckworth and the roof bolters that they had completed an examination of the 8157 roof bolting machine. Tr. 115. This led Stone to reasonably conclude that the machine was in fact ready and available to be placed into production in the condition he found it during his inspection. It is undisputed that the condition of the filter was likely to contribute to a permanently disabling injury, and in the event a

violation is found that the condition of the dust filter was a significant and substantial violation of the standards. Tr. 16. It is also undisputed that four people would have been affected had silica particles entered the air since there were four miners working in close proximity to the roof bolting machine at the time of the violation. Ex. A, Tr. 70. Therefore, based on the evidence presented by the Secretary, I find that the Secretary has satisfied all four elements of the Mathies S&S test and affirm citation No. 8506100 as S&S.

C. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

Inspector Stone, without equivocation, credibly testified that the DTI board reflected that the examination certification was complete. Tr. 37-39, 49, 60, 64, 114-115. Even though the 8157 roof bolter was not in operation at the time of inspection, a certified machine should be ready for operation even if currently idle. Tr. 79, 120-121. Foreman Duckworth testified he knew all steps for the on-shift examination needed to be conducted prior to the examination being certified. Tr. 171. He was aware that the 8157 roof bolter was not at the face when his roof bolters communicated the suction rating and relayed to him through the scoop operator that everything else was good. Tr. 169. Duckworth also testified the standard procedure is for the roof bolters to wait until the machine is at the face to inspect the dust boxes and dump them if needed. Tr. 168-169, 175. Even though the box could have been opened to check the filter, the machine was not located in an area suitable for dumping. Tr. 177, 60-62. Duckworth also clarified that the boxes do need to be checked wherever the machine is located. Tr. 180. Further, Inspector Stone noted the roof bolter operators had the option to move the machine to a different area or to the face before certifying a complete exam. Tr. 61-63.

Foreman Duckworth testified that the roof bolters operating the machine were proficient in MSHA training as well as the River View Mine's expectations training. Tr. 148-150. It was standard procedure at River View for the roof bolter operators to wait until they reached the face to open the dust boxes because there is a chance for dust to enter the air each time a box is opened. Tr. 175. When roof bolters are in use, boxes will typically be dumped three or four times per shift, and the roof bolter operators conduct a visual inspection of the filter during each dump. Tr. 175-176, 214. There were no restrictions preventing the roof bolter operators from conducting another exam once they pulled up to the face. Tr. 166, 174, 210. However, the operators should have reported their intent to Foreman Duckworth rather than communicate that everything with the machine was good. It was this report that led Duckworth to certify on the DTI board that the inspection was complete. I find Foreman Duckworth certified the examination as complete knowing that the dust boxes were not examined by the roof bolters. The examination should never have been certified until such time as the dust boxes were examined. While it is true Respondent, under the standard, had until the time the machine went into production to conduct further examinations and correct the deficiencies in the dust filter

there is no indication that was going to happen. In fact Inspector Stone was told by both Duckworth and the roof bolters that the inspection of the machine was complete. Under these circumstances I find the high negligence level designated by Inspector Stone to be appropriate.

D. Unwarrantable Failure

Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,….and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d)(2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

For Citation No. 8506100, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). Therefore citation 8506100 shall be **MODIFIED** from a 104(d)(1) to a 104(a) violation.

1. Extent and Duration of the Violation

Inspector Stone observed the dust accumulation on the mufflers was noticeable to a casual observer. Ex. A. Inspector Stone concluded from the dust build up that the condition of the dust box existed for more than one shift. Tr. 71-72. However, Foreman Duckworth testified that he observed rock dust on the machine in question and that due to its location at the last open crosscut it would have been rock dusted over calling into question the length of time the condition of the dust box Inspector Stone observed existed. Tr. 156. While it is undisputed there was dust on the clean side of the filter and that the filter had been damaged there is insufficient

evidence to conclude the length of time that the filter had been damaged and operated in that condition.

2. Notice to the Operator

The "notice" factor of unwarrantable failure pertains to MSHA citations, directives, and communications prior to the violation at issue that notify the operator of hazardous conditions or practices. *Consolidation Coal*, 22 FMSHRC 2353; *IO Coal. Co.*, 31 FMSHRC 1353-55.

The River View Mine has not been cited for a violation of 30 C.F.R. § 75.362(a)(2) in two years as of 2015. Ex 1. Furthermore, previous MSHA and mine operator respirable dust samples taken from the mine showed only 2 samples exceeding the standard for respirable dust. Tr. 159-160. Neither of the samples were taken from working sections of the mine. Tr. 195-196.

3. Abatement Efforts

Citation 8506100 notes that Inspector Stone allowed Respondent "time to meet with all roof bolter operators and section foreman to train these persons to conduct the examination to assure compliance with respirable dust control parameters and to provide proof by signature that these individuals received this training." Ex A. No evidence was presented at hearing to dispute that Respondent abated this citation in anything other than an effective and timely fashion.

4. Obviousness of the Hazard and Degree of Danger

Inspector Stone noticed dust accumulation on the mufflers coming from the dust collection system and rock drill dust on the clean side of both filters. Tr. 45-47. Inspector Stone alleged the deficiencies were obvious to a casual observer and should have been found by a person who is trained to conduct these exams. Ex. A. However, as noted above, Section Foreman Duckworth testified that he observed rock dust on the machine in question and that due to its location at the last open crosscut it would have been rock dusted over calling into question whether what Inspector Stone observed on the outside of the machine was rock dust or hazardous drill dust. Tr. 156.

At the time of the citation there were four miners working downwind from the machine. Ex. A, Tr. 70. Rock drill dust is dangerous because it contains silica, which can lead to a permanently disabling disease called silicosis. Tr. 69, 72. Silicosis is caused when airborne silica particles, similar to glass or sand, enter the lungs and cut the tissue. Tr. 72-73, 207. Persons affected by silicosis will never get better, even if the individual is removed from the environment. Tr. 72-73, 207.

5. Operator's Knowledge of the Violation

During Foreman Duckworth's testimony he acknowledged that all steps of the on-shift examination needed to be completed prior to the examination being certified. Tr. 171. Duckworth did not complete the examination himself, rather a scoop operator radioed him informing him of the suction rating and that everything else was good. Tr. 154. It was standard

procedure at the River View Mine for the roof bolter operators to wait until they reached the face to open the dust collection boxes. Tr. 175. In failing to ensure that the filter was checked prior to certifying the examination of the 8157 roof bolter complete I found Foreman Duckworth acted with high negligence as noted above.

However, I am not convinced Duckworth acted with reckless disregard or willful aggravated intent to justify an unwarrantable failure designation. He knew the roof bolter operators were certified in MSHA training and the River View Mine's expectations training. Tr. 148-150. He also knew that the dust boxes would be checked and dumped once the roof bolter was trammed to the face. His mistake here was knowingly certifying that the examination was complete before it was actually complete. A highly negligent failure on his part but not one indicative of aggravated conduct. I find that had Foreman Duckworth been aware of the condition of the dust box and filter he would have promptly corrected the problem or instructed the operators to do so. Factoring in that no prior violations of this standard had occurred and Respondent's timely abatement I conclude that the faulty certification of an inadequate examination of the dust collection box was not an unwarrantable failure on the part of the Respondent.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(I).

Respondent had no history of violations for this particular standard in two years as of 2015. Ex 1. In 2013, 525 MSHA and mine operator respirable dust samples were taken from the River View Mine. Tr. 159-160. Two of the samples exceeded the respirable dust standard, however all samples from working sections of the mine were satisfactory. Tr. 159-160, 195-196. The Respondent had not been placed on notice that greater efforts were needed in complying with the standard. Resp. Br., 23. The Respondent is a large mine, employing approximately 600 miners during the time of the violation. Resp. Br., 2. The payment of a reasonable civil penalty will not affect the Respondents ability to continue business. Resp. Prehearing Report, 4. As I have stated above the Respondent was highly negligent because the examination of the 8157 roof bolter was not complete at the time Section Foreman Duckworth certified the examination as complete. It is undisputed that the condition of the dust box filter was likely to contribute to a permanently disabling injury, and that the condition of the dust filter was a significant and

substantial violation of the standards. It is also undisputed that four people would have been affected had silica particles entered the air since there were four miners working in close proximity to the roof bolting machine at the time of the violation. Silicosis is caused from silica particles entering the air and is a permanently disabling disease. Tr. 69, 72. The Respondent quickly worked to abate the violative condition by immediately informing inspector Stone they would get someone to clean out the box and get the filter taken care of. Tr. 209, Resp. Br., 24.

The Secretary proposed a regularly assessed penalty of $5,961.00. I find that the Respondent was highly negligent but that the failure to conduct a complete respirable dust examination prior to the examination being certified as complete was not an unwarrantable failure. Thus, after considering the statutory criteria, I find that a penalty of $4,500.00 is appropriate.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$4,500.00** within 30 days of this order.[1]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Hanah Harris-Yager, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Gary D. McCollum, 1146 Monarch Street, 3rd Floor, Lexington, KY 40513

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 25, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LOCUST GROVE, INC., Respondent	CIVIL PENALTY PROCEEDING: Docket No. KENT 2015-296 A.C. No. 15-19638-372766 Mine: Ben's Branch Mine

DECISION AND ORDER

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLX, Lexington, Kentucky, for Respondent

Before: Judge David Barbour

In this proceeding arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. §§ 815, 820, the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of civil penalties against Locust Grove, Inc. ("Locust Grove"), a corporation that operates Ben's Branch Mine, a surface bituminous coal mine located in Perry County, Kentucky. The Secretary charges Locus Grove with two violations of the Secretary's mandatory safety standards for surface coal mines, namely 30 C.F.R. § 77.1730(a) and 30 C.F.R. § 77.1001. Section 77.1713(a) requires a certified person designated by the operator conduct an examination for hazardous conditions in each active working area of a mine at least once during each working shift. It also requires any hazardous condition to be reported and corrected.[1] Section 77.1001 requires the

[1] The standard states:

> At least once during each working shift, or more often if necessary for safety, each activing working area shall be examined by a certified person designated by the operator . . . for hazardous conditions and any hazardous conditions noted during such examinations shall be corrected by the operator.

operator of a surface coal mine to strip loose, hazardous material a safe distance from the top of a highwall.[2]

The Secretary charges that on June 27, 2014, MSHA Inspector Larry Stubblefield found that Locus Grove failed to strip loose, hazardous material a safe distance from the top of the active highwall at its Ben's Branch Mine. The Secretary asserts that Inspector Stubblefield observed numerous rocks of various sizes lying or hanging near the crest of the highwall and saw three miners working approximately 10 feet from its bottom. The inspector found that the condition was highly likely to result in the miners' deaths and was a significant and substantial contribution to a mine safety hazard (an "S&S" violation) caused by the company's reckless disregard and unwarrantable failure to comply with section 77.1101. In addition, the Secretary charges that the preshift and onshift examination records for the first and second production shifts of June 23, 2014, through the inspection of June 27 did not note the presence of the loose rocks at the top of the highwall, an indication that the examinations were inadequate and therefore in violation of section 77.1713(a). The inspector found that the inadequate examination were highly likely to result in three fatalities (the same three miners who Inspector Stubblefield saw working within 10 feet of the bottom of the highwall). The inspector also found the alleged violation was caused by Locust Grove's reckless disregard and unwarrantable failure to comply with of section 77.1713(a). Inspector Stubblefield cited the alleged violation of section 77.1713(a) in a citation issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1)), and the alleged violation of section 77.1001(a) in an order issued pursuant to the same section of the Act. The Secretary proposed penalties of $178,900 for each alleged violation. The Secretary then filed the instant petition seeking assessment of the penalties as proposed. For its part, the company denied it committed the alleged violations and challenged Inspector Stubblefield's findings and the Secretary's penalty proposals.

After Locust Grove's answer was received, the Commission's Chief Judge assigned the case to the court, which in turn ordered counsels to confer to determine if all or part of the case could be settled. Counsels worked diligently to resolve their differences but were unable to do so. Therefore, the case went forward as scheduled in Corbin, Kentucky. At the hearing the Secretary's counsel stated that the Secretary would call Inspector Stubblefield as a witness. Counsel for the company stated he would call three management officials. The Secretary moved that the witnesses be sequestered. The motion was granted, and the inspector was called to the stand. Tr. 22-23.

The inspector explained the conditions he found on June 27, 2014, and he stating the reasons why he made his various findings. However, as his testimony developed, it became clear that the inspector had serious second thoughts about the number of miners affected by the cited conditions, the degree of likelihood that the conditions would result in an injury or injuries, and about management's degree of culpability for the cited conditions. Therefore, after counsel for the Secretary finished her direct examination and before counsel for Locust Grove began his cross examination, the court asked counsels to approach the bench for a side bar discussion.

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[2] The standard states in pertinent part:

> Loose hazardous material shall be stripped for a safe distance from the top of pit[s] or highwalls[.]

When the discussion concluded a recess was taken and counsels left the court room to continue discussing the case. Upon their return, counsel for the Secretary announced that counsels agreed to settle the case by modifying the gravity and negligence findings on the citation and order from the conditions making it highly likely three persons would suffer fatal injuries to the conditions making it reasonably likely one person would suffer a fatal injury, and to change the allegations of reckless disregard to high negligence, but to retrain the findings of unwarrantable failure. Counsel for the Secretary explained that the changes warranted significant reductions in the proposed penalties, to wit $7,500 for each violation. Tr. 72-74. After the agreement was explained, the settlement was approved on the record by the court. Tr. 74.

ORDER

Citation/Order No.	Date	30 C.F.R.	Proposed Penalty	Date
8390397	6/27/24	77.1713(a)	$178,900	$7,500
8390398	6/27/24	77.1001	$178,900	$7,500

The settlement has been approved (Tr. 74) and within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 8390397 and Order No. 8390398 at line 10 by deleting the "highly likely" findings and making them "reasonably likely," by deleting the number of persons affected as three and making them one, and at line 11 by deleting the "reckless disregard" findings and making them "high." In addition, within the same 30 days, Locust Grove **IS ORDERED** to pay a civil penalty of $7,500 for each violation, a total of $15,000.[3] Upon modification of the citation and order and payment of the penalties, this proceeding is **DISMISSED**.

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

[3] Payment shall be sent to: The Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, Missouri 63197-0290.

Distribution: (Certified Mail)

Mary Sue Tyler, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLX, 3151 Beaumont Centre Circle, Suite 375, Lexington, Kentucky 40513

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

July 25, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BLANCHARD MACHINERY COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-56-M A.C. No. 38-00600-397382 (1BU) Mine: Haile Gold Mine

DECISION

Appearances: James Shaffer, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Birmingham, Alabama; and Kristin R. Murphy, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

Travis W. Vance, Esq., Fisher & Phillips, LLP, Charlotte, North Carolina, for Respondent.

Before: Judge Paez

This case is before me upon the petition for the assessment of a civil penalty filed by the Secretary of Labor ("Secretary") against Blanchard Machinery Co. ("Blanchard" or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "the Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation issued to Blanchard, a contractor at the Haile Gold Mine. To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned this matter to me on December 22, 2015. Citation No. 8899032 alleges Respondent violated 30 C.F.R. § 56.14207[1] by

[1] Section 56.14207 provides: "Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207.

leaving a pickup truck unattended without setting its parking brake. The Secretary proposes a penalty of $100.00. I held a hearing on June 2, 2016, in Columbia, South Carolina. The Secretary presented testimony from MSHA Inspector Harold Poe. Blanchard presented testimony from its former employee Clayton Cowart. Pursuant to the Commission's procedural rules on simplified proceedings, the parties presented closing arguments at the hearing in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e). I accepted Respondent's bench brief explaining the case law cited in its closing argument.

II. ISSUES

For Citation No. 8899032, the Secretary asserts Blanchard's employee left mobile equipment unattended without setting the parking brake. The Secretary argues that the citation and proposed penalty are valid and appropriate. (Tr. 109:8–24.)[2] According to the Secretary's interpretation of section 56.14207, a miner must be "behind the wheel" or present within the vehicle to attend it. (Tr. 48:15–25, 109:17–24.) The Secretary asserts Blanchard violated section 56.14207 when its employee was not inside the vehicle and could not control it if it began to roll. (Tr. 109:8–109:24.)

Although Blanchard admits the parking brake was unset, it contends its employee did not leave the equipment "unattended" within the meaning of 30 C.F.R. § 56.14207. (Tr. 116:4–118:24.) Blanchard argues that section 56.14207 permits an operator of mobile equipment to exit if the operator remains in proximity. (Tr. 116:14–23, 118:17–24.) Blanchard cites to the definition of "attended" in 30 C.F.R. § 56.2 and avers this definition governs the usage of "unattended" in section 56.14207. (Tr. 116:14–17; Resp't Prehr'g Rep. at 2.) Based on this reading, Blanchard asserts that the citation should be vacated; alternatively, Blanchard seeks a modification of the citation to no negligence. (Tr. 122:1–15.) The gravity was not contested.

Accordingly, the issues before me are (1) whether the Secretary has proven Blanchard violated 30 C.F.R. § 56.14207; (2) whether the Secretary's negligence determination is appropriate; and (3) whether the Secretary's proposed penalty is appropriate.

For the reasons set forth below, Citation No. 8899032 is **MODIFIED** to no negligence.

III. FINDINGS OF FACT

At the hearing, the parties stipulated to the following:

1. Blanchard Machinery Company was, at all times relevant to these proceedings, engaged in mining activities at the Haile Gold Mine in or near Kershaw, South Carolina 29067;

2. Blanchard Machinery Company's mining operations affect interstate commerce;

[2] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

3. Blanchard Machinery Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.;

4. Blanchard Machinery Company is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the Haile Gold Mine (Federal Mine I.D. NO. 38-00600) where the contested citation in these proceedings was issued;

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to [s]ection 105 of the Act;

6. On or about September 16, 2015, MSHA Inspector Harold A. Poe 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 citation from docket SE 2016-0056 at issue in these proceedings;

7. The citation at issue in these proceedings was properly served upon Blanchard Machinery Company as required by the Act, and was properly contested by Blanchard Machinery Company;

8. The citation at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing its issue. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties;

9. Blanchard Machinery Company demonstrated good faith in abating the violation;

10. Without Blanchard Machinery Company admitting the propriety or reasonableness of the penalty proposed herein, the penalty proposed by the Secretary in this case will not affect the ability of Blanchard Machinery Company to continue in business.

(Tr. 9:2–6; Sec'y Prehr'g Report at 2–3.)

A. Blanchard's Operations at Haile Gold Mine

Blanchard Machinery Company, a contractor, supplies rental equipment to the Haile Gold Mine in Kershaw, South Carolina. (Tr. 13:17–25, 28:21–29:3.) Blanchard delivers equipment to the mine site for other contractors to use in moving earth to install plants for gold extraction. (Tr. 28:7–29:3.) Alongside several other contractors, Blanchard rents a portion of the Haile Gold Mine's large property, occupying a fenced area located eighty yards from the mine's gated entrance. (Tr. 27:17–24, 29:4–9, 100:7–10.) Several office trailers are situated in this area. (Tr. 62:18–23; Ex. R–2.) A flat parking area sits next to the office trailers. (Ex. R–2; Tr. 41:25–42:12, 76:15–19.) At the time of the citation's issuance, Haile Gold Mine was not yet engaged in any gold extraction activities. (Tr. 51:3–7, 76:2–8.) Rather, operations at the mine site were just beginning, whereby contractors were just starting to move earth to grade the land in preparation of building the plants for gold extraction. (Tr. 28:7–16.)

B. September 2015 Inspection

On September 15, 2015, MSHA Inspector Harold Poe came to inspect Blanchard's area at the Haile Gold Mine. (Tr. 13:17–25; Ex. S–3.) In the parking area next to Blanchard's office trailer, Poe observed Clayton Cowart, a rental representative for Blanchard, inside a parked Chevy Silverado pickup truck. (Tr. 14:21–22; Exs. R–2, S–3.) The pickup truck had an automatic transmission. (Tr. 22:22–23, 95:20–21.) Cowart had just returned from town with his lunch and parked the pickup truck against a railroad tie, perpendicular to the trailer. (Tr. 79:8–20, 43:12–18; Ex. R–2.) Cowart had been working for Blanchard for two years, but had never gone through an inspection with an MSHA inspector. (Tr. 78:21–79:3, 107:6–22.)[3] While parked and sitting in the driver's seat, Cowart got flustered and forgot to engage the parking brake when he saw MSHA's Inspector Poe in the mirror approaching his pickup truck. (Tr. 33:18–24, 107:1–22.)

Inspector Poe walked towards the pickup truck from behind at a forty-five-degree angle to the truck's cab. (Tr. 16:10–17, 32:20, 36:4–13.) Upon seeing Poe, Cowart overlooked his everyday habit of setting the parking brake before exiting the vehicle; instead, he immediately opened the door wide and hopped out to shake hands with the inspector. (Tr. 79:17–20, 80:3–21, 107:6–22.) He left his warm but uneaten lunch sitting on the seat of the truck. (Tr. 15:8–14.)

Poe was approximately twenty feet from the driver's side of the truck's cab when Cowart exited the pickup truck and approached Poe to introduce himself and shake his hand before the inspection. (Tr. 15:24–16:2, 80:16–21.) The driver's side door was open the entire time. (Tr. 16:12–17.) Upon meeting, straightaway Poe asked Cowart whether he had set the parking brake. (Tr. 16:20–23.) Cowart spun around moving back towards the cab to set the brake, but Poe insisted that Cowart wait until Poe got out his camera and took a photograph of the unset parking brake. (Tr. 16:20–25, 20:4–15, 107:6–12; Ex. S–1.)

After Inspector Poe photographed the violation, Cowart engaged the parking brake. (Tr. 83:3–6.) Poe then took a photograph of the set parking brake to note the violation's abatement. (Tr. 39:20–40:1; Ex. S–2.) From Poe noting the violation and photographing the unset parking brake to Cowart engaging the parking brake and Poe photographing the violation's abatement, the entire exchange lasted less than two minutes—and the time between photographs was perhaps a few seconds. (Tr. 45:17–46:5, 66:3–11; Exs. S–1, S–2, S–3.) Poe subsequently issued Citation No. 8899032, stating:

> The Chevy Silverado pick-up, company #8210, was left unattended with the provided park brake not set when inspected. The truck is used for transportation to and from the mine as needed as well as around the mine site and in use today. The driver may be exposed

[3] Cowart no longer works for Blanchard. (Tr. 78:15–79:3.) After graduating in May 2013 from the University of South Carolina with a degree in political science, Cowart worked as a rental representative for Blanchard between August 2013 and November 2015. (Tr. 78:15–17, Tr. 98:25–99:23.) In late November 2015, Cowart began work as a product engineer for Contour Mining and Construction at the Haile Gold Mine. (Tr. 98:25–99:23.)

> to a struck by hazard when replacing/removing the chocks and the truck roll unsuspectedly for any reason.[4]

(Ex. S–3.) With regard to the violation's gravity, Poe determined that a single miner could be injured and that the likelihood of an injury or illness was unlikely. (*Id*.; Tr. 22:18–23:21.) In the event of an injury or illness, Inspector Poe found that the injury would reasonably be expected to result in lost workdays or restricted duty. (*Id*.) Poe later spoke to Cowart's manager. (Tr. 25:24–26:2.) Because Blanchard's management gave specific training on 30 C.F.R. § 56.14207, Poe determined that the violation was due to Blanchard's moderate negligence and noted that the violation was abated within a single minute by setting the parking brake. (Ex. S–3; Tr. 25:17–26:5.)

At the parking area, Inspector Poe did not have Cowart conduct a formal "roll test" after issuing the citation. (Tr. 24:8–19.) During a roll test, the vehicle is placed in neutral gear while the examiners observe the vehicle for any movement to determine whether the surface has an incline that would create a hazard. (*Id*.) Because the ground was level in the parking area, Poe did not believe the test was necessary.[5] (Tr. 24:15–19.) None of Blanchard's mining supervisors were present in the cited area or possessed any knowledge of the violation at the time the citation was issued. (Tr. 58:10–13.) Citation No. 8899032 was the only citation issued to Blanchard by Poe during his inspection of the Haile Gold Mine. (Tr. 13:17–14:3.) According to MSHA's mine data retrieval system, Blanchard has not been cited for any other violations at the Haile Gold Mine. (Ex. S–4.)[6]

IV. PRINCIPLES OF LAW

A. Operator Liability

Under the Mine Act, operators are strictly liable for violations of the Secretary's mandatory health and safety standards. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634–36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). The Mine Act's regulatory regime establishes strict operator liability for the conduct of contractors. *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs,

[4] Poe explained that he believed the likelihood of injury was unlikely but included this last sentence to describe the hazard of not setting the parking brake. (Tr. 46:8–47:25.)

[5] Although Poe did not perform a formal roll test, prior to leaving the parking area he had Cowart put the pickup truck in neutral; the truck did not appear to move. (Tr. 42:7–9, 94:6–15.) Cowart said this informal roll test was done "kind of just out of curiosity." (*Id.*)

[6] MSHA's data retrieval system catalogues citations, orders, and safeguards. It is available on MSHA's public website. Mine Safety and Health Admin., *Inspection Violations Summary: For Event Number 667183*, Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp (last accessed July 5, 2016).

regardless of the level of fault.") (citations omitted). The Commission has observed that "operator[] fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Asarco, Inc.*, 8 FMSHRC at 1636.

B. Regulatory Interpretation

Regulatory interpretation is a two-step analysis. *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076, 1081 (10th Cir. 1998). The first step is determining whether the regulation is clear and unambiguous. *Northshore Mining Co.v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). When the regulatory language is clear and unambiguous, the regulation must be applied as written. *Id*. If the regulation is ambiguous or subject to multiple meanings, the second step is to determine whether the agency's interpretation is permissible. *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192 (10th Cir. 2008) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The agency's interpretation is valid so long as it is reasonable. *Id.* ("An agency's interpretation of its own regulation is ordinarily controlling unless plainly erroneous or inconsistent with the regulation."); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (holding that the agency's regulation should be sustained as long it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function"). To determine whether the Secretary's interpretation is reasonable, the Commission considers the regulatory language and history. *See Twentymile Coal Co.*, 36 FMSHRC 2009, 2012–13 (Aug. 2014).

C. Operator Negligence

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory regulation carries a requisite duty of care. *Id*. In the negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id*. In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically" and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

V. REGULATORY ANALYSIS, ADDITIONAL FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. Citation No. 8899032—Leaving Mobile Equipment Unattended

1. Interpretation of 30 C.F.R. § 56.14207

The Secretary asserts Blanchard is liable as Cowart left the pickup truck unattended with an unset parking brake when he met Inspector Poe ten to twelve feet from the pickup truck. (Tr. 109:8–24.) The Secretary argues that exiting the pickup truck's cab is sufficient to meet the definition of "unattended" under section 56.14207. (Tr. 109:12–16.) Respondent relies on the regulatory definition of "attended" provided in 30 C.F.R. § 56.2 to assert that Blanchard did not

violate the standard. (Tr. 116:14–17.) Respondent reasons Cowart had no need to set the parking brake because he remained in proximity to the vehicle to prevent unauthorized entry. (*Id.*)

a. "Unattended" is Ambiguous

I must first determine whether the meaning of "unattended" in the text of section 56.14207 is unambiguous. The Commission itself has not squarely addressed the meaning of "unattended" in section 56.14207. Consequently, the starting point of interpretation is whether the plain meaning of section 56.14207's language is apparent. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). "Unattended" in plain language has two relevant alternate meanings: "[n]ot being attended to, looked after, or watched: *an unattended fire*" and "[h]aving no attendants: *unattended gasoline pumps*." *The American Heritage Dictionary of the English Language* 1871 (4th ed. 2009). In turn, "attendant" is defined broadly as "one who attends or waits on another." *Id.* at 116. The Commission has held that when the dictionary definition of a term is open to alternative interpretations, the term is ambiguous. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1680. Section 56.14207 instructs miners to set the parking brake if the mobile equipment is left unattended, but the regulation does not speak to the precise distance a miner may move from the controls of the mobile equipment or how someone would attend or wait on the equipment. 30 C.F.R. § 56.14207. Indeed, the dictionary definitions could lead to two drastically divergent requirements: either a miner must be ever present at the equipment's controls or a miner may merely observe from a distance. I conclude that this definition does not plainly indicate the meaning of "unattended."

Respondent disputes the definition of "unattended" and argues that the section 56.2 definition of "attended"—"presence of an individual or continuous monitoring to prevent unauthorized entry or access"—should determine the meaning of "unattended." 30 C.F.R. 56.2. It is true that when a regulatory definition of a term is available, that definition should apply to other standards within the regulatory scheme. *See Wolf Run Mining, Co.*, 32 FMSHRC at 1679–1681. However, Respondent's argument fails to address two reasons why the section 56.2 definition does not apply to section 56.14207.

First, section 56.14207 predates the "attended" definition in section 56.2. 50 Fed. Reg. 4,048, 4,069 (Jan. 1985); 56 Fed. Reg. 2,070, 2,089 (Jan. 1991). MSHA drafted new definitions in 1991, including "attended" at section 56.2, to govern the regulations on "Explosives" in Subpart E. 56 Fed. Reg. at 2,089. As originally conceived, "attended" applied solely to MSHA regulations of explosive material. 56 Fed. Reg. at 2,071. Thus, the definition of "attended" in section 56.2 was not meant to apply to parking procedures for mobile equipment.

Second, the regulatory context does not support Respondent's definition. The purpose of section 56.14207 is to prevent the unintentional movement of mobile equipment. Respondent agrees that the requirement to set the parking brake is a precaution to prevent vehicles from rolling. (Tr. 121:10–20.) But the regulatory history reveals the definition of "attended" in section 56.2 is concerned with a different goal—the prevention of unauthorized entry. 30 C.F.R. § 56.2. In its original context of Subpart E, section 56.2's definition of "attended" referred to continuous monitoring to maintain the security of stored explosives which may be satisfied by "electronic or video monitoring devices." 56 Fed. Reg. at 2,071; *see* 30 C.F.R. § 56.6202(a)(7) ("[v]ehicles

containing explosive material shall be [a]ttended or the cargo compartment locked"). The original context of section 56.2 emphasizes guarding access to explosives, not preventing unintentional rolling. Because the regulatory history and context suggest otherwise, I reject Respondent's arguments applying section 56.2's definition to section 56.14207.[7]

Consequently, I determine that the meaning of "unattended" in section 56.14207 is ambiguous.

b. The Secretary's Definition is Reasonable and Entitled to Deference

Next I determine whether the Secretary's interpretation of "unattended" is reasonable. The Secretary interprets "unattended" in section 56.14207 to mean a miner is not "behind the wheel" of the vehicle or cannot control the mobile equipment. (Tr. 48:15–25.)

The Secretary's definition of "unattended" would simply require a miner to put the vehicle's gear in park and set the parking brake whenever the miner was not behind the wheel or was not within reach of the controls. The Secretary's interpretation is based on the potential rolling hazard of an unset parking brake. (Tr. 63:21–64:4.) Record evidence indicates the possibility of injury if the equipment rolled and the operator tried to jump back into the moving vehicle to control it. (Tr. 73:23–74:4.) A miner in proximity to the mobile equipment, but not in arm's reach of the controls, is not in a position to prevent the mobile equipment from rolling. Even a slow-moving vehicle may prove harmful to a miner unaware of its approach or unable to swiftly react. Moreover, section 56.14207 is among the most frequently cited standards in fatalities, which explains its inclusion in MSHA's "Rules to Live By." (Tr. 24:20–25:12.)

In contrast, Respondent attacks the Secretary's interpretation of "unattended" by arguing that the Secretary's definition is unreasonable and internally inconsistent with section 56.14207. (Tr. 116:9–118:7.) According to Respondent, a miner parking on a grade would violate section 56.14207 anytime the miner left the cab of the vehicle to chock the tires because the vehicle would be "unattended" under the Secretary's definition. (Tr. 117:15–118:7.) Rather, Respondent asks me to apply the definition of "attended" as defined in 30 C.F.R. § 56.2. (Tr. 116:12–117:7.) In Respondent's view, under the section 56.2 definition, Cowart was in proximity and thus "attended" his pickup truck; therefore, the pickup truck was not "unattended" under section 56.14207 and no violation occurred. (Tr. 119:9–120:1.)

First, Respondent conflates the regulatory definition of "attended" under section 56.2 with the Secretary's definition of "unattended" and the requirements in section 56.14207. Respondent's theory relies on the definition of "attended" which I found inapplicable to section 56.14207 because it is a different term with a different legislative history. *See* discussion *supra* V.A.1.a.

[7] In support of its argument Respondent cites to *Drilling & Blasting Systems, Inc*., where the Commission considered section 56.7012's definition of "attended." 38 FMSHRC 190, 194–197 (Feb. 2016); (Resp't Bench Br. at 2). This case is distinguishable and inapplicable as section 56.7012 refers to safety procedures for drilling, not parking procedures for unattended mobile equipment, and discusses the term "attended," not "unattended." 30 C.F.R. § 56.7012.

Second, Respondent's logic is faulty. Section 56.14207, composed of two sentences, has two separate requirements: (1) put the equipment's gear in park position and set the parking brake whenever the equipment is left "unattended," and (2) ensure the tires are "chocked or turned into a bank" when "parked on a grade." 30 C.F.R. § 56.14207. Respondent misreads section 56.14207. The phrase "when parked on a grade" indicates that the second requirement (i.e., to ensure the tires are "chocked or turned into a bank") is conditioned on completion of the first requirement (i.e., to put the equipment's gear in park position and engage the parking brake whenever equipment is left unattended). *Id.* Respondent's example above alleges a miner would violate section 56.14207 every time the miner leaves the cab to chock the tires; but under the Secretary's definition of "unattended" in section 56.14207, compliance is achieved if the miner puts the mobile equipment's gear in park and sets the parking brake *before* exiting the vehicle to chock the tires when parked on a grade. Contrary to Respondent's arguments, the Secretary's definition is logical and workable.

Even if I were to adopt Respondent's theory that to "attend" the vehicle means being in its proximity, doing so could essentially allow a miner to complete in any order the section 56.14207 requirements of putting the gear in park position, setting the park brake, and chocking the tires if on a grade. Using Respondent's example, as long as a miner was in proximity to the mobile equipment, the miner could put the gear in park without engaging the parking brake and then exit the cab to chock the tires; while chocking the tires the miner remains in proximity to the pickup truck and may later re-enter the cab to set the parking brake. (*See* Tr. 116:9–118:7.) But Respondent's reading would potentially risk crushing a miner's hands or other injury during placement of the chocks underneath the tires even while in "proximity" to the equipment should the equipment slip out of gear if the parking brake is not set. Indeed, Respondent's interpretation could potentially lead to a less safe working environment.

Respondent's attacks on the Secretary's interpretation of "unattended" ring hollow and I reject them. I determine the Secretary's interpretation of "unattended" in section 56.14207 to be reasonable, and accordingly, I give deference to the Secretary's interpretation.

My determination is consistent with the decisions of other ALJs who have similarly deferred to such an interpretation of "unattended" under section 56.14207. *See, e.g.*, *Knife River Constr.*, 36 FMSHRC 2176, 2181 (Aug. 2014) (ALJ) (holding a miner outside of, but close to, a vehicle cannot operate the vehicle and therefore cannot attend it under the standard, as no miner was in position to immediately control the vehicle); *Southern Nevada Cement Co.*, 18 FMSHRC 1653, 1655 (Sept. 1996) (ALJ) (holding mobile equipment was "unattended" when a miner in

proximity was not able to stop the vehicle)[8]; *Christman Quarry*, 18 FMSHRC 2151, 2153 (Dec. 1996) (ALJ) (determining that exiting a bulldozer is leaving the equipment unattended inasmuch as the miner could not retain control of throttle lever or otherwise stop the equipment from the outside). Although these Commission ALJ decisions are not controlling, I find their reasoning to be instructive and persuasive regarding the meaning of "unattended" under section 56.14207.

2. Violation of 30 C.F.R. § 56.14207

Respondent does not dispute that Cowart failed to set the parking brake. (Tr. 107:2–4, 116:4–8.) Instead, Respondent disputes the distance between Cowart and the cab of the pickup truck. (Tr. 35:3–7, 119:2–7.) According to Respondent, Cowart stayed within the swing radius of the pickup truck's door and within reach of the steering wheel and parking brake. (Tr. 81:23–83:2, 118:12–13.) Respondent alleges Cowart never advanced far from the pickup truck based on his position in the inspector's photograph. (Tr. 81:13–15.) But Cowart was not standing by the door when Poe first observed the violation, and Poe estimates Cowart had been at least ten to twelve feet from the cab's side when they met. (Tr. 14:24–15:1, 39:14–19.)

I do not need to decide the precise number of feet Cowart stood from the side of the pickup truck. Cowart stated he exited the vehicle, and I find he moved to a position out of reach of the vehicle's controls whether it was ten feet from the pickup truck's side or to the position shown in the inspector's photograph. (Ex. S–1; Tr. 81:13–15.) I determine that the vehicle was unattended under section 56.14207 and that Cowart could not immediately control the vehicle or prevent it from rolling if it unexpectedly moved. Therefore, Blanchard violated section 56.14207 by Cowart failing to set the parking brake of the Chevy Silverado pickup truck.

3. Negligence

Inspector Poe assigned moderate negligence to the violation. (Ex. S–3.) Respondent contends no negligence is the appropriate determination. (Tr. 122:5–15.) While employee error or misconduct is not a defense to liability under the Mine Act, it is a factor in assessing the negligence determination. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115–1117 (July 1995.) Moreover, "the negligence of a rank-and-file miner is not imputable to the operator for purposes of penalty assessment or unwarrantable failure." *Martin Marietta Aggregates*, 22 FMSHRC 633, 636 (May 2000) (citing *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullar, Inc.*, 17 FMSHRC 1112, 1116 (July 1995.); *Southern Ohio*

[8] Respondent cites *Southern Nevada Cement Co.* as support for its argument. (Resp't Bench Br. at 2.) Contrary to supporting Respondent's argument, the ALJ in that case determined the mobile equipment was unattended because the miner was working underneath it, and thus held that the miner's proximity to the vehicle under the facts of that case was insufficient under section 56.14207. *Southern Nevada Cement Co.*, 18 FMSHRC at 1655. In addition, Respondent cites to *American Colloid Co.* where the ALJ applied a *de minimis* rule to determine that the measured grade was insignificant for a violation. 37 FMSHRC 2078, 2089–90 (Sept. 2015) (ALJ). The holding pertained to the second requirement of section 56.14207 (chocking tires when parking on a grade) and is inapplicable to the facts of this case. *Id.* If Respondent is inviting me to apply a *de minimis* standard to the first requirement of section 56.14207, I decline.

Coal Co., 4 FMSHRC 1459, 1463–64 (Aug. 1982)). The actions of supervisors, foremen, or other managers may be imputed to the mining operator in the negligence determination. *Southern Ohio Coal Co.*, 4 FMSHRC at 1464. On the other hand, when the operator has taken care to train its employees, including supervisors and managers, and the manager acts aberrantly, negligence is not imputed to the operator. *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981).

The Secretary provided no evidence or argument showing that Cowart, a rental representative, occupied a supervisory or managerial position. (Tr. 25:24–26:5, 26:16–17, 58:10–13, 98:6–99:19.) Nor did the Secretary provide evidence indicating Blanchard's management knew or should have known its employee left the pickup truck unattended without setting the parking brake. (Tr. 58:24–59:7.) Indeed, Cowart had an everyday habit of setting his parking brake. (Tr. 107:16–22.) And the record shows that Blanchard trained its employees to comply with the provisions of section 56.14207. (Tr. 58:10–13, 100:18–101:24.) Cowart freely admitted to Poe that he knew he was supposed to set the parking brake; but it slipped his mind given Poe's sudden appearance. (Tr. 58:7–8, 107:18–22.) Other than establishing the existence of the violation at the moment it occurred while the vehicle door was still open, the Secretary made no argument for why Cowart's conduct – admittedly a momentary lapse because he was flustered – should be imputed to Blanchard's management. Rather, the record shows Blanchard's management was unware of the September 15 violation as it occurred. (Tr. 58:10–59:17.) Moreover, Blanchard received no other citations during Poe's September inspection. *See* Mine Safety and Health Admin., *Inspection Violations Summary: For Event Number 667183*, Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp (last accessed July 5, 2016).

Even considering Cowart's lapse, I note that he parked against a railroad tie which mitigated potential harm. (Tr. 80:6–15.) I also note conditions surrounding the violation strongly support reducing the negligence determination. First, the parking area where Inspector Poe issued the citation was flat and little danger of rolling existed. (Tr. 83:22–25, 94:6–15.) Second, the parking area did not contain any current mining activities at the time of the citation. (Tr. 76:2–8.) Although workers were moving earth prior to erecting plants at other parts of the Haile Gold Mine, no evidence in the record suggests even a remote chance of an unexpected force moving the pickup truck. (Tr. 28:7–16.) Third, the pickup truck possessed an automatic transmission that reduced the likelihood of unexpected rolling. (Tr. 22:18–23.) Moreover, Poe testified that if the pickup truck did move, it would roll very slowly. (Tr. 57:12–16.) Fourth, the duration of the violation was extremely short, possibly seconds. Finally, Cowart's eagerness to meet the MSHA inspector motivated his mistake of not setting the parking brake. (Tr. 107:1–22.) Cowart's error resides in his temporary oversight in abiding by the strict letter of the regulation when meeting a MSHA inspector for the first time rather than in his exercising poor judgment. Nothing in the record suggests Cowart habitually neglected to set his parking brake.

Given the evidence, I conclude that Blanchard did not know and had no reason to know of the momentary lapse of one of its employees. Based on the totality of the circumstances holistically given the particular facts of this case, I determine that Blanchard's conduct constituted no negligence.

B. Penalty

The Secretary has proposed a penalty of $100.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–1264 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). There is no requirement that these criteria receive equal weight in my assessment. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

Upon evaluating the criteria, I considered Blanchard's size and insignificant history of violations. (Ex. S–4.) It has already been stipulated that the citation will not affect Blanchard's capacity to continue in business. The gravity of the violation is low. I have also found Blanchard's actions to constitute no negligence. *See Asarco, Inc.*, 8 FMSHRC at 1636. Nevertheless, I note that the amount of the proposed penalty is consistent with a technical violation. The evidence of record indicates Blanchard's employee took immediate, good faith steps to abate the violation by setting the parking brake. (Tr. 20:1–3, 83:3–6.) In consideration of all the relevant facts and circumstances, I hereby assess a penalty of $75.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8899032 is **MODIFIED** to no negligence and affirmed in all other respects.

WHEREFORE, it is hereby **ORDERED** that Respondent Blanchard Machinery Company pay a penalty of $75.00 within 40 days of this decision.[9]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

[9] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

Distribution: (Via U.S. Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TIM M. BALL, employed by Mountain Materials, Inc., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. VA 2014-0148-M A.C. No. 44-00165-340588 A Mine: Castlewood Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RICKY A. ROSE, employed by Mountain Materials, Inc., Respondent.	Docket No. VA 2014-0149-M A.C. No. 44-00165-340589 A Mine: Castlewood Plant

DECISION AND ORDER

Appearances: Jason S. Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

David M. Toolan, Esq., Oldcastle Law Group, Atlanta, Georgia, for Respondent.

Before: Judge L. Zane Gill

I. INTRODUCTION

These proceedings arise under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 820(c). Section 110(c) provides that corporate agents, officers, or directors who knowingly authorize, order, or carry out a Mine Act violation may be subject to individual civil penalties. Here, the Secretary of Labor ("the Secretary") seeks to impose individual civil penalties on Tim M. Ball and Ricky A. Rose ("Respondents") in their capacity as employees and agents of mine operator Mountain Materials, Inc. for two violations

that were issued to Mountain Materials by the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).[1]

The sole matter at issue in Docket Number VA 2014-0148-M is Citation Number 8634338, which alleges a housekeeping violation. The Secretary seeks a $1,200.00 penalty against Respondent Ball for this alleged violation. The sole matter at issue in Docket Number VA 2014-0149-M is Order Number 8634340, which alleges an examination violation. The Secretary seeks a $1,500.00 penalty against Respondent Rose for this alleged violation.

The parties presented testimony and evidence on May 27, 2015, in Big Stone Gap, Virginia. For the reasons discussed below, after considering all the evidence, I uphold the two violations as written and assess an individual penalty against each Respondent.

II. STIPULATIONS

The parties have entered into the following stipulations of fact, which were listed in the parties' Joint Prehearing Report and read into the record at hearing (Ex. S-5; Tr. 5:17–6:18)[2]:

1. Mountain Materials, Inc., was an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the Castlewood Plant mine.

2. Castlewood Plant is a "mine" as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. The products of the Castlewood Plant entered commerce, or the operations or products of the Castlewood Plant affected commerce, within the meaning of the Mine Act, specifically sections 3(b) and 4, 30 U.S.C. §§ 802(b), 803.

4. Operations of Mountain Materials, Inc. at the Castlewood Plant where the citation and order at issue in this docket were issued are subject to the jurisdiction of the Mine Act.

5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges under sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.

6. Mountain Materials, Inc. is a "corporation" under the Mine Act.

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[1] MSHA's Mine Data Retrieval website shows that Mountain Materials paid a $2,000.00 penalty for each violation without contesting either one. *See* U.S. Dep't of Labor, MSHA, Mine Data Retrieval System, http://arlweb.msha.gov/drs/drshome.htm.

[2] The Secretary's exhibits are labeled Exhibits S-1 through S-5. The Respondents did not submit any exhibits. Citations to the transcript of the hearing are abbreviated "Tr." The parties were directed to submit closing briefs within 30 days of receipt of the transcript. (Tr. 119:8-14) Because the Secretary filed his brief approximately 10 months after receipt of the transcript, I deem the brief to have been untimely filed and decline to consider it.

7. Citation 8634338 was properly served by a duly authorized representative of the Secretary of Labor.

8. Order 8634340 was properly served by a duly authorized representative of the Secretary of Labor.

III. FACTUAL BACKGROUND[3]

The citation and order at issue in this matter were written by MSHA Inspector Danny Hagy[4] on April 11, 2011, at Mountain Materials' limestone processing facility, the Castlewood Plant. (Ex. S-1; Ex. S-2) A few days earlier, Hagy had been contacted by a former MSHA colleague, Jack Burnett,[5] regarding dust conditions and buildups of material at the Castlewood Plant. (Tr. 106:14-19, 107:11–108:8) At the time, Burnett was working for Mountain Materials as a safety consultant tasked with conducting mock inspections at four of the company's operations, including the Castlewood Plant. (Tr. 66:3-12, 99:15–100:2) Burnett's comments about dust and buildups at the pelletizer plant spurred Inspector Hagy to visit the facility to make sure there were no problems. (Tr. 114:5-12)

Hagy arrived at the Castlewood Plant around 7:00 p.m. on April 11, and initiated a regular semiannual MSHA inspection. (Tr. 12:4–13:7) The mine office was closed, so he traveled directly to the pelletizer plant. (Tr. 13:5-8) The pelletizer plant is a large building where raw limestone is fed through a grinding mill, mixed with a binding agent, spun on a disc to form round pellets, and run through a dryer to create a product that is sold for use in agricultural applications. (Tr. 13:11-21, 34:14-20, 49:14-18, 52:4–53:5, 75:13-15, 80:13–83:25)

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[3] My findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies or inconsistencies in each witness's testimony and between the testimonies of the witnesses. I have also taken into account each witness's demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (holding that administrative law judge is not required to discuss all evidence, and that failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file.

[4] Hagy has worked as a metal/nonmetal mine inspector for MSHA since October 2008. To become an inspector, he completed 6 weeks of field training and 26 weeks of classroom training at MSHA's Mine Academy. He has prior industry experience working at a limestone quarry for 22 years as a drill helper, equipment operator, and plant manager. (Tr. 9:20–11:25)

[5] Burnett died prior to the hearing. (Tr. 106:21) The Respondents object to Burnett's statements as hearsay. (Tr. 107:1-8) However, hearsay evidence is admissible under the Commission's procedural rules. *See* 29 C.F.R. § 2700.63(a). Moreover, I rely on Burnett's statements only to reveal his impressions of the plant as conveyed to Hagy, not to show whether or not there were buildups of material and dust at the plant. *See* Fed. R. Evid. 803(1) (providing that rule against hearsay does not apply to statements describing present sense impressions).

When Hagy looked through the doorway of the plant, his view was obscured by "excessive" airborne dust that prevented him from seeing beyond about fifteen feet into the building. (Tr. 13:22–14:16, 15:2-12, 18:4-11) Because his visibility was limited and he did not want to inhale the dust, he waited outside the door for about ten minutes until an employee arrived and directed him to the control room at the back of the building. (Tr. 14:1-3, 14:17–15:25) Respondent Ball,[6] the shift foreman, was in the control room operating the pelletizer plant. (Tr. 15:21-23) He was the only person in the plant at the time. (Tr. 76:11-13) Inspector Hagy asked why the dust was so thick, but as of the hearing date four years later, he could no longer recall what Ball had said to him. (Tr. 16:16-19, 32:6-10, 38:22-25) Ball immediately attempted to tamp down the dust by applying water to the material he was processing, which clogged the machinery and halted production. (Tr. 17:2-9)

Hagy walked through the plant with Ball after the dust had settled. (Tr. 17:8-19, 18:14-24) He observed "quite a bit of buildup of material throughout the plant" both in walkways and on the floor, including multiple areas where footprints were visible and one location where material was piled to a height of 63 inches. (Tr. 17:11–18:1, 19:2-15) Hagy alleges that he noticed several other obvious safety hazards, although by the hearing date he could no longer remember any of them except a large door that was hanging by a hinge which he was concerned would fall on a miner. (Ex. S-2; Tr. 29:17–30:11) When he reviewed the plant's workplace examination records, he found that no hazards had been recorded over the past two weeks except a leak in the roof. (Ex. S-2 at 5; Tr. 31:11-24)

Based on his observations, Inspector Hagy issued Citation Number 8634338, which alleges that the operator failed to keep the pelletizer plant's floor and travelways clear, and Order Number 8634340, which alleges that the operator failed to conduct an adequate workplace examination in the pelletizer plant. (Ex. S-1; Ex. S-2; Tr. 20:17–21:2, 26:9–27:18) Citation Number 8634338 was terminated eight days later, on April 19, 2011, with notation that the buildups of material in the travelways had been cleaned up. (Ex. S-1 at 3) Order Number 8634340 was terminated on April 20 with notation that shift foremen had been retrained in the proper performance of workplace exams. (Ex. S-2 at 4)

In July 2011, an MSHA investigator interviewed Ball and the plant's fine grind superintendent, Respondent Rose,[7] who had been onsite but not at the pelletizer plant the evening

[6] Ball began working at the Castlewood Plant in 1994, serving as a general laborer and mill operator before becoming a certified foreman in 2000 or 2001. At the time of the inspection, he was the second shift foreman for the dust plant. In this capacity, he supervised five employees and was responsible for conducting pre-shift examinations, monitoring the plant for potential problems, and ensuring the safety of his men. (Tr. 72:9-20, 89:2-7; Ex. S-4 at 2)

[7] Rose is the fine grind plant superintendent at the Castlewood Plant. He began working at the mine intermittently in 1980 and became a full-time employee in 1984. Over the years, his duties have included stacking dust, driving a truck, operating a mill, operating crushers in the crushing plant, and "[doing] everything in the fine grind plant." He served as a foreman for 13 years before becoming a superintendent in 1997. As a superintendent, he directly supervises the plant foremen, including Ball, and is responsible for daily activities at the mine. (Tr. 47:3-20, 63:11-25; Ex. S-3 at 2)

of the inspection. (Ex. S-3; Ex. S-4; Tr. 47:25–49:4) The Respondents told the investigator that the buildups had been caused by a malfunction or imbalance in the pelletizing process that occurred while running a special product. (Ex. S-3 at 4, 5; Ex. S-4 at 5) At hearing, they explained that when an imbalance causes the material to become too wet or too dry, it is diverted and dumped into a "floor bin" area[8] as reject material that is later picked up with a skidsteer and run through the system again. (Tr. 49:12–53:17, 79:4-14, 82:3–83:10, 97:11-13) They suggested this is a normal part of the pelletizing process that can rapidly generate large amounts of reject material and dust. (Tr. 49:9-11, 54:12–55:2, 59:3-18, 79:15–80:3, 84:5-20, 91:11-21, 101:5-15)

IV. LEGAL PRINCIPLES

Section 110(c) Liability

Section 110(c) of the Mine Act provides that "[w]henever a corporate operator violates a mandatory health or safety standard … any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation shall be subject to the same civil penalties" as the corporate operator. 30 U.S.C. § 820(c).

Thus, as a threshold matter, section 110(c) requires a showing that the individual respondent is a director, officer, or agent of a corporate operator. Although the corporate operator – in this case, Mountain Materials – need not be a party to the proceeding, another necessary predicate for 110(c) liability is a finding that the operator violated the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 9-11 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Importantly, section 110(c) also requires a showing that the individual respondent knowingly authorized, ordered, or carried out the violation. The Commission has construed "knowingly" to include both actual and constructive knowledge, explaining that 110(c) liability is triggered whenever a person "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." *Kenny Richardson*, 3 FMSHRC at 15-16 (emphasis added); *accord Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1299-1300 (11th Cir. 2014); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Specific intent is not required. The Secretary must prove only that the individual knowingly acted, not that the individual knowingly violated the law. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug. 2014) (citing *Warren Steen Constr. Co.*, 14 FMSHRC 1125, 1131 (July 1992)). Although a showing of willfulness is not required either, "section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); *see also Freeman United*, 108 F.3d at 360.

Whether conduct is "aggravated" is determined by looking at all the facts and circumstances of the case to see if any aggravating or mitigating factors exist. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec.

[8] There is no physical bin. The term "floor bin" simply refers to a section of the floor that is designated as a holding area for reject material. (Tr. 57:16-24, 90:15-17)

2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Big Ridge, Inc*., 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include: (1) the extent of the violative condition; (2) the length of time that the violative condition existed; (3) whether the violation posed a high degree of danger; (4) whether the violation was obvious; (5) the respondent's knowledge of the existence of the violation; (6) the respondent's prior efforts in abating the violative condition; and (7) whether the respondent had been previously placed on notice that greater efforts were necessary for compliance. *Sierra Rock Products, Inc*., 37 FMSHRC 1, 4 (Jan. 2015); *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637 (Oct. 2014); *Manalapan*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351-57; *Consolidation Coal*, 22 FMSHRC at 353; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *see also Ernest Matney*, 34 FMSHRC at 783-87 (analyzing aggravated conduct in 110(c) case by discussing unwarrantable failure factors).

Assuming that 110(c) liability applies, the gravity of the violation and negligence must also be evaluated in accordance with the Commission's well-established legal principles, summarized below, in order to determine the appropriate penalty.

Significant and Substantial (S&S)

The citation and order at issue in this case 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 Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., 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).

Traditionally, the third element of the *Mathies* test has presented the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co.*, 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.'" 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 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 Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). 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.*, 6 FMSHRC 1573, 1574 (July 1984).

The Fourth and Seventh Circuits have interpreted the *Mathies* test somewhat differently by placing the emphasis and the bulk of the analysis on the second element of the test. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). Because the Castlewood Plant is located in the Fourth Circuit, my S&S analysis will follow the Fourth Circuit's ruling in *Knox Creek*. According to the Fourth Circuit, the second element of the *Mathies* test "primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm" because "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162. The Fourth Circuit also held that the occurrence of the hazard must be assumed at the third prong of the *Mathies* test, characterizing the appropriate inquiry as whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 161-65.

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) 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.

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).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *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.

Indeed, 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." *Id.* at 1701-02 (citing *Jim Walter Res., Inc.*, 36 FMSHRC at 1975 n.4, and *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties … we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

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.

Penalties

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). 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. Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52; *American Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ Zielinski).

Section 110(i) of the Mine Act sets forth six statutory criteria for the Commission to consider when assessing civil penalties. *See* 30 U.S.C. § 820(i). These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). Specifically, the Commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

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). 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 621.

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 negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). 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. 13592-601, 13621.

V. FINDINGS AND DISCUSSION

A. Threshold Finding of Corporate Agency

As a preliminary matter, I find that Respondents Ball and Rose were agents of a corporate operator within the meaning of section 110(c). The parties stipulated that Mountain Materials is a corporation. (Ex. S-5) Ball and Rose admitted that at all times relevant to these proceedings, they

were employed by Mountain Materials as shift foreman and superintendent, respectively. (Answer ¶7) The Respondents also admitted they were "agents" of the company within the meaning of section 3(e) of the Mine Act, 30 U.S.C. § 802(e), which defines an agent as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." (Answer ¶7; Tr. 45:22-25) Both men were charged with responsibility for the operation of the pelletizer plant and the supervision of miners working there. (Ex. S-3 at 2; Ex. S-4 at 2, 5; Tr. 63:18–64:12) Accordingly, the Respondents are subject to section 110(c) as corporate agents.

B. Citation Number 8634338 (Housekeeping Violation)

Citation Number 8634338 alleges a violation of 30 C.F.R. § 56.20003(a). The Secretary seeks an individual penalty against Respondent Ball for this violation.

1. Violation of 30 C.F.R. § 56.20003(a)

Section 56.20003(a) is a broad, general "housekeeping" standard that provides: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a). Thus, the Secretary must establish two elements: (1) the cited area is a "workplace," "passageway," "storeroom," or "service room," and (2) the area is not being kept clean and orderly. The Secretary bears the burden of proving each element of the violation by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). The Secretary may properly charge an operator with a violation if a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the alleged violation, 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).

In this case, Inspector Hagy alleges that § 56.20003(a) was violated when the mine operator failed to keep travelways clean and orderly in the pelletizer plant. (Tr. 20:17–21:5; Ex. S-1) Specifically, the narrative portion of the citation states that there were buildups of material "throughout the floor and the travel ways" of the plant, including one area where the material was 63 inches high and several areas where miners had been walking through the buildups. (Ex. S-1 at 1) Hagy supported these allegations by documenting and describing specific locations where he observed buildups.

Buildups in Front of the MCC

One such location was on the floor in front of the MCC (the motor control center or master control center), which houses the electrical switches that lock out the pelletizer plant. (Tr. 25:10–26:2, 76:18) Hagy observed and photographed accumulated material with footprints in it at this location. (Ex. S-1 at 6) Respondent Ball did not deny that there were buildups of material in front of the MCC. He testified that this area is adjacent to the disc that spins the material into pellets, which emits "small particles that fly everywhere" when it malfunctions, and that the

plant had malfunctioned the day of the inspection. (Tr. 76:14-77:17) Ball also conceded that he was the person who had walked through the built-up material, leaving footprints. (Tr. 19:21–20:1, 25:10-15, 88:8-14) He testified that there is a "little walkway" running through the area that is used by the plant operator. (Tr. 77:2-4)

I find that the area in front of the MCC constitutes a "passageway" under § 56.20003(a) because miners must pass through it in order to access the MCC, as evidenced by the fact that Ball referred to it as "a little walkway" and walked through it. This area was not being kept clean and orderly, in violation of § 56.20003(a).

Buildups in the Floor Bin Area

Elsewhere on the plant floor, Hagy photographed a pile of material that had accumulated to a height of 63 inches. (Ex. S-1 at 5; Tr. 19:2-7) Respondents Ball and Rose did not dispute that the 63-inch pile existed. (Tr. 53:18-24, 73:2, 88:4, 92:8-9) They also agreed that, as depicted in the photograph, there were visible footprints or a "goat path" in the pile as if someone had walked across it. (Tr. 55:18-21, 88:1-7; Ex. S-1 at 5) Ball stated that an access road had been cut through the pile on the prior shift so that miners could drive equipment through the area hauling pallets of sodium to be "poured in the bottom" or reject material to be dumped back on the belt. (Tr. 72:23–73:13, 90:22–91:10; Ex. S-4 at 4)

Respondents suggested it is acceptable for material to accumulate in this area because it is designated as a floor bin, not a walkway or workplace. (Tr. 49:9-11, 53:22–55:2, 79:15–80:3, 91:11-21, 94:9-17) According to Respondents, allowing reject material to collect here does not present a safety issue because miners should know to avoid walking through the area if material is present. (Tr. 55:9-13, 95:4–96:13) However, relying on miners' skill and attentiveness to prevent injury "ignores the inherent vagaries of human behavior." *Peabody Coal Co.*, 19 FMSHRC 1381, 1385 (Aug. 1997). Moreover, the footprints and Ball's account of an access road running through the pile show that miners were actually using this area as a passageway. In fact, Ball admitted that the area could be characterized as a travelway under the circumstances (Tr. 94:25–95:5), bringing it within the ambit of § 56.20003(a). The pile of material in this area was so large that a reasonably prudent person would have at least made an attempt to begin clearing it. I find that this area was not being kept clean and orderly, in violation of § 56.20003(a).

Buildups in Other Parts of the Plant

Other parts of the plant aside from the MCC and floor bin areas were also covered in dust, according to Inspector Hagy. (Tr. 19:8-15, 43:13-15, 108:9-21) For example, a catwalk around one of the crushers or mills was so full of rocks and dust that the material was rolling off the sides. (Tr. 19:10-13, 108:12-15, 114:20–115:2) Hagy described the accumulations as excessive. (Tr. 19:14) He did not recall seeing any parts of the plant floor that were clear. (Tr. 19:16-20, 108:22-24) There were so many places in need of cleaning that it was difficult to list them all, he testified. (Tr. 115:7-9)

The Respondents did not specifically challenge these allegations. Ball stated that if the catwalks or stairs had been "bad," he was sure he would have written them up, but he "c[ould]n't really remember." (Tr. 97:14-22) Rose opined that "on the most part, we run a pretty good – pretty clean house" (Tr. 59:22-24), but did not address Hagy's account of material blanketing the floor and spilling over the sides of the catwalk around the crusher. Ball and Rose also attempted to explain why the citation was not terminated for eight days. They testified that they had probably finished cleaning the plant relatively quickly, but had to wait several days for Inspector Hagy to return to terminate the citation. (Tr. 68:4–71:9, 78:19–79:3, 87:3-23) However, Hagy testified that although the floor probably could have been cleaned with a loader in just a few hours, "it was all the catwalks and these other areas that had to be manually shoveled and cleaned that took the amount of time that it did." (Tr. 108:18-21)

After considering all the evidence, I find Hagy's description of the conditions at the pelletizer plant to be more credible than Respondents'. I fully credit Hagy's testimony that there were extensive buildups of material throughout the travelways and floor of the plant, in violation of § 56.20003(a).

I also reject Respondents' suggestion that the buildups of material were a normal, unavoidable part of the mining process. Respondents argue that the dust and buildups developed very rapidly at the beginning of the shift when an attempt to make a particularly difficult product triggered a malfunction that required Ball, who was not the regular plant operator, to dump large amounts of reject into the floor bin to prevent it from accumulating elsewhere. (Resp. Br. 6; Tr. 57:4-6, 73:22–75:12, 77:18–78:9, 97:1-10, 101:3-15) Ball testified that his normal practice would be to clean up the material in the bin area once the plant is running smoothly again. (Tr. 97:23–98:1) The implication is that the plant would have been cleaned in due time, but the material built up too rapidly to be addressed before the inspector showed up. However, the buildups were very extensive and bore footprints in multiple places. It is improbable to believe they arose in the short period of time suggested by Respondents. Also, Ball admitted that a pile of material was already present before his shift began. (Tr. 72:16–73:10, 86:1-7) A reasonably prudent person would have recognized a hazard and initiated a cleanup. Ball chose to begin running the plant instead. This action was inconsistent with the standard of care placed on the operator under § 56.20003(a). Because the operator failed to keep passageways clean and orderly in the plant, § 56.20003(a) was violated.

2. S&S and Gravity

Inspector Hagy marked this violation as S&S and reasonably likely to result in a permanently disabling injury to one miner. (Ex. S-1) He was concerned that "[i]f normal mining practices were to continue in this condition, [with] people walking over this excessive amount of material, dust in the plant, visibility low, it's reasonably likely we could have had a serious injury" such as a broken bone caused by a miner tripping and falling over material in the floor or falling down a flight of stairs. (Tr. 21:9–23:3)

I have already found a violation of the mandatory safety standard at § 56.20003(a), satisfying the first element of the *Mathies* test for S&S.

The second *Mathies* element requires a showing that the violation contributed to a discrete safety hazard. As conceded by Respondents Ball and Rose, this violation contributed to the hazard of a miner slipping, tripping, or falling due to the built-up material. (Tr. 65:1-11, 88:19–89:21) According to the Fourth Circuit, "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162. The buildups of material at issue in this case were located in travelways and on the floor of the active pelletizer plant in areas where miners worked and traveled, as evidenced by the footprints in many of the buildups. The buildups were so extensive that Inspector Hagy did not see any clear paths across the floor. (Tr. 19:16-20, 108:22-24) If normal mining operations had continued, it was reasonably likely that miners accessing the equipment in the pelletizer plant building would have to walk over and through the widespread accumulations, as Respondent Ball admitted doing. The accumulated material included dust, rocks, and pellets. (Tr. 53:6-13, 77:4-6, 79:19-23, 114:20-24) It would be difficult for a miner to keep his footing in these materials. Airborne dust obscured visibility in the plant (Tr. 18:4-11), increasing the chance that a miner would lose his footing and fall while trying to cross the unstable and uneven surfaces created by the buildups. Given these factors, I find that this violation was more than "at least somewhat likely to result in harm" to miners and that the safety hazard to which it contributed was discrete. Accordingly, the second *Mathies* element is satisfied.

The third and fourth *Mathies* elements inquire whether the hazard, assuming it occurred, would be reasonably likely to result in a reasonably serious injury. As noted above, the hazard presented by this violation was a slip- or trip-and-fall hazard. Extensive buildups were present both on elevated catwalks and on the floor of the pelletizer plant. If a miner were to lose his footing in the buildups and fall against a piece of machinery, down a flight of stairs, or onto the hard plant floor, especially from an elevated catwalk, he would be reasonably likely to sustain reasonably serious injuries such as broken bones, muscle sprains, or permanently disabling injuries related to contacting moving machine parts. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the evidence satisfies all four elements of the *Mathies* test, I find that this violation was S&S.

Based on my findings above, I also find that the gravity of this violation was serious because it was reasonably likely to result in a serious or permanently disabling injury to a miner.

3. Respondent Ball's Liability and Negligence

Ball can be held individually liable for a penalty under section 110(c) if he "knowingly authorized, ordered or carried out" the violation. It is not necessary to find that he intended to violate the safety standard, actually knew a standard was being violated, or displayed willfulness. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997) (actual knowledge or specific intent not required); *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (willfulness not required); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992) (conscious disregard of safety standard not required). It is sufficient to find that he should have known of the violation but nonetheless authorized, ordered, or carried out the violative conduct and, in doing so, engaged in more than ordinary negligence. *See, e.g.*, *McCoy Elkhorn Coal*

Corp., 36 FMSHRC 1987, 1996-99 (Aug. 2014) (affirming 110(c) liability when foreman was aware of coal accumulations but directed production to continue before initiating cleanup).

I find that Ball knew there were buildups of material throughout the pelletizer plant on April 11, 2011, and should have known that this condition violated § 56.20003(a). As shift foreman, he was responsible for reviewing prior examination records and conducting his own examination to ensure the workplace was clear of safety hazards. (Ex. S-4 at 2, 3, 5, 7; Tr. 89:2-7, 92:24–93:6) He customarily walks through the workplace at the beginning of the shift to ensure the area is safe for his men, and he did so on April 11. (Tr. 72:16–73:21) At that time, he was aware that the plant had not been running smoothly. He observed a pile of reject material on the plant floor that was so large a road had been cut through it, and he walked through buildups of material in front of the MCC. (Tr. 73:1-13, 86:1-7, 88:11-14) He was aware that the housekeeping standard requires travelways to be kept clear and that buildups in travelways pose a slip/trip hazard. (Tr. 88:15–18) He admits it was his responsibility to clear buildups and make sure dust was controlled at the plant. (Tr. 90:1-3, 91:22–92:11; Ex. S-4 at 5) He also admits that buildups in travelways or a large pile such as the one he saw in the floor bin area create a hazard, and that he could have made a managerial decision to initiate immediate cleanup action. (Tr. 88:19–89:21, 93:7-22) Despite knowing that hazardous conditions existed and being in a position to address them, Ball failed to do so. Instead, he added to the buildups by running the plant. (Tr. 73:14–74:3, 95:18-24) I find that his actions amounted to carrying out and implicitly authorizing the violation.

Ball argues that he works with friends and family members at the mine and would never deliberately interfere with his coworkers' safety or violate a safety practice or standard. (Tr. 8:2–9:1) However, deliberate intent to commit a violation is not required. *See McCoy Elkhorn*, 36 FMSHRC at 1996. Even if Ball genuinely did not realize the buildups were extensive enough that they needed to be cleared in order to meet the standard of care prescribed in § 56.20003(a), he still can be held liable as a foreman for failing to take adequate steps to meet that standard of care. *See Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1300 (11th Cir. 2014) (rejecting good faith as a defense to 110(c) liability); *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148-49 (Oct. 1998) (noting it is incumbent on agents to recognize serious hazards and meet the standard of care proportionate to the danger); *Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (rejecting argument that foreman did not realize accumulations were extensive enough to constitute a violation).

As discussed above, 110(c) generally requires a showing of aggravated conduct, which is analyzed with reference to factors such as the extensiveness, obviousness, dangerousness, and duration of the violation, the respondent's knowledge of the violation, his abatement efforts, and whether he was on notice that he needed to make a greater effort to comply with the Mine Act.

Notice of the need for greater compliance efforts generally takes the form of specific warnings from MSHA or a history of past similar violations. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014). In this case, MSHA did not single out the Respondent to warn him that he needed to make a greater effort to comply with the housekeeping standard.

However, Ball had knowledge of the violation in that he was fully aware of the conditions at the plant and was familiar with the requirements imposed on him by § 56.20003(a) and by his role as a foreman, yet he failed to make any effort to abate the violation until Inspector Hagy arrived at the plant and asked him about the dust. (Tr. 88:15-18, 89:2-7, 90:1-3, 91:22–94:13) The violation was very obvious. The photographs taken by Inspector Hagy show that the buildups of material would have been readily discernable to anyone who walked into the pelletizer plant. (Ex. S-1 at 5-6; *see also* Tr. 24:8-9, 65:12-16) The violation was extensive both in terms of the physical extent of the buildups and the time taken to cleat them: numerous areas in the plant were affected; large amounts of material had been permitted to accumulate in some locations, such as the 63-inch pile in the floor bin and the overflowing catwalk around the crusher; and it took eight days for the citation to be terminated. The violation was dangerous in that the buildups contributed to the hazard of a miner incurring serious injury in a slip- or trip-and-fall accident. I agree with Inspector Hagy that the large amounts of material could not have accumulated in one shift, and therefore the duration of the violation was longer than a shift. (Tr. 23:8-22, 39:18-21) These are all aggravating factors.

Despite Ball's knowledge of the violation, the extensiveness and obviousness of the violative conditions, and the danger they posed, he failed to take abatement action. Ball has not shown that there were any significant mitigating factors. For these reasons, I find that he engaged in aggravated conduct constituting more than ordinary negligence in connection with this violation.[9] Because he knowingly authorized and carried out this violation and his conduct was aggravated, he is liable for a penalty under 110(c).

Based on my finding of aggravated conduct with no mitigating factors, I also find that Ball's negligence in connection with this violation was high.

4. Penalty

The Secretary requests that I assess a penalty of $1,200.00 against Ball for this violation. As discussed above, the criteria to be considered when assessing a penalty against an individual respondent include: (1) his history of previous violations; (2) the appropriateness of the penalty to his income and net worth; (3) the effect of the penalty on his ability to meet his financial obligations; (4) whether he was negligent; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. *Mize Granite Quarries, Inc.*, 34

[9] Consistent with this finding, it was appropriate for Inspector Hagy to mark the violation as an unwarrantable failure, which is defined as aggravated conduct constituting more than ordinary negligence. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). However, the unwarrantable failure allegation in the citation is directed against Mountain Materials, not Respondent Ball, as evidenced by the fact that the Secretary's proposed penalty against Ball falls below the $2,000.00 statutory minimum for unwarrantable failure violations (see 30 U.S.C. § 820(a)(3)(A)), so it is unnecessary to address the unwarrantable failure determination here. *See Kenneth D. Bowles*, 29 FMSHRC 1055 (Nov. 2007) (ALJ Barbour) (declining to address unwarrantable failure allegation in 110(c) case); *Charles Clevinger*, 26 FMSHRC 485, 499 (June 2004) (ALJ Feldman) (distinguishing between operator's aggravated conduct and individual agent's aggravated conduct).

FMSHRC 1760, 1764 (Aug. 2012); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

With regard to the first penalty criterion, the Secretary has not provided any information on Ball's violation history. Ball asserts that he has worked at the Castlewood Plant for more than thirty years and has never been accused of the type of aggravated conduct necessary to establish 110(c) liability. (Resp. Br. 6) I conclude that he does not have a history of 110(c) violations.

The second and third penalty criteria are intended to account for factors such as the Respondent's income and family support obligations, the appropriateness of the penalty in light of his job responsibilities, and his ability to pay. *Sunny Ridge*, 19 FMSHRC at 272. The Commission has encouraged ALJs to make specific findings as to the Respondent's net worth and income and the nature and extent of his financial obligations. *Ambrosia*, 19 FMSHRC at 824. However, in this case, the parties have presented no information that would shed any light on Ball's personal financial status aside from the fact that he is a shift foreman who has worked at a limestone processing plant for more than thirty years.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. My findings on gravity and negligence are discussed at length above. The evidence shows that this violation was promptly abated in good faith by shutting down the plant for eight days in order to clean up the accumulations.

After considering the statutory penalty criteria, I find that $1,200.00 is an appropriate penalty to assess against foreman Ball for this serious, high-negligence violation.

C. Order Number 8634340 (Examination Violation)

Order Number 8634340 alleges a violation of 30 C.F.R. § 56.18002(a). The Secretary seeks an individual penalty against Respondent Rose for this alleged violation.

1. Violation of 30 C.F.R. § 56.18002(a)

The cited mandatory safety standard provides: "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 action to correct such conditions." 30 C.F.R. § 56.18002(a). This standard can be satisfied by a preshift examination conducted at the beginning of the shift or by an onshift examination. (Tr. 42:9-24) The standard carries an implicit adequacy requirement. As the Commission recently explained, the examination must be adequate in the sense that it must identify the hazardous conditions that would be recognized by a reasonably prudent competent examiner. *Sunbelt Rentals, Inc.*, 38 FMSHRC _, Docket Nos. VA 2013-275 et al., slip op. at 9 (July 12, 2016).

According to the Respondents, the competent persons designated by the operator to conduct workplace examinations at the Castlewood Plant are the shift foremen. (Tr. 60:20-22, 92:24–93:6; Ex. S-3 at 5; Ex. S-4 at 5) As of the inspection date, there was no written policy in place for conducting workplace exams. (Ex. S-3 at 3, 6; Ex. S-4 at 3) The examiners were

expected to record the exam results in the mine's preshift books, which were kept in a control room until full and then stored in Rose's office. (Ex. S-3 at 3, 4; Ex. S-4 at 4; Tr. 64:4-9) Rose, who holds overall responsibility for safety at the plant, generally reviewed the exam records. (Ex. S-3 at 3, 6; Tr. 64:1-12)

Order Number 8634340 alleges that proper workplace examinations were not being conducted at the pelletizer building, sand plant, and pulverized bagging area. (Ex. S-2 at 1) Both the order and Inspector Hagy's contemporaneous Citation/Order Documentation state that Hagy issued six citations, some for violations that were of a serious nature, at these locations during the April 11, 2011 inspection. (Ex. S-2 at 1, 5) Hagy described two of these violations at hearing. The first was the built-up material throughout the pelletizer plant and the second was a heavy door that was broken and hanging by one hinge. (Tr. 29:22–30:11) Hagy believed that the operator had violated § 56.18002(a) because all the violations he cited on April 11 were obvious, but no action was being taken to correct any of them, and the only hazard reported in the preceding two weeks' worth of examination records was a leak in the roof. (Tr. 27:5-18, 29:17-21) Hagy took pictures of the examination records for the weeks of March 28 to April 2, 2011, and April 3 to April 9, 2011, which confirm that no hazards were recorded in any areas of the Castlewood Plant during that timeframe except water leaks. (Ex. S-2 at 6, 7) In fact, there is no indication that five of the seven areas listed on the examination forms were actually examined at all. *Id.* Two of the areas were marked "OK" on some days, but the boxes where examination results should be recorded for the other five areas are completely blank. *Id.*

I have already found that buildups of material were present in the pelletizer plant for more than one shift, constituting "conditions which may adversely affect safety or health" within the meaning of § 56.18002(a). I credit Inspector Hagy's undisputed allegation that he issued five other violations during the inspection. Rose testified that he and Ball probably did not notice the broken door because it stays open most of the time (Tr. 60:8-19), but the Respondents failed to explain why the obvious, extensive buildups of material were not reported and corrected through a proper workplace examination or why the exam records do not address any of the other violations referenced by Hagy. The fact that two weeks' worth of exam record forms were left blank for some areas of the plant suggests that these areas may not have been examined at all. Further, any exam that was performed at the pelletizer building on the day of the inspection was inadequate in that the examiner failed to identify and address the obvious, extensive buildups of material. Accordingly, I find that § 56.18002(a) was violated.

2. S&S and Gravity

Inspector Hagy marked this violation as S&S and reasonably likely to result in a permanently disabling injury to one miner. (Ex. S-2) He believed the violation contributed to the same hazard as Citation Number 8634338, namely, the hazard of a person tripping or slipping and falling in the buildups of material in the pelletizer plant, leading to serious injuries such as broken bones. (Tr. 27:19–29:14) He also believed the door that was hanging by a hinge presented a safety hazard because it could fall on a miner. (Tr. 29:7-10; Tr. 30:6-8)

The first element of the *Mathies* test for S&S is satisfied because a mandatory safety standard was violated. The second *Mathies* element is also satisfied because this violation

contributed to the discrete safety hazards of a miner tripping and falling in the buildups of material or the heavy door falling on a miner and injuring him. Although the violation did not itself create these hazards, the operator's failure to identify and promptly correct the hazards through a proper workplace exam contributed to the risk that the hazards would occur and cause injury. I have already found that, assuming a slip/trip-and-fall accident were to occur in the pelletizer building, it would be reasonably likely to result in serious injury. This finding satisfies the third and fourth elements of the *Mathies* test. Accordingly, this violation is S&S.

I find that the gravity of this violation is serious because it was reasonably likely to result in serious injury to a miner, as discussed above. The inspector's gravity designations are consistent with my findings and I uphold them.

3. Respondent Rose's Liability and Negligence

Superintendent Rose can be held liable for a "knowing" violation under 110(c) if the examination violation involves aggravated conduct and he knew or should have known of the violation but nonetheless authorized, ordered, or carried out the violative conduct.

I find that Rose should have known of this violation. As the fine grind superintendent at the pelletizer plant, he is responsible for dust control, daily activities, supervision of the foremen, and overall safety at the plant. (Ex. S-3 at 2, 5; Tr. 63:22-25, 64:10-12) He spends 80-90% of his workday in the plant area. (Ex. S-3 at 3) He is also the person responsible for reviewing the examination records. (Ex. S-3 at 3, 6; Tr. 64:1-3) Although he was not in the pelletizer building when Hagy inspected it, he was onsite that day and should have been aware of the buildups of material, given that they were extensive, obvious, and had been amassing long enough to create a 63-inch pile in one location, and given that he was responsible for daily activities and safety at the plant. Given his position and responsibilities, Rose had a duty to make sure that the foremen he supervised were conducting proper workplace examinations. He should have recognized their failure to correct the obvious hazardous conditions in the pelletizer plant, and he should have noticed the blank spaces in the exam records indicating that his men may not be duly conducting the required exams. Whether he turned a blind eye to the spotty exam records and the buildups in the pelletizer plant, or whether he simply failed to adequately supervise the foremen working beneath him, his actions amounted to knowing authorization of this violation.

I further find that Rose engaged in aggravated conduct constituting more than ordinary negligence in knowingly authorizing the violation. Several aggravating factors contribute to this determination. As discussed above, this violation posed a serious degree of danger to miners by virtue of its contribution to the likelihood of a slip/trip-and-fall accident or other accident stemming from the hazards that were not identified and corrected through a proper exam. The violation was also obvious. The widespread presence of built-up material in the plant and the blank spaces stretching across two weeks' worth of exam records rendered it very apparent that adequate workplace exams were not being conducted. The violation was also extensive in terms of the area affected and the hazards missed by the examiners. Failure to conduct an adequate exam affects the entire workplace, and in this case, six violations were permitted to exist because they were not addressed through a proper workplace exam. Rose should have known of this violation, yet took no abatement action, even though he could have stopped production to

address the hazards and could have instructed his foreman of the need to conduct more effective exams. Rose has not identified any significant mitigating factors. For all these reasons, I find that Rose engaged in aggravated conduct in connection with this violation,[10] and he is liable for a penalty under 110(c).

Based on my finding of aggravated conduct with no mitigating factors, I further find that Rose's negligence was high.

4. Penalty

The Secretary requests that I assess a penalty of $1,500.00 against Rose for this violation.

As was the case for Respondent Ball, the parties have not presented any evidence regarding Rose's income, net worth, or financial obligations aside from the general fact that he holds a position as fine grind superintendent at the Castlewood Plant, where he has worked for 35 years. (Resp. Br. 6) Thus, the record does not support specific findings on the appropriateness of the penalty to Rose's income and net worth or its effect on his ability to meet his financial obligations.

The Secretary also has not provided any information about Rose's violation history. Rose, like Ball, asserts he does not have a history of 110(c) violations. (Resp. Br. 6) I accept this assertion.

My findings on gravity and negligence are discussed in detail above. I further find that this violation was abated promptly and in good faith, in that the shift foremen at the plant were retrained on the proper performance of workplace exams within a week of the violation. (Ex. S-2 at 4) The foremen's hours were also changed so that they would have time to perform more thorough workplace examinations. (Ex. S-4 at 7) In addition, Rose indicated to the MSHA investigator that he began reviewing the exam records more frequently after receiving this violation. (Ex. S-3 at 3)

[10] As discussed in footnote 9, my finding of aggravated conduct would support Inspector Hagy's designation of this violation as an unwarrantable failure, but the unwarrantable failure allegation is not relevant here.

After considering the penalty criteria, I find that $1,500.00 is an appropriate penalty to assess against superintendent Rose for this serious violation involving high negligence and aggravated conduct.

ORDER

It is hereby **ORDERED** that Tim M. Ball pay a penalty of $1,200.00 and Ricky A. Rose pay a penalty of $1,500.00 within thirty (30) days of the date of this order.[11]

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

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[11] 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

July 28, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. SE 2015-136-M AC No. 40-02213-370090
v.	
NYRSTAR GORDONSVILLE, LLC, Respondent	Mine: Cumberland Mine

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("the Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Nyrstar Gordonsville, LLC ("Nyrstar"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $5,000.00 for an alleged violation of his mandatory safety standard regarding timely accident notification.

Nyrstar filed a Motion for Summary Decision and Supporting Memorandum of Points and Authorities ("Resp't Mot.") with attached exhibits ("Exs. R-1 through R-6"), including a copy of the citation, MSHA Inspector James Hollis' notes, an autopsy report, affidavits and phone call logs of Adolph Minert and Eric Steidl, and a copy of MSHA's Escalation Report. The Secretary filed a Response to Respondent's Motion for Summary Decision/Cross-Motion for Summary Decision ("Sec'y Mot.") with Nyrstar's Assessed Violation History Report ("Ex. P-1") and Joint Stipulations ("Jt. Stips.") attached. Nyrstar then filed a Reply in Opposition to the Secretary's Cross-Motion for Summary Decision ("Resp't Reply"). The following are issues for resolution in this case: (1) whether Nyrstar violated 30 C.F.R. § 50.10(a); and, if so (2) whether Nyrstar was highly negligent in violating the standard; and (3) the appropriate penalty.

Pursuant to Commission Rule 67(b), "[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.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court

has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that "the Supreme Court has stated that 'we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that '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.'" *Id.* at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based on agreement of the parties to file cross motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the citation, as modified, and assess a penalty against Nyrstar.

I. Joint Stipulations

Stipulations of Fact:

> 1. Mine Superintendent Adolph Minert was not at the Cumberland Mine on Sunday, November 16, 2014.[1]
>
> 2. At approximately 13:08 [1:08 p.m.], on November 16, 2014, hoistman Donald Gentry, an hourly non-management employee, called Mr. Minert to inform him that Danny Thom was found in the change house and that Mr. Thom had killed himself. The change house is located on mine property at the Cumberland Mine.
>
> 3. Mr. Minert drove to the Cumberland Mine immediately after the call from Mr. Gentry and arrived at approximately 13:19 [1:19 p.m.].
>
> 4. While Mr. Minert was in transit to the Cumberland Mine, he called Eric Steidl, Operations Manager for Middle Tennessee Mines, which includes the Cumberland Mine, and informed him that Danny Thom was found in the change house and it appeared he had committed suicide.
>
> 5. At the Cumberland Mine, Mr. Minert was not permitted to enter the change house where Mr. Thom's body was found. Mr. Minert spoke with mine personnel, the police, and EMS responders who were at the scene on the mine site.
>
> 6. After hearing back from Mr. Minert, Mr. Steidl called the MSHA Hotline at 1-800-746-1553 at approximately 13:31 [1:31 p.m.] to report the incident.
>
> 7. No one answered the call, so Mr. Steidl left a message reporting an apparent suicide at the Cumberland Mine and left his name and contact number for a call

[1] The relevant date has been corrected. *See* Resp't Reply at n.1.

back. MSHA recorded Mr. Steidl's phone call as being received at 13:33 [1:33 p.m.]. MSHA called Mr. Steidl back to collect the necessary information.

8. After an inspection of the scene and interviewing witnesses, Inspector James (Mike) Hollis issued Citation No. 6464299 to Nyrstar Gordonsville, alleging a violation of 30 C.F.R. § 50.10(a).

General Stipulations:

A. Respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

B. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

C. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

D. Respondent operates the Cumberland Mine, Mine ID 40-02213.

E. The citation in this docket is complete, authentic, and admissible.

F. The inspector's notes for the citation (identified in Paragraph E above) are complete, authentic, and admissible.

G. The exhibits and affidavits, and attachments thereto, filed with Respondent's Motion for Summary Decision are complete, authentic, and admissible.

H. Respondent is a zinc mine with more than 250,000 hours worked in 2014.

I. The citation in this docket was properly served on Respondent by a duly authorized representative of the Secretary on the date stated therein.

J. The civil penalty proposed in this docket will not affect Respondent's ability to remain in business.

II. Factual Background

Nyrstar operates the Cumberland Mine, an underground zinc mine, in Smith County, Tennessee. Jt. Stips. D, H. At 1:08 p.m. on Sunday, November 16, 2014, hoistman Donald Gentry called Mine Superintendent Adolph Minert at his home to report that miner Danny Thom had killed himself inside the mine's change house. Ex. R-4 at 2; Jt. Stips. 1, 2. Minert lives about 10 minutes from the mine, and drove there immediately upon receiving the call from Gentry. Ex. R-4 at 2; Jt. Stip. 3. While en route to the mine, he called Nyrstar Operations Manager Eric Steidl to inform him that Thom was found in the change house and it appeared that he had committed

suicide. Ex. R-4 at 2, Ex. R-5 at 2; Jt. Stip. 4. Later, on December 16, a county medical examiner confirmed the cause of Thom's death as suicide. Ex. R-3 at 4.

At 1:19 p.m., Minert arrived at the mine and told Steidl that he would call him back as soon as he gathered more information. Ex. R-4 at 2; Jt. Stip. 3. While police on-site prevented Minert from entering the change house, he spoke with them, Gentry, geology technician Joe Spoon, and EMS responders. Ex. R-4 at 2; Jt. Stip. 5. At 1:31 p.m., immediately following Minert's follow-up call, Steidl called MSHA to report Thom's death based on Minert's report to him. Ex. R-5 at 2; Jt. Stip. 6. No one answered the initial call at MSHA, so Steidl left a voicemail at 1:33 p.m. Ex. R-6; Jt. Stip. 7. MSHA returned Steidl's call at 1:38 p.m. and gathered the necessary information. Ex. R-6; Jt. Stip. 7.

After inspecting the scene and interviewing witnesses, MSHA Inspector James (Mike) Hollis issued the citation in question to Nyrstar for failure to report Thom's death to MSHA within the mandated 15-minute reporting period. Ex. R-2 at 16; Jt. Stip. 8.

III. Findings of Fact and Conclusions of Law

Inspector Hollis issued 104(a) Citation No. 6464299 on November 16, 2014, alleging a violation of section 50.10(a) that had "no likelihood" of causing an injury, and was due to Nyrstar's "high" negligence."[2] The "Condition or Practice" is described as follows:

> The company failed to immediately contact MSHA at once without delay and with-in the 15 minutes, when the death of an individual was discovered at the mine on November 16, 2014. A company agent knew of the incident at approximately 13:08 [1:08 p.m.] and MSHA was not notified until approximately 34 minutes later.

Ex. R-1. The citation was terminated on November 25, 2014, after Nyrstar held meetings with management, and included instructions addressing the requirements of section 50.10(a) in its emergency procedures.

A. Fact of Violation

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)).

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[2] 30 C.F.R. § 50.10(a) provides that "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."

The Secretary argues that he is entitled to summary decision as a matter of law because Nyrstar knew or should have known that a reportable death had occurred at the mine when Minert received the call from Gentry at 1:08 p.m. and, therefore, further investigation before calling MSHA was unnecessary. Sec'y Mot. at 1, 7-8. The Secretary supports these contentions by arguing that no reasonable inference can be drawn from the record that undermines the truthfulness of Gentry's report to Minert, and that the 2006 revisions to section 50.10, and the Commission's decisions in *Consolidation Coal*, 11 FMSHRC 1935 (Oct. 1989); *Wolf Run Mining*, 35 FMSHRC 3512 (Dec. 2013); and *Signal Peak Energy*, 37 FMSHRC 470 (Mar. 2015), only permit an operator to perform a pre-reporting investigation to determine whether a reportable death has occurred at the mine. Sec'y Mot. at 5-6, 8. Furthermore, the Secretary argues, the judge's reasoning in *Premier Chemicals*, 29 FMSHRC 686 (Aug. 2007) (ALJ), which permitted an operator to perform an investigation after management knew of a reportable event, is irreconcilable with Commission precedent and has not been followed in later cases. Sec'y Mot. at 6 n.6.

In response, Nyrstar contends that it is entitled to summary decision as a matter of law, arguing that the 15-minute notification requirement was triggered at 1:29 p.m., when Minert verified Thom's death to Steidl after concluding a reasonable investigation into the information conveyed by Gentry. Resp't Mot. at 4, 7-8. Nyrstar further argues that to reduce the risk of frivolously notifying MSHA of non-reportable accidents, Minert, as a management employee, should have been permitted to conduct a first-hand investigation before calling MSHA because the initial report, coming from rank-and-file miner Gentry, was not enough to constitute knowledge on the part of Minert. Resp't Reply at 5, 8-9. In support of this contention, Nyrstar interprets *Consolidation Coal*, 11 FMSHRC 1935; *Wolf Run*, 35 FMSHRC 3512; *Signal Peak*, 37 FMSHRC 470; *Hanson Aggregates Midwest*, 35 FMSHRC 2412 (Aug. 2013) (ALJ); and *Premier Chemicals*, 29 FMSHRC 686, as affording it an opportunity to investigate potentially reportable accidents before calling MSHA, irrespective of the rank-and-file miner's veracity. Resp't Reply at 4-6, 9.

The Commission has stated that the investigation period prior to reporting only lasts until the operator knows or should know that a reportable event has occurred; once a person with sufficient authority to call MSHA learns of a reportable event, the reporting period is triggered. *Signal Peak*, 37 FMSHRC at 476; *Wolf Run*, 35 FMSHRC at 3518. In *Signal Peak*, there was sufficient information to trigger the reporting period when a shift foreman encountered a miner who had been thrown 50-80 feet from a roof fall and sustained a back injury. 37 FMSHRC at 476, 477 n.7 (stating that the determination of whether an incident is reportable "must resolve any reasonable doubt in favor of notification"). The Commission has also found that an underground foreman's statements that "we had a mine explosion or something in here" and "get mine rescue here right now" to a manager on the surface were enough to create knowledge of a reportable accident under section 50.10. *Wolf Run*, 35 FMSHRC at 3516-18. In *Wolf Run*, the Commission explained that *Consolidation Coal* merely "stands for the proposition that although an operator should be afforded a reasonable opportunity to investigate, once it is determined that

a reportable accident has occurred, an operator must act immediately to report the incident."[3] 35 FMSHRC at 3518.

Nyrstar cites *Premier Chemicals* and *Hanson Aggregates* in support of the operator's right to investigate whether a reportable accident has occurred prior to the 15-minute time frame in which it must contact MSHA. In *Premier Chemicals*, the judge found the safety coordinator's 20-minute investigation reasonable because, despite notice of a miner's collapse at the mine, the cause of death was not immediately known, the possibility of an ongoing risk to other miners existed, the investigation was prompt and MSHA was notified shortly thereafter, and the miner's death was confirmed to have resulted from natural causes. 29 FMSHRC at 690-92. Similarly, a citation charging a violation of section 50.10 was vacated upon a finding that a non-fatal heart attack was not a reportable injury, and an alternative finding that the 15-minute reporting requirement was not breached because operators are afforded a "'reasonable opportunity to investigate an event'" before the reporting requirement is triggered. 35 FMSHRC at 2414 n.5, 2416-17.

Nyrstar's reliance on *Premier Chemicals* and *Hanson Aggregates* is misplaced. These cases were decided before the Commission's *Wolf Run* and *Signal Peak* decisions, which made clear that a pre-reporting investigation is not a *per se* guarantee, but rather an opportunity that ends once an operator knows or should know that a reportable accident has occurred. Furthermore, there is no indication in *Signal Peak*, *Wolf Run*, or *Consolidation Coal* that knowledge of a reportable event is contingent upon management's opportunity to observe the event first-hand. In fact, such a limitation would effectively undermine the Commission's direction to "resolve any reasonable doubt in favor of notification." *Signal Peak*, 37 FMSHRC at 477. Thus, Nyrstar was not entitled to perform a pre-reporting inspection simply because Gentry was a rank-and-file miner rather than a management-level employee.

Under the circumstances of the instant matter, it is undisputed that Gentry informed Minert via a phone call at 1:08 p.m. that Thom had killed himself. Therefore, Minert was aware that the cause of Thom's death, by its very nature, foreclosed any reasonable inference that other miners were exposed to an ongoing hazard. Furthermore, no reasonable inference can be drawn from the established facts to suggest that Gentry's report was not clear or credible, or that he had reason to falsely report the incident. Drawing all reasonable inferences in favor of Nyrstar, I find that Minert had been given all the information that he needed during the 1:08 p.m. phone call to know that a reportable accident had occurred, and that the 15-minute reporting timeline had been triggered at that time.

Accordingly, I find that Nyrstar violated the reporting requirement in section 50.10(a) when Thom's death was untimely called in to MSHA 23 minutes after the operator was put on notice of its occurrence, and exceeded the 15-minute rule by eight minutes.

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[3] The pre-2006 version of section 50.10 involved in *Consolidation Coal* and *Wolf Run*, required an operator to "immediately contact" MSHA in the case of a reportable event, with no mention of a specific time frame for reporting. The final rule changing the provision to include the "within 15 minutes" language became effective in December 2006. *See* 71 Fed. Reg. 71430 (Dec. 8, 2006).

B. Gravity and Negligence

The record establishes that Thom's death did not arise from an ongoing hazard affecting miners' safety, and that the delay in reporting the incident to MSHA had no likelihood of exacerbating his condition or putting others in peril. The Commission has found a violation of section 50.10 to have resulted from high negligence where the operator had no intention of reporting the incident or intentionally delayed reporting. *See Wolf Run*, 35 FMSHRC at 3518 (finding the operator highly negligent because the record "strongly suggest[ed]" that "management was motivated not to contact MSHA immediately in order to avoid enforcement"); *Rex Coal Co*., 38 FMSHRC 208, 210, 213 (Feb. 2016) (affirming the operator's high negligence when a miner searched for another miner instead of calling MSHA regarding a reportable event, which MSHA learned of through a news report).

Minert arrived at the mine 11 minutes after receiving the call from Gentry. Another 12 minutes elapsed between Minert's arrival on-site and Steidl's call to MSHA. Despite the inference drawn in favor of Nyrstar, that its management personnel held a good-faith belief that an investigation into Thom's death was warranted prior to contacting MSHA, it was unreasonable to assess the information initially conveyed to Nyrstar as insufficient notice of a reportable incident requiring immediate contact with MSHA; Gentry's call clearly conveyed that a death had occurred inside the change house and that suicide was the probable cause. It was reasonable for Minert and Steidl to agree that Minert follow up with his own investigation, but only after MSHA had been contacted without delay. After all, Nyrstar was always free to supplement its report to MSHA as more information became available. All things considered, however, including the promptness with which Nyrstar called MSHA after concluding its 12-minute in-house investigation, I find no indication that Nyrstar intended to avoid or even forestall enforcement. Therefore, Nyrstar's conduct constituted no more than ordinary, or moderate, negligence.

IV. Penalty

While the Secretary has proposed a civil penalty of $5,000.00, 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). Notwithstanding application of *Sellersburg* criteria, however, the Act imposes a minimum penalty of $5,000.00 for section 50.10 violations. 30 C.F.R. § 110(a)(2).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Nyrstar is a large operator, with no prior violations of section 50.10(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty.[4] As stipulated, the proposed civil penalty will not affect Nyrstar's ability to continue in business. Jt. Stip. J. I also find that Nyrstar demonstrated good faith in achieving rapid compliance after

[4] Nyrstar's motion to strike the Elmwood/Gordonsville mine's violation history from Ex. P-1, opposed by the Secretary, is **DENIED**, inasmuch as the appropriate weight has been accorded to that evidence.

notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Nyrstar's negligence in committing it. These factors have been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

It has been established that this violation of section 50.10(a) had no likelihood of resulting in an injury, that Nyrstar was moderately negligent, and that the violation was timely abated. Therefore, I find that a penalty of $5,000.00, the statutory minimum proposed by Secretary, is appropriate.

ORDER

ACCORDINGLY, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, and it is **ORDERED** that the Secretary **MODIFY** Citation No. 6464299 to reduce the level of negligence to "moderate," and that Nyrstar Gordonsville, LLC, **PAY** a civil penalty of $5,000.00 within 30 days of the date of this Decision.[5]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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[5] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket number and AC number.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2016

BRIAN JACKSON, Complainant, v. ALAN RITCHEY MATERIALS CO., LC, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2016-0178-DM SC-MD-16-02 Mine: Pope's Point Mine ID: 34-01930

ORDER ON MOTION

Before the Court in this Section 105(c)(3) discrimination action is Respondent Alan Ritchey Materials Co., LC's ("Alan Ritchey") Motion to Strike Complainant's First Amended Complaint. For the reasons which follow, because the Court finds that the First Amended Complaint is superfluous, the Motion is **GRANTED**. However, the Complainant's original complaint before the Mine Safety and Health Administration ("MSHA") remains intact and this proceeding, along with the Court's observations and comments about the nature and limits of Mine Act discrimination proceedings, as set forth below, moves forward towards its October 12, 2016, hearing date.

Complainant Brian Jackson filed a discrimination complaint with MSHA on November 24, 2015. According to his handwritten complaint, Jackson stated, in essence, that on November 17, 2015 he showed up for work and was then advised that he would be assigned to work on a boat that evening. Concerned about the assignment, Jackson then went to the plant manager's office "to explain [that he did] not feel safe on the river at night time due to [the] sinking [of] a boat on July 28, 2015." Jackson was on that boat. He was told that, despite his concerns, he had to perform the work on the dredge. Jackson then expressed the same issue to his supervisor, Daniel Baker, and advised Baker that he would return to work the next day. When Jackson arrived at work the following day, he was informed that he no longer had a job with Alan Ritchey. Jackson's complaint stated that he believed his discharge was "due to [his] feeling unsafe and discrimination against [him] being a registered Choctaw Nation Tribal Member." MSHA's discrimination report acknowledges that "Mr. Jackson [asserts that he] was terminated after he told his supervisor that it was unsafe to work in a small boat on the river in the dark to repair a cable near the dredage (sic) [i.e. "dredge"]. Mr. Jackson refused to do this particular job

again because two weeks prior the boat he was in sanked (sic) to where (sic) the fire department had to be called in to rescue him." [1]

Thereafter, on January 5, 2016, MSHA sent a letter to Jackson advising that, pursuant to its investigation, it did not believe there was sufficient information to establish by a preponderance of the evidence that a violation of Section 105(c) occurred.

Complainant Jackson filed an appeal of MSHA's determination on January 21, 2016. Critically, he did state "I request an appeal of MSHA's determination dated January 5, 2016." That statement constitutes a sufficient basis to preserve the Complainant's appeal under Section 105(c)(3). On February 1, 2016, Ronald R. Huff, Esq. advised, by letter to the Federal Mine Safety and Health Review Commission ("Commission") that he was representing the complainant. On May 19, 2016, the case was assigned to this Court.

Subsequently, Attorney Huff filed, on June 10, 2016, Complainant's "First Amended Complaint." That Amended Complaint alleges the grounds for Jackson's safety concerns involving working on a boat, asserts that he refused to work under such unsafe conditions, and that he was then discharged from his employment with the Respondent. First Amended Complaint, ¶ 5-11. However, the Amended Complaint then adds that "[d]uring the course of his employment, Complainant, a member of the Choctaw Nation, was subjected to discrimination, harassment, and derogatory comments from supervisors and fellow employees based on his ethnicity." [2] *Id.* at ¶ 12. It continues, stating that "Complainant was also subjected to sexual harassment by his supervisor, Daniel Baker, who threw feminine hygiene products at him and telling him, 'this is for your bleeding p***y.'" *Id.* at ¶ 13. The Amended Complaint then returns to Jackson's original discrimination complaint, filed with MSHA, noting that it "alleg[ed] he was discharged because he refused to work under unsafe conditions." *Id.* at ¶ 14. Further, the Amended Complaint notes that Jackson alleges he "was discharged in violation of Section 105(c) of the [Mine Act] . . . for refusing to work under unsafe or unhealthy conditions." Id. at ¶ 18.

[1] This recounting should not be viewed as findings of fact. Rather, it is a recounting of the Complainant's version of the events which led to his discharge from Respondent's employment and MSHA's remark in that report about the allegations.

[2] Jackson's appeal of the MSHA determination made the same claims, stating:

> During the course of my employment, I, a member of the Choctaw Nation, was subjected to discrimination, harassment, and derogatory comments from supervisors and fellow employees based on my ethnicity. These include being called a 'f**king Injun' and 'damn Indian.' I was also told to 'get [my] brown a** over here.' I was also subjected to sexual harassment by my supervisor, Daniel Baker, who threw feminine hygiene products at me and telling me 'this is for your bleeding p***y.' This was witnessed by Joshua Hall. I seek reinstatement to my position as Ground Hand and lost earnings.

On June 15, 2016 Respondent filed its Motion to Strike Complainant's First Amended Complaint ("Respondent's Motion"). [3] Respondent asserts that there were procedural flaws in Complainant's Amended Complaint and that "Complainant [ ] substantially changed the allegations and the claims for relief" in that filing from his original complaint. Respondent's Motion, at 3.

Discussion

Both sides displayed some misunderstanding about discrimination claims under the Mine Act. Therefore, the basic elements for such claims are briefly reviewed. A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y o/b/o Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y o/b/o Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette test*).

Of particular importance to this case, the Court calls attention to the fact that protected activity does not encompass all types of discrimination. Protected activity includes filing or making complaints under or related to the Act or exercising any other statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). The Act states that protected activity includes when a miner "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation." 30 U.S.C. § 105(c)(1).

"Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act." *Sec'y. o/b/o Piper v. Ken American Res.*, 35 FMSHRC 1680, 1680 n.1 (June 2013) (ALJ Andrews) (citing *Pasula*, 2 FMSHRC at 2799).

"The purpose of the protection is to encourage miners 'to play an active part in the enforcement of the [Mine Act]' recognizing that, 'if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which

[3] Also considered by the Court were Complainant's Motion for Leave to file its First Amended Complaint, its response to Respondent's Motion to Strike its amended complaint, and Respondent's Reply to Complainant's Response to Respondent's Plea to the Jurisdiction and Motion to Dismiss.

they might suffer as a result of their participation.'" *Sec'y. o/b/o Rodriquez v. C.R. Meyer & Sons*, 35 FMSHRC 981, 982 (Apr. 2013) (ALJ Steele) (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978)).

"[W]hile the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, 'the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger.'" *Lujan v. Signal Peak Energy*, 37 FMSHRC 1362, 1364 (June 2015) (ALJ Barbour) (quoting *Dykhoff v U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000)).

Accordingly, Mine Act discrimination claims may not entertain other types of discrimination, such as those based on sex, religion, age, or national origin. There is a further important limitation where a Section 105(c)(3) claim is involved; it is confined to the grounds of cognizable claims which were raised before MSHA and its investigation of such claims. Thus, the complaint, and MSHA's investigation of the allegations in it, establishes the extent of the court's jurisdiction. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (April 1991) [4]; *Pontiki Coal Co*., 19 FMSHRC 1009, 1017 (June 1997).

Thus, there are two limiting factors: (1) only those non-extraneous, cognizable, grounds claimed by the miner when the complaint of discrimination is made to MSHA may be raised when appealing a determination by MSHA that it believed there was insufficient information to establish by a preponderance of the evidence that a violation of Section 105(c) occurred; and (2), the corollary factor that, upon such an appeal of MSHA's determination, one may not attempt to broaden the original basis for the complaint. The latter limitation exists because MSHA's investigation is based upon the grounds alleged in the discrimination complaint.

In this instance, Complainant Jackson did allege a cognizable basis for discrimination under the Mine Act by expressing his safety concerns relating to working on the river at night time due to the recent sinking of a boat on July 28, 2015. The other expressed grounds in his complaint, to wit, his allegation of discrimination based on his ethnicity as a registered Choctaw Nation Tribal Member, as it is not a cognizable protected activity, will not be considered by the Court.

[4] In *Hatfield*, the operator argued that the complainant's amended filing pursuant to Section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under Section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else "the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met." *Hatfield*, 13 FMSHRC at 546.

Accordingly, the complaint filed by Jackson before MSHA continues to be his complaint before this Court. Although the Court has noted that some of the grounds in that complaint are not cognizable, other aspects do not have such an infirmity. As the Commission has observed:

> Although section 105(c)(3) refers to an 'action' before the Commission, the person who files this action is referred to in that section as the "complainant." 30 U.S.C. § 815(c)(3) (emphasis added). . . . The reference to 'complainant' is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the 'complainant.'

Sec'y. o/b/o Gray v. North Fork Coal, 33 FMSHRC 27, 37 (Jan. 2011).

The parties are directed to continue preparation for the scheduled hearing in a manner consistent with the directions set forth in this Order.

So Ordered.

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

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July 1, 2016

SECRETARY OF LABOR, MSHA, on behalf of **CHERYL GARCIA**, Complainant, v. VERIS GOLD USA, INC., and its successors, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-905-DM WE MD 14-16 Jerritt Canyon Mill Mine ID 26-01621

ORDER CONDITIONALLY APPROVING WITHDRAWAL MOTION

Before: Judge Simonton

This case is before me upon a discrimination complaint filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), by the Secretary of Labor on behalf of Ms. Cheryl Garcia against Veris Gold USA., Inc.

Complainant Cheryl Garcia, through the Secretary, has withdrawn her complaint in this matter, originally filed with the Secretary on May 6, 2014, and filed by the Secretary before the Commission on August 4, 2014, and moves for an Order of Dismissal, with prejudice, of their respective complaints against Veris Gold USA, Inc., and any claimed or potential successor(s), including but not limited to Jerritt Canyon Gold, LLC, Whitebox Asset Management, and Eric Sprott.

Consistent with prior court review, the joint motion is **CONDITIONALLY APPROVED**. This matter will be immediately dismissed with prejudice upon notification from the Secretary and the Complainant of full execution of the parties' agreed upon resolution.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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July 6, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RALPH W. DUSHANE, employed by CEMEX CONSTRUCTION MATERIALS OF FLORIDA, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-132-M A.C. No. 08-01287-402507A Mine: Brooksville South Cement Plant

ORDER DENYING DISMISSAL

Before: Judge Rae

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor against Ralph W. Dushane ("Respondent") in his capacity as an employee and agent of Cemex Construction Materials of Florida, LLC ("Cemex") under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 820(c). Respondent has filed a motion to dismiss the petition due to the Secretary's delay in filing it.

Procedural Background

Following receipt of a hazard complaint in October 2012, the Mine Safety and Health Administration (MSHA) investigated Cemex's Brooksville South Cement Plant and issued two violations on November 5 and 7, 2012. Cemex and the Secretary resolved the two violations by reaching a settlement that was approved by a judge in December 2013. Meanwhile, on March 26, 2013, Respondent received a letter from MSHA informing him of MSHA's intent to assess penalties against him under section 110(c) of the Mine Act, which provides in pertinent part: "Whenever a corporate operator violates a mandatory health or safety standard … any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation … shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon" the corporate operator. 30 U.S.C. § 820(c).

After a lengthy delay, the Secretary issued a proposed penalty assessment against Respondent on February 4, 2016. Respondent timely contested the proposed penalties. The Secretary filed a penalty petition with the Commission on April 14, 2016. Respondent subsequently filed his motion to dismiss.

Parties' Arguments

Respondent contends that the Secretary failed to provide notice of the proposed penalty "within a reasonable time after the termination of [the underlying] inspection or investigation," as required under section 105(a) of the Mine Act. 30 U.S.C. § 815(a). Respondent asserts that MSHA's internal guidelines set forth the Secretary's interpretation of what constitutes a "reasonable time" for assessment of a 110(c) penalty: 18 months from the date of issuance of the subject violation. *See* MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Vol. I, § 110, at 42 (2015) ("PPM"). In this case, approximately 38 months elapsed between the issuance of the subject violations in November 2012 and the assessment of the proposed penalties in February 2016. Respondent contends that the Secretary has failed to show adequate cause for this delay. Respondent further argues that he is prejudiced by the delay because there has been no formal discovery yet; the case against him is based primarily on the allegations of one other miner whom he has not yet had a chance to confront through cross-examination; and the lengthy delay will negatively impact his ability to obtain reliable evidence.[1]

In response, the Secretary first contends that the proposed assessment was issued within a reasonable time after termination of the underlying investigation because the investigation did not end until this matter was referred to the MSHA Office of Assessments on January 31, 2016. Thus, by the Secretary's count, it took just four days to issue the proposed assessment. This argument is predicated on the Secretary's view that the 110(c) investigation included not just the initial information-gathering phase at the MSHA district level during which witnesses were interviewed and documentary evidence was collected, culminating in the issuance of the March 26, 2013 letter notifying Respondent that MSHA was proposing to assess penalties against him, but also included the approximately 34 months during which MSHA's Technical Compliance and Investigation Office (TCIO) and the Office of the Solicitor (SOL) decided whether to refer the case to the Office of Assessments.

Alternatively, the Secretary contends that three years is a reasonable timeframe for the issuance of a 110(c) assessment given MSHA's workload and the logistics of coordinating among the various offices involved in the 110(c) assessment process. The Secretary asserts that the guidelines set forth in the PPM are not binding or determinative as to what constitutes a "reasonable time." Rather, the Secretary contends that his interpretation of "reasonable time" advanced in this litigation is entitled to *Chevron* deference. *See Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Finally, the Secretary argues that even if the time it took to assess a proposed penalty was unreasonable, Respondent has failed to show legally cognizable prejudice.

[1] Respondent also notes in passing that the penalty petition was filed 3 days beyond the deadline set forth in 29 C.F.R. § 2700.28(a), which provides that the Secretary must file a petition within 45 days of receiving a notice of contest. Respondent has submitted a USPS return receipt showing that an MSHA employee signed for the notice of contest on Friday, February 26, 2016. However, MSHA's internal date stamp on the copy of the notice that was submitted with the penalty petition indicates it was received on Monday, February 29. The Secretary contends that this was merely a clerical error. Because the 3-day delay was minimal and apparently was caused by a clerical error, I find that the delay does not justify dismissal of the petition.

Discussion

Determining whether a petition was filed in a "reasonable time" within the meaning of section 105(a) requires an analysis of the circumstances of each case, including "whether adequate cause existed for the Secretary's delay in proposing a penalty and …whether the delay prejudiced the [respondent]." *Sedgman*, 28 FMSHRC 322, 338 (June 2006). In *Long Branch Energy*, the Commission held that the Secretary can establish adequate cause merely by providing a non-frivolous explanation for his delay in filing. 34 FMSHRC 1984, 1991 (Aug. 2012). By contrast, in order to secure dismissal, the respondent must establish that the delay has resulted in actual prejudice – i.e., prejudice that is "real" or "substantial" (as opposed to "potential" or "inherent") and is "demonstrated by a specific showing." *Id.* at 1991-93. Although the respondent's burden is heavy and the Secretary's burden is light, the Commission has explained that "regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety." *Id.* at 1991. Consistent with this principle, Commission ALJs have overwhelmingly disfavored dismissal of 110(c) cases in the wake of *Long Branch* despite the Secretary's consistent substantial delays in completing 110(c) investigations and assessing penalties. *See, e.g.*, *Steve B. Rees*, 37 FMSHRC 1852 (Aug. 2015) (ALJ); *Scott Carpenter*, 36 FMSHRC 2311 (Aug. 2014) (ALJ); *Adam Whitt*, 35 FMSHRC 3487 (Nov. 2013) (ALJ); *Duffy, Inc.*, 35 FMSHRC 2291 (July 2013) (ALJ); *Christopher Brinson*, 35 FMSHRC 1463 (May 2013) (ALJ). *But see Steve Adkins*, 35 FMSHRC 1481 (May 2013) (ALJ) (disagreeing that *Long Branch* applies in 110(c) context, but still placing burden on respondent, as moving party, to show actual and meaningful prejudice unless petition was filed outside 5-year statute of limitations for federal civil suits).

The Secretary argues it took him a reasonable amount of time to file the petition because the special investigation had ended just four days beforehand. The idea that the length of the delay is calculated starting at the end of the special investigation is supported by precedent and by the language of section 105(a). *See, e.g.*, *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (stating that time to file petition begins at conclusion of accident investigation); *Steve B. Rees*, *supra* (extending this principle to a 110(c) investigation). I am less certain that it is reasonable for the Secretary to interpret "investigation" to include the period during which TCIO and SOL review the case before referring it to the Office of Assessments. The actual investigative work is already complete by then, yet the review period inexplicably lasted almost three years in this case, raising concerns about fairness to Respondent. *Cf. Dyno Nobel East-Central Region*, 35 FMSHRC 265, 267 n.2 (Jan. 2013) (ALJ) (noting that the Commission has not definitively resolved how to calculate the investigation period in 110(c) cases, but expressing concern that "because there is a potential for substantial delay in the initiation and conduct of a section 110(c) investigation, granting the Secretary carte blanche for that part of the process may well not comport with considerations of fair play and due process for individual respondents").

However, I need not decide whether to defer to the Secretary's interpretation of "investigation" because Respondent has not made a showing of actual prejudice. The violations at issue in this case were settled in 2013 and, as Respondent contends, the parties did not engage in discovery to preserve testimony. Four years have passed since the violations occurred. These two facts could very well prejudice Respondent's ability to find witnesses with any recollection

of the events. However, it is premature to make that determination now, as Respondent has not indicated whether there are any necessary witnesses who are physically unavailable or unable to recall the relevant events. Respondent has alleged only potential prejudice of the sort that inherently flows from delaying litigation.

I note that although the Commission has been extremely tolerant of the Secretary's habitual delays in filing 110(c) petitions, the Commission's most lenient decisions (such as *Long Branch*) came out several years ago when MSHA's case backlog was at historic levels. This has not been the case for more than a year. General references to MSHA's workload can no longer be accepted at face value as an excuse to spend in excess of three years processing a 110(c) case. Even if Respondent cannot show actual prejudice, I find such a lengthy delay raises questions about the reliability of any testimony that is presented, including the testimony of the investigator.

While Respondent is not entitled to dismissal at this time because he has not made a specific showing of actual prejudice, I will, however, entertain a renewed motion to dismiss before or at trial. In the event that Respondent, having had an opportunity to conduct full discovery, finds witnesses cannot be located or memories have indeed faded to the extent that he can demonstrate actual prejudice, dismissal may be warranted.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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July 11, 2016

SECRETARY OF LABOR, MSHA, on behalf of **CHERYL GARCIA**, Complainant, v. VERIS GOLD USA, INC., and its successors, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-905-DM WE MD 14-16 Jerritt Canyon Mill Mine ID 26-01621

AMENDED ORDER CONDITIONALLY APPROVING WITHDRAWAL MOTION[1]
ORDER CONDITIONALLY VACATING DEFAULT ORDER

Before: Judge Simonton

This case is before me upon a discrimination complaint filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), by the Secretary of Labor on behalf of Ms. Cheryl Garcia against Veris Gold USA., Inc.

Complainant Cheryl Garcia, through the Secretary, has withdrawn her complaint in this matter, originally filed with the Secretary on May 6, 2014, and filed by the Secretary before the Commission on August 4, 2014, and moves for an Order of Dismissal, with prejudice, of their respective complaints against Veris Gold USA, Inc., and any claimed or potential successor(s), including but not limited to Jerritt Canyon Gold, LLC, Whitebox Asset Management, and Eric Sprott.

Additionally, Complainant, through the Secretary, moves for an Order to Vacate, with prejudice, the September 21, 2015, Default Order entered against Respondent Veris Gold USA, Inc. and any claimed or potential successor(s), including, but not limited to Jerritt Canyon Gold, LLC, Whitebox Asset Management, and Eric Sprott. In light of the Complainant's resolution of her dispute with the Respondents and withdrawal of her claim, my previously issued Default Order is now moot. I therefore conditionally grant this motion to vacate the default order.

[1] Order was amended to include conditional vacatur of the September 21, 2015 Default Order.

ORDER

THEREFORE, consistent, with prior court review, Complainant's Motion to Withdraw her Section 105(c) Complaint and to Vacate Default Order, with prejudice, is **CONDITIONALLY APPROVED**. This matter will be immediately dismissed with prejudice upon notification from the Secretary and the Complainant of the full execution of the parties' agreed upon resolution.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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July 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GATEWAY EAGLE COAL CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-987 A.C. No. 46-08637-388319 Mine: Campbells Creek No. 10

DECISION DENYING MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge Moran

Over at least the past 33 years, Commission judges, citing section 110(k) of the Mine Act, 30 U.S.C. § 820(k), have required that settlements must be adequately justified. The Secretary of Labor has filed a motion to approve settlement in this matter. For the reasons that follow, as the present motion fails to meet this requirement, the Court has no choice but to deny the motion.

The settlement motion at issue involves two citations. Citation No. 9055796 pertains to a section 104(a) action, marked as significant and substantial (S&S), with a fatality as the injury reasonably expected, and the negligence listed as moderate. The standard invoked, 30 C.F.R. § 75.517, provides: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." Specifically, Citation No. 9055796 alleges:

> The 480 volt cable, supplying power to the Fletcher Roof Bolter (co.#406), is not insulated adequately and fully protected. A splice in the cable is found to be damaged with exposed conductors. This condition exposes the miners who handle and/or work or travel near this energized cable to hazards of electrical shock, which is likely to result in electrocution. Standard 75.517 was cited 11 times in two years at mine 4608637 (11 to the operator, 0 to a contractor).

The parties' settlement agreement proposes reducing the civil penalty for Citation No. 9055796 from $1,657.00 to $829.00.

The Secretary's settlement motion presents only the following in support of the 50% reduction of the proposed penalty: "Respondent presented evidence that miners are required to check cables prior to each use, a requirement that is more stringent than demanded by regulations, potentially reducing its negligence. Based on this information and the risks of litigation, the parties agreed to the stated penalty." *Mot. for Dec. and Order Approving Settlement*, at 4 (Apr. 20, 2016).

The "information" provided by the Secretary, through the Respondent, does not add up, as section 75.517 does not speak to checking cables prior to each use. Instead, it requires cables to be "insulated adequately and fully protected," and such cable conditions were apparently not present. The Secretary bases his agreement for a 50% penalty reduction "on [that] information," which rests only upon a potential reduction in the mine's negligence, but leaves unanswered how it is that the mine's "more stringent" practice did not detect that the splice in the cable was "damaged with exposed conductors." *Id.* Thus, the "more stringent" requirement was ineffective and the standard itself is not qualified by employing such alleged practices. Instead, it plainly requires that cables be insulated adequately and fully protected. As noted, the inspector marked the violation as S&S and the expected injury to be a fatality. Correction of the violation required that a damaged splice be replaced.

For Citation No. 9055799, another section 104(a) action, marked as S&S, fatal, and with moderate negligence, invoked 30 C.F.R. § 75.400. That standard, titled "Accumulation of combustible materials," 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." Specifically, Citation No. 9055799 alleges:

> Combustible materials have been permitted to accumulate at the #9a Belt Take-up. *Dry coal fines have accumulated under the take-up and are found to be compressed against the moving belt.* The coal fines measure 6' long X 17" deep. This condition exposes miners to hazards associated with mine fires which are likely to result in fatal injuries due to smoke inhalation. Standard 75.400 was cited 29 times in two years at mine 4608637 (29 to the operator, 0 to a contractor).

(Emphasis added). The parties' settlement agreement proposes reducing the civil penalty for Citation No. 9055799 from $3,143.00 to $1,571.00.

The settlement motion states that the Respondent presented evidence that the coal belt accumulations "could have occurred since the last examination, potentially reducing its negligence." *Mot. for Dec. and Order Approving Settlement*, at 4. The motion also stated that the Respondent presented evidence that, "in the event of a fire, the expected injuries may be less severe than originally assessed." *Id.* As with the first citation discussed above, the motion seeks a 50% reduction in the penalty. The problem with the asserted basis for the reduction is that the motion does not provide the information relied upon to support the claim that the accumulations could have occurred since the last examination, nor does the Secretary weigh in on that claim. Similarly, there is no basis to support the claim that "the expected injuries may be less severe than originally assessed."

As the Commission has noted, accumulation violations are serious business.[1] In fact, the provision essentially repeats the statutory language of section 304(a) of the Mine Act. *See* 30 U.S.C. § 864(a). With respect to the issue of such violations, the Commission has previously held that

> section 75.400 'is violated when an accumulation of combustible materials exists.' *Old Ben I*, 1 FMSHRC at 1956. The Commission has further held that a violative 'accumulation' exists 'where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present.' *Old Ben Coal Co*., 2 FMSHRC 2806, 2808 (October 1980)('*Old Ben II*') . . . The Commission [has] emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats 'demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.' *Old Ben I*, 1 FMSHRC at 1957.

Utah Power & Light Co., 12 FMSHRC 965, 968 (May 1990).[2]

The Court is aware that the Secretary does not care for the Court's requirements for additional information to support settlements. However, pursuant to section 110(k) of the Mine Act, it is the Court's responsibility to require additional information in motions where reductions are insufficiently explained. It should be pointed out that the requirement for adequate supporting information in motions for settlement is not new. Former Chief Judge Paul Merlin invoked this requirement 33 years ago in a denial of a proposed settlement order, noting that "[t]he Solicitor has given me no basis whatsoever to approve the proposed settlement. None of the violations are

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[1] At least one of the Upper Big Branch citations involved an accumulation of loose coal at a tailpiece, where the material was some two to eight inches in depth along the number 2 belt. *See* Citation No. 8094527, issued 07/21/2009.

[2] As noted in *ICG Knott County,* 35 FMSHRC 1027, 1039 (Apr. 2013) (ALJ Moran):

> To place these standards in context, the legislative history of the Mine Act details Congress' concern with the hazards associated with such belts, noting that 'many fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, and examination of belt conveyors is necessary.' S. Rep. No. 91-411, at 57 (1967), reprinted in Senate Subcomm. On Labor, Comm. On Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975).

explained or analyzed." *Yakima Cement*, 5 FMSHRC 1278, 1279 (July 1983) (ALJ). The Chief Judge went on to note:

> The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. *Sellersburg Stone Company*, 5 FMSHRC 287 (March 1983). *Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary*.

Id. at 1279 (emphasis added); *see also Columbia Portland Cement*, 10 FMSHRC 1375 (Sept. 1988) (ALJ Merlin) (settlement motion denied by Chief Judge Merlin based on insufficient information). Noting the Secretary's practice, which continues to be frequently carried out today, the Chief Judge noted: "Using the same language each time, the Solicitor gives no facts or rationale to support any of [its] conclusions . . . [and therefore the court has] no basis to accept [the Secretary's] representations." *Columbia Portland Cement*, 10 FMSHRC at 1375, 1377, 1378, 1379.

Among many examples, in the same vein, a quarter century ago, Judge William Fauver found two instances of deficient settlement presentations:

> The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. Determination of that issue will depend on a fuller presentation and evaluation of the facts. The settlement will therefore be rejected," and later in the same decision stated, "[t]he settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For the reasons discussed above, I find the motion to be insufficient as to this citation.

Consolidation Coal, 13 FMSHRC 748, 751 (Apr. 1991) (ALJ).

In light of section 110(k) and the Commission's long-established construction of its role under that provision, in reviewing proposed penalties contested before it, it is difficult to discern any legitimate basis for the Secretary's recalcitrance. As it is the Secretary of Labor, not the Secretary of Commerce, that is objecting to demonstrating the legitimacy of compromises associated with violations of the Mine Act, one would anticipate that the Secretary would be anxious to demonstrate that his proposed settlements are patently supportable. Frequently, in dragging his feet to establish such legitimacy, the Secretary will invoke "transparency" in its

submissions. As this Court noted in *Bristol Coal*, 36 FMSHRC 2198, 2198 (Aug. 2014) (ALJ Moran):

> [I]n *Sec. of Labor v. The American Coal Company*, LAKE 2011-13 ("American Coal") and in its underlying submission to this Court in that case, the Secretary repeatedly invoked the claim that its approach for settlement submissions promotes transparency and satisfies the need for public scrutiny, objectives to which it professedly subscribes. *See, for e.g.* Sec's Brief in *American Coal* at 43.
>
> The Secretary, in this Court's view, has not caught on to the trend that began in the late twentieth century that more, not less, public information from government is the preferred practice. As the dictionary explains, to be 'transparent' means to be 'easily detected … characterized by visibility or accessibility of information especially concerning business practices.' Merriam-Webster.com. Instead, in its Motion before this Court in American Coal, the Secretary merely proclaimed, in a decidedly non-transparent manner that '[a]fter 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 assessed penalty with no changes to gravity or negligence for any of the citations at issue." *See, American Coal* Motion at 2-3. In the Court's view, such an approach is at odds with the normal sense of the meaning of transparency and, importantly, makes public scrutiny impossible. Further, the Secretary exaggerates, and some might fairly state outright misrepresents, what is required for a settlement to pass muster, by asserting that the Commission's approach requires 'the Secretary to supply extensive information to justify proposed settlements.'1 *See, Sec's Br*. at 5, presently before the Commission under interlocutory review in *American Coal*.

Id.

The Court hopes that the Secretary will see the short-sightedness of his lack of transparency and, rather than fighting his duty to disclose the legitimacy behind his proposed settlements, instead demonstrate the basis for his compromises.

On the basis of the foregoing, the Secretary's Motion is DENIED. The parties are directed to provide a sufficient basis to support the proposed settlement reductions or to prepare for trial. If a trial occurs, regarding any violations that may be established, the Court may impose a greater, lesser, or the same penalty as that proposed in the motion, but such penalties as may be imposed will be based upon those facts found through the testimony and documentary evidence produced in the proceeding.

SO ORDERED

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

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July 14, 2016

SECRETARY OF LABOR, MSHA, on behalf of **CHERYL GARCIA**, Complainant, v. VERIS GOLD USA, INC., and its successors, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-905-DM WE MD 14-16 Jerritt Canyon Mill Mine ID 26-01621

ORDER OF DISMISSAL
ORDER VACATING DEFAULT ORDER

Before: Judge Simonton

This case is before me upon a discrimination complaint filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), by the Secretary of Labor on behalf of Ms. Cheryl Garcia (Complainant) against Veris Gold USA, Inc. (Respondent).

On July 11, 2016, this court issued an Amended Order Conditionally Approving Withdrawal Motion and Order Conditionally Vacating Default Order stating that this matter would be dismissed with prejudice and the September 21, 2015 Default Order would be vacated after confirmation of full satisfaction of the parties' private settlement agreement. July 11, 2016 Order. On July 12, 2016, counsel for the Complainant and Respondent represented that the terms of the settlement agreement had been completed and satisfied.

Accordingly, the September 21, 2015 Default Order is **VACATED** and this matter is **DISMISSED** with prejudice.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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July 14, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-237-M A.C. No. 05-04600-399463
v.	Nine Pit
PARK COUNTY ROAD & BRIDGE, Respondent	

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Park County Road & Bridge ("Park County") 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"). Park County filed a motion for summary decision in which it maintains that the two citations at issue in this case must be vacated.[1] The Secretary filed an opposition to the motion to which Park County filed a reply. For the reasons set forth below, the motion for summary decision is denied.

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> 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).

[1] In its answer to the penalty petition and in its motion for summary decision, Park County stated that "Park County Road & Bridge" is not a proper party in this case and that it is not waiving its objection to this proceeding by filing the motion. In its answer, however, it admitted that the Nine Pit is operated by Park County, Colorado. I have not addressed this issue in this order as the Secretary has not responded to this claim.

The Commission has long recognized that "summary 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)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to … the party opposing the motion,' and that '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.'" *Hanson Aggregates New York Inc*., 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

I. SUMMARY OF ARGUMENT

A. Park County

Park County contends that Citation Nos. 8932192 and 8932193 should be vacated. The citations were issued to Park County because a "Community Clean-up Day" was being held on county property on October 3, 2015. Park County argues that this Clean-up Day was being held on a flat piece of ground located near, but not in, an idle gravel pit at which no mining operations were being conducted and at which no mining equipment was present. Park County engaged Mountain View Waste to operate the Clean-up Day.

In the motion, Park County presents what it labeled as "Undisputed Facts" in support of its motion. Because the Secretary argues that these undisputed facts do not include all pertinent information, I have labeled these facts as "Park County Facts" in this order. These facts, with only minor edits, are as follows:

1. Park County, Colorado, is a Colorado county organized and existing under Title 30 of the Colorado Revised Statutes. C.R.S. § 30-1-101.

2. Park County is the owner and operator of the Nine Pit, Mine ID No. 0504600, a gravel pit used only intermittently to produce road base for Park County roads. (Affidavit of Thomas Eisenman attached as Exhibit 1).

3. In the early autumn of 2015, Park County scheduled three "Community Clean-up Day" events, on various dates and locations, at which residents of Park County would be allowed to drop off waste material in dumpsters. The dumpsters would then be hauled away and the waste material disposed of. *Id*.

4. The October 3, 2015, location of the Community Clean-up Day was property near the Nine Pit but "off to [the] side of [the] main property." (General Field Notes prepared by MSHA Inspector Kathleen T. Gearity dated October 3, 2015 attached as Exhibit 2, page 3). Community Clean-up events have been held at this location several times before in previous

years without incident since the property adjacent to the Nine Pit is an ideal location for this activity. (Affidavit of Thomas Eisenman).

5. On October 2, 2015 at 3:14 p.m., MSHA received an anonymous telephone call "requesting an inspector to go there [to the Community Clean-up] and shut this event down." (MSHA Escalation Report attached as Exhibit 3).

6. Rather than call Park County to inquire about the Community Clean-up, MSHA dispatched an inspector, Kathleen T. Gearity, to the event on October 3, 2015, where Gearity made observations and took notes and photographs. (Exhibit 2).

7. On October 3, 2015 "no portable plant or mining equipment [was] visible" and "no mining equipment was on site." (*Id*. at pages 1 and 3).

8. On October 3, 2015, according to the records of MSHA the "Mine has a status of temp[orary] idle." (*Id.* at pages 1).

9. At the conclusion of her inspection, Gearity noted: "Due to temp idle status no mining equipment; and location off to side of main property, question of jurisdiction. Will review w/ Field Office Supervisor prior to issuing citations." (*Id*. at page 3).

10. No citation was issued by Gearity on October 3, 2015. Instead, she "[a]dvised [the County to call] in next time to be certain they are in compliance." (*Id*. at page 5).

11. On October 6, 2015, Gearity "[r]eviewed the situation w/ Shane Julien, Field Office Supervisor. Per district recommendation we will not issue citations due to question of jurisdiction. Ultimately – negative findings." (*Id*. at page 5).

12. This conclusion was reiterated in MSHA's Miscellaneous Inspection Information report in which it is stated: "Per Field Office Supervisor and District Staff there were no issuances due to question of jurisdiction due to mine temp idle status and no mining activity on site." (Miscellaneous Inspection Information attached as Exhibit 4, page 2).

13. At some point subsequent to the events of October 2015, MSHA apparently issued Citations 8932192 and 8932193. (Copies attached as Exhibit 5). However, the citations were not served upon or provided to Park County until January 8, 2016, when Shane P. Julien of MSHA sent copies to the Park County Transportation Director attached to an email reading, in pertinent part: "Tammy, My apologies, here are the missing citations they did not get sent out by AR as originally thought. We intended to send them to Mr. Eisenman but did not." (Email from Shane P. Julien to Tammie Crawford dated January 6, 2016, with attachments, attached as Exhibit 6).

14. None of the reports prepared by MSHA personnel identify any mine hazard at the site of the Community Clean-up. (*See* Exhibits 1, 2 and 3).

15. The Community Clean-up event was not conducted on an area where mining operations occur. (Exhibit 2; Affidavit of Thomas Eisenman).

16. Mountain View Waste did not perform any services at the Nine Pit but, instead, merely supplied roll off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for the Community Clean-up. (Affidavit of Thomas Eisenman).

17. At no time on October 3, 2015 was any person exposed to mine hazards. (Affidavit of Thomas Eisenman).

Citation No. 8932192 charges a violation of section 46.11(a) and alleges, in part, that five employees of Mountain View Waste were on mine property for a community trash day and had not received site-specific hazard awareness training. 30 C.F.R. § 46.11(a). Citation No. 8932193 charges a violation of section 46.12(a)(2) and alleges, in part, that Mountain View Waste employees were on mine property at Nine Pit for a community trash day and they were not given site-specific hazard awareness training. 30 C.F.R. § 46.12(a)(2).

Based on these facts, Park County argues that Citation No. 8932192 must be vacated. The cited regulation provides that "site-specific hazard awareness training [must be provided] before any person specified under this section is exposed to mine hazards." Persons specified under this regulation includes "any person who is not a miner as defined by § 46.2 of this part but is present at a mine site." 30 C.F.R. § 46.11(b). The term "mine site" is defined as "an area of the mine where mining operations occur." 30 C.F.R. § 46.2(f). The Secretary has defined "mining operations" to mean "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h). Park County maintains that it is undisputed that there were "absolutely no mining operations in progress on October 3, 2015, that there was no mining equipment on site, that the Nine Pit was in 'temporary idle status,' and that the Community Clean-up event was conducted not on the mine site, as that term is defined [in section 46.2(f)], but 'off to [the] side of [the] main property.'" (Motion at 7 quoting Resp. Ex. 2, p. 3). Under the undisputed facts, no person was "exposed to mine hazards." The Community Clean-up was not being conducted in an area of the Nine Pit "where mining operations occur."

Based on the same facts, Park County also contends that Citation No. 8932193 must be vacated. The cited regulation provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." 30 C.F.R. § 46.12(a)(2). The citation states that Mountain View Waste, the firm hired to deliver and remove dumpsters at the clean-up event, did not receive information on site-specific hazards and was not advised by the County that it must comply with MSHA regulations. Park County argues Mountain View Waste was not an "independent contractor" as that term is defined by the Secretary because it did not perform any services at the Nine Pit site but, instead "merely supplied roll-off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for the Community Clean-up." (Motion at 11; Resp. Ex. 1, Affidavit of Thomas Eisenman). The Secretary has defined the term "independent contractor" to mean "any person, partnership, [or] corporation . . . that contracts to perform services at a mine under this part." 30 C.F.R. § 46.2(e). Read in context and applying the plain and ordinary meaning of the words used in this definition, the phrase "perform services at a mine under this part" means that the "entity must be

performing mine related work." (Motion at 12). Park County contends that under any other construction of the definition the words "at a mine" and "under this part" would have no meaning and would be superfluous. *Id.* "Delivery and removal of roll off dumpsters for a non-mining related Community Clean-up day is simply not the performance of 'services at a mine under this part.'" *Id.* Consequently, Mountain View Waste was not an independent contractor as that term is defined by the Secretary. In addition Mountain View Waste never employed anyone at a mine as it simply supplied roll-off dumpsters. Finally, because no mining activities were taking place at the Nine Pit, Park County was under no obligation to "provide information" to Mountain View Waste "on specific mine hazards."

B. Secretary of Labor

The Secretary takes issue with many of the "undisputed" facts listed by Park County, as discussed below. With respect to Park County Fact 4, whether the Clean-up Day was held "off to [the] side of [the] main property," it was still on mine property. To get to the clean-up day, the "public drives into the mine gate [and onto] mine property [and] past existing stockpiles." (Sec'y Opposition at 4, quoting Sec'y Ex. 6, p. 2). Being near stockpiles and behind mine gates strongly indicate that Mountain View Waste was on mine property.

Park County Fact 5 leaves out the concern of the anonymous caller that "[t]here will be a front loader being operated and drivers driving trucks with no training." (*Id.* at 5, quoting Sec'y Ex. 4). Park County Fact 7 fails to mention that Inspector Gearity found a front-end loader in operation at the site and the equipment operator was not wearing a seatbelt. (Sec'y Opposition at 5, quoting Sec'y Ex. 6 p. 2). The equipment operator would have known of his obligation to always wear a seatbelt had he received the proper MSHA training.

Park County Fact 14 states that MSHA failed to identify any mine hazards at the site of the Clean-up Day. To the contrary, Citation No. 8932192 lists a number of hazards including "stockpiles, the pit, and mine equipment such as the screening plant and front-end loader." In addition, no County or Mountain West Waste employee at the site had received any hazard training.

Park County Fact 15 incorrectly states that the Clean-up Day was not held on an area where mining occurs. Although neither extraction nor milling were taking place on October 3, mine records show that as recently as September 29 miners engaged in nine hours of material screening at the Nine Pit. Park County Fact 16 incorrectly states that Mountain View Waste merely supplied roll-off dumpsters. The facts show, however, that there were five Mountain View Waste employees at the site and one of these employees was operating a front-end loader.

The Secretary also disputes Park County's legal arguments. With respect to Citation No. 8932192, Park County relies exclusively on the inspector's passing phrase that the Clean-up Day was off to the side. When the facts are analyzed taking into consideration the definition of a "coal or other mine" in section 3(h)(1) of the Mine Act, it becomes clear that the Clean-up Day took place at a "mine." 30 U.S.C. § 802(h)(1). As a consequence, the requirements of section 46 applied to the Clean-up Day. With respect to Citation No. 8932193, the Secretary argues that although "Mountain View Waste was not assisting in the removal of sand and gravel from the

mine site; [it was] nevertheless performing services on mine property at the invitation of the mine operator, [Park County].” (Sec’y Opposition at 8).

C. Park County’s Reply

In response to the Secretary’s opposition, Park County makes the following argument. First, it contends that the Secretary’s opposition rests on mere allegations and denials rather than specific facts supported by affidavits or other verified documents as required by 29 C.F.R. § 2700.67(d). Second, the Secretary did not address most of the Park County Facts set forth in the motion for summary decision. Third, Park County responded to specific statements made by the Secretary in opposition to the Park County Facts. With respect to Park County Fact 7, Park County notes that it did not mention the front-end loader because it “had absolutely nothing to do with the mine but was owned, operated, and used by Mountain View Waste to move dumpsters and pick up trash.” (Park County Reply at 6). The presence of the front-end loader is totally irrelevant to the issues in this case because it was not mining equipment. In addition, the “facts” set forth in the two subject citations are mere allegations that were prepared at a later date and should not be considered in response to a motion for summary decision because the allegations are not supported by an affidavit. With respect to Park County Fact 15, it is immaterial that mining occurred at the Nine Pit in the past. The key fact that the Secretary cannot dispute is that no mining, milling, or stockpiling has ever occurred at the site of the Clean-up Day. Finally, Park County maintains that it is undisputed that no employees of Mountain View Waste entered the pit or traveled to other areas on the property other than the site of the clean-up activity where no mining activity was taking place. (Park County Reply at 8). It cannot be disputed that employees of Mountain View Waste “never engaged in mining operations and were never exposed to any mine hazards, as is recited in the Eisenman Affidavit.” *Id.* at 9.

II. DISCUSSION AND ANALYSIS

The only issue before me at the present time is whether summary decision can be granted. I reject Park County’s argument that the Secretary failed to comply with Commission Procedural Rule 67(d). Although the Secretary did not include a declaration or affidavit in his opposition, he did provide documents to support his position that there are genuine issues of material fact that must be resolved. I may also rely on the conditions described in the two citations as specific facts that the Secretary is prepared to establish at an evidentiary hearing. (Exs. 1-7).

I find that there are a few genuine issues of material fact that need to be resolved before I can rule on Park County’s motion, as follows:

1. The photographs attached to Park County’s motion show a number of stockpiles of aggregate and other material. It is not clear how close those stockpiles were to the dumpsters and to the activities of the Mountain View Waste employees. In his affidavit, Thomas Eisenman stated that he “personally confirmed with Mountain View Waste that no employees entered the pit area nor were any employees of Mountain View Waste exposed to any mine hazards since no mining operations were occurring on October 3, 2015 and the Clean-up Day activities were not at the mine site.” (Affidavit ¶ 7). There was no evidence that the pit was near the location of the Clean-up Day or that the any “structures, facilities, equipment, machines, [or] tools . . . used in,

or to be used in, or resulting from, the work of extracting . . . minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals" were anywhere near the Clean-up Day location. 30 U.S.C. § 801(h)(1). Consequently, only the stockpiles were potentially close enough to the Clean-up Day location to pose a potential mine hazard. I need to know whether these material stockpiles were produced as a result of mining or screening activities at the Nine Pit. If so, I need evidence of the minimum distance between these stockpiles and the Clean-up Day activities on October 3, 2015. If the exact distances are not known, a reasonable estimate would be sufficient. If the Secretary believes that these stockpiles were close enough to the area where Mountain View Waste employees were working, I need evidence as to how the stockpiles exposed these employees to mine hazards.

2. Park County stated that Mountain View Waste "merely supplied roll off dumpsters on County-owned property adjacent to the Nine Pit Mine Site for Community Clean-up." (Eisenman Affidavit ¶ 7). Yet, five Mountain View Waste employees apparently were present at the Clean-up Day and a front-end loader was used during the event. In its reply to the Secretary's opposition to the motion, Park County stated that the front-end loader "was owned, operated and used by Mountain View Waste to move dumpsters and pick up trash." (Park County Reply at 6). This statement contradicts the affidavit of Mr. Eisenman. I need more evidence as to what the front-end loader was used for and how closely it operated to the stockpiles shown in the photographs.

I do not believe that an evidentiary hearing will be necessary to resolve these evidentiary issues. If the parties are unable to settle the case, time will be allowed for them to supplement their previous filings based on a schedule developed during a conference call with me.

Although I am denying the motion for summary decision because there remain genuine issues of material fact, I am offering some thoughts on the merits of the case. With respect to Citation No. 8932192, the hazard training requirement in section 46.11(b) only arises if specified persons are "exposed to mine hazards." Those specified persons are individuals who are not miners but who are present at a "mine site." Section 46.2(f). A "mine site" does not encompass the entire mine but only those parts of the mine in which "mining operations occur." *Id.* "Mining operations" include "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." Section 46.2(h). If the Secretary is unable to establish that the five Mountain View Waste employees were present at a "mine site," as defined by the Secretary, and were "exposed to mine hazards," then I will vacate the citation. Establishing that these individuals were present at a "coal or other mine," as that term is defined in the Mine Act is insufficient to establish a violation of section 46.11(a) in this instance. In addition, the mere fact that Mountain View Waste brought the dumpsters through the mine gate would be insufficient

With respect to Citation No. 8932193, a key issue will be whether Mountain View Waste was an independent contractor as that term is defined in section 46.2(e). Generally, any contractor performing services at a mine is considered to fit within the definition of independent contractor in the Mine Act, unless "an entity's contacts with a mine would be so attenuated as to remove it from the jurisdiction of MHSA." *Northern Illinois Steel Supply Co. v. Sec'y of Labor*,

294 F.3d 844, 848 (7th Cir. 2002). There comes "a point at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed under the Mine Act." *Id; See also Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 n. 3 (D.C. Cir. 1990). If I find that the activities of Mountain View Waste were *de minimis*, I will hold that it was not an independent contractor of Park County and I will vacate the citation. If I find that Park County was an independent contractor, the Secretary would be required to establish that Mountain View Waste's employees were exposed to specific mine hazards for which hazard awareness training would be required.

I strongly encourage the parties to settle this case taking into consideration this order. If you are unable to settle the case, please advise me by no later than **August 9, 2016,** so that I may schedule a conference call to discuss further proceedings.

III. ORDER

For the reasons set forth above, the motion for summary decision filed by Park County is **DENIED**. I find that there are genuine issues of material fact that remain in dispute.

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

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July 14, 2016

MARK BAILEY, Complainant, v. REX OSBORNE, COLIN MILAM, ROCKWELL MINING, LLC, and GATEWAY EAGLE COAL CO., LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-241-D PINE CD-2016-03 Gateway Eagle Mine Mine ID: 46-06618

ORDER DENYING MOTION TO DISMISS
ORDER DENYING MOTION FOR SUMMARY DECISION

This matter is before me on a Motion to Dismiss due to bankruptcy filing of the original employer and for Summary Judgment on the merits of the case filed by Respondent Rockwell Mining, LLC. Complainant Mark Bailey filed a response to the motion. Bailey initiated this case after being terminated from his employment with Gateway Eagle Coal Co., LLC. He has named Rockwell Mining, LLC ("Rockwell") as a party in his action under a theory of successor liability. In its motion, Rockwell argues that a finding of successor liability against it is precluded by a bankruptcy court order stating that Rockwell's parent company, Blackhawk Mining, LLC, purchased assets including the Gateway Eagle Mine "free and clear of all Liens, Claims and interests." Rockwell further argues that under the Commission's test for successor liability, it is not a successor to Bailey's former employer, Gateway Eagle Coal Co., LLC. Finally, it argues that Bailey's complaint is without merit and that a finding of summary decision in favor of Rockwell is appropriate on the merits. For the reasons that follow, the motions are denied.

I. BACKGROUND

Mark Bailey began working at the Gateway Eagle Mine on February 5, 2014. The mine was operated at that time by Gateway Eagle Coal Co., LLC. Bailey alleges that he began refusing to operate his roof bolting machine in return air in late 2014 because of concerns about inhaling coal and silica dusts while the machine was operating downwind of the continuous miner. He alleges acts of interference with his refusal to work culminating in his suspension with intent to discharge on September 10, 2015. He seeks reinstatement to his former position, back pay, attorneys' fees, and injunctive relief. Respondents argue that Bailey's discharge was not discriminatory, but rather based on excessive absences. Bailey has named Rockwell Mining, LLC, as a respondent in his case, alleging that Rockwell is a successor-in-interest to Gateway Eagle.

Gateway Eagle Coal Co., LLC ("Gateway Eagle") and its parent company, Patriot Coal, filed voluntary petitions for relief under Chapter 11 on May 12, 2015. A bar date for creditors to file proofs of claim was set for June 27, 2015. In early June 2015, Patriot entered into an agreement with Blackhawk Mining and its subsidiary, Rockwell Mining, LLC, for Rockwell to acquire the Gateway Eagle Mine. The plan of acquisition was confirmed by the bankruptcy court 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"). An Administrative Claims Bar Date was set for November 25, 2015. *In re Patriot Coal Corp*., Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 28, 2015) (notice of confirmation, effective date, and bar dates) ("Notice of Admin. Bar Date").

The bankruptcy court's confirmation order approves the sale of assets to Blackhawk "free and clear of all Liens, Claims and interests … pursuant to the terms and conditions of the Blackhawk APA." Confirmation Order ¶ 114. The order further states in its findings of fact and conclusions of law that:

> Blackhawk is not and shall not be deemed, as a result of any action taken in connection with the Blackhawk Transaction, 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 antitrust, environmental, successor or transferee liability, labor, employment or benefits law … whether known or unknown as of the closing of the Blackhawk Transaction, then existing or hereafter arising … with respect to the Debtors . . . .

Confirmation Order ¶¶ 76, 116, 120.

Bailey's termination occurred after the deadline for filing a proof of claim, but before Rockwell acquired the mine and before the deadline for filing an administrative claim. Bailey filed his complaint of discrimination with MSHA on September 23, 2015. MSHA notified him that it was declining to pursue the complaint on January 21, 2016. Bailey filed his complaint with FMSHRC on February 22, 2016.

II. STANDARD OF REVIEW

A. Motion to Dismiss

Federal Rule of Procedure 12(b)(6) permits a respondent to file a motion to dismiss a claim for failure to state a claim upon which relief can be granted. When ruling on a respondent's motion to dismiss, the judge "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 508 n.1 (2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter to allow the court to draw a

reasonable inference that the respondent is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Motion for Summary Decision

Commission Rule 67 provides:

> 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 facts; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to … the party opposing the motion." *Hanson Aggregates N.Y., Inc*., 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc*., 368 U.S. 464, 473 (1962)). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id*. (citing *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

III. DISCUSSION

A. Discharge in Bankruptcy

In its Motion to Dismiss, Rockwell argues that the bankruptcy court's October 9, 2015, order confirming the sale of Patriot Coal's assets to Blackhawk Mining "free and clear of all Liens, Claims and interests" precludes a finding of successor liability against it. As explained below, I find that for due process reasons, it is inappropriate to dismiss the case on these grounds.

i. Free and Clear Sales

Gateway Eagle, through its parent company, Patriot Coal, filed for Chapter 11 bankruptcy protection in May 2015 and sought to sell its assets as a part of the bankruptcy plan. The Bankruptcy Code provides two avenues for the sale of a debtor's assets during the Chapter 11 bankruptcy process. The first is through the Chapter 11 plan of reorganization, which may provide for the "sale of all or any part of the property of the estate either subject to or free of any lien." 11 U.S.C. § 1123(a)(5)(D). Section 1141(c) of the Bankruptcy Code provides that, with some exceptions,[1] "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. § 1141(c). The second avenue available is § 363(f), which empowers the trustee in bankruptcy to "sell property under subsection (b) or (c) free and clear of any interest in

[1] The exceptions are not relevant and so are not addressed here. *See* 11 U.S.C. § 1141(d).

such property of an entity other than the estate." 11 U.S.C. § 363(f). Section 363 may be used before a reorganization plan is approved and involves fewer procedural requirements than the reorganization process. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 236 (2002). The transfer from Gateway Eagle to Blackhawk was accomplished through the plan process, *see* Confirmation Order, but cases involving § 363(f) sales are also relevant to this discussion.

Courts have generally decided that the trustee's power to sell assets "free and clear of any interest in property" under § 363(f) includes the power to sell free and clear of claims for successor liability. *See, e.g., In re Chrysler LLC,* 576 F.3d 108, 126 (2d Cir. 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) (finding that bankruptcy court lacked jurisdiction to enjoin a successor liability suit in state court against a § 363 asset purchaser after the bankruptcy proceeding closed). These courts have explained that while successor liability claims are typically not "interests in property" in the sense of being *in rem*, they nevertheless "arise from the property being sold." *TWA*, 322 F.3d at 290; *but see* Rachel P. Corcoran, L.L.M. Thesis, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 Am. Bankr. Inst. L. Rev. 697 (2010) (arguing that "interests in property" extinguishable under § 363(f) should be limited to *in rem* interests); Kuney, *supra* (similar). For instance, the Third Circuit in *TWA* found that successor liability claims for employment discrimination would not have arisen "[h]ad TWA not invested in airline assets, which required the employment of the EEOC claimants." 322 F.3d at 290; *see also Leckie*, 99 F.3d at 582.

In addition to this textual argument, these courts have observed that "[t]o allow the claimants to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." *Chrysler*, 576 F.3d at 126 (alteration original) (quoting *TWA*, 322 F.3d at 292); *see also New Eng. Fish Co*., 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982); *but see Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) ("In fact, once a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force."). Section 507 of the Code lists classes of unsecured creditors entitled to priority, and successor liability claimants are not among them. 11 U.S.C. § 507.

Finally, these courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables it 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; *In re White Motor Credit Corp*., 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987); *but see Zerand*, 23 F.3d at 163 (7th Cir. 1994) (suggesting that allowing the bankruptcy court to immunize buyers in asset sales from liability to a greater extent than can be done under ordinary property law creates an improper incentive for companies to enter bankruptcy). In *TWA*, the court found that "a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of … EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits." 322 F.3d at 293.

There is less case law addressing the question of whether an asset sale pursuant to a reorganization plan may extinguish successor liability. However, the textual argument appears to be stronger: whereas § 363(f) provides for a sale of property "free and clear of any interest in such property," § 1141(c) provides that "after confirmation of a plan, the property dealt with by the plan is free and clear of *all claims* and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. §§ 363(f), 1141(c) (emphasis added); *see also Chrysler*, 576 F.3d at 125 (deciding to "harmonize the application of § 1141(c) and § 363(f)" by interpreting the latter to permit sales free and clear of successor liability). If a successor liability claim can be considered an "interest in property," it almost certainly can be considered a "claim" of a creditor.[2] Additionally, the arguments for maximizing sale prices and preserving Code priorities apply equally in the context of § 1141(c).

While the dominant trend is towards permitting bankruptcy courts to extinguish claims for successor liability, the National Labor Relations Board ("NLRB") reached a contrary result in *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) ("*ITP*"). The Board determined 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.[3] 249 N.L.R.B. 1301, 1303 (1980) ("*ITP*"). The Board emphasized that a Board order is not focused on the property of the employer, suggesting that bankruptcy law was therefore inapplicable. 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.

In a recent FMSHRC discrimination case, Judge Moran cited *ITP* in an order suggesting that a bankruptcy court's § 363(f) sale order did 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). Judge Moran concluded that "There is nothing in the Mine Act that relegates it to a status as an appendage of bankruptcy law and therefore there is nothing which prohibits this Court … from making the legal determination of whether [the asset purchaser] is a successor entity under the Mine Act." *Id*. at 16.

However, the status of *ITP* as good law is uncertain. While the Board has stated that *ITP* is "current Board law," *Leiferman Enters., LLC*, 354 N.L.R.B. 872, 872 n.3 (2009), *aff'd*, 649

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[2] A "creditor" is defined in the Bankruptcy Code as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10).

[3] The case was decided under the previous version of the Bankruptcy Act, but was based primarily on policy concerns rather than textual interpretation and so remains relevant. 249 N.L.R.B. at 1303-04.

F.3d 873 (8th Cir. 2011), its reasoning has never been reexamined by the Board. *See* N.L.R.B., Office of General Counsel, Opinion Letter re: *In the Matter of RFS Ecusta, Inc.*, 2005 WL 936629 (Mar. 21, 2005). The Board's reasoning has also been questioned in later decisions. *See Herbert N. Zimmerman, Inc.*, 314 N.L.R.B. 107, 112 (1994) ("Whatever the final balance between the two acts may be, totally ignoring regular bankruptcy proceedings is not it."); *New Eng. Fish Co.,* 19 B.R. at 327 (stating that *ITP* was "based on specious reasoning"); *see also In re Pan Am. Hosp. Corp.,* 364 B.R. 832, 837 (Bankr. S.D. Fla. 2007) ("The NLRB does not, however, have a right to assert successor liability to a *bona fide* § 363 purchaser for reinstatement and back pay incurred prior to the sale.")

Reviewing the law as it stands, the most plausible interpretation of the Bankruptcy Code is that it enables a bankruptcy court to extinguish claims for successor liability through either a § 363(f) sale or a reorganization plan.

ii. Due Process

While most courts agree that the Bankruptcy Code permits a bankruptcy court to extinguish claims for successor liability, they have found that this power is limited by the requirements of due process. Courts have recognized that permitting a bankruptcy court to extinguish claims where the injury occurs after the conclusion of the bankruptcy proceeding ("future claims") presents significant due process problems. *See, e.g., Chrysler*, 576 F.3d at 127 (declining to decide whether order extinguishing claims applied to future claims); *Zerand*, 23 F.3d at 163; *In re Chateaugay Corp*., 944 F.2d 997, 1003 (2d Cir. 1991). The Supreme Court has explained that for a proceeding to satisfy due process there must be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The Fifth Circuit addressed the issue of future claims in *Lemelle*, a wrongful death action against an alleged successor corporation involving a mobile home fire. *Lemelle v. Universal Mfg. Corp*., 18 F.3d 1268 (5th Cir. 1994). The assets of the mobile home manufacturer had been sold to a third party in bankruptcy, and the alleged successor corporation merged with the reorganized company after the bankruptcy. *Id*. at 1271. The mobile home had been manufactured prior to the bankruptcy, but the fire occurred after the conclusion of the bankruptcy. *Id*. at 1271. The alleged successor argued that the wrongful death claim had been discharged in the predecessor's bankruptcy. *Id*. at 1271. The court determined that the wrongful death suit was not a "claim" that the bankruptcy court could have discharged because the claimants were completely unknown at the time of the petition and could not have been given notice of the proceeding. *Id*. at 1277.

Several federal district courts have also addressed the issue of future claims in the context of § 363(f) asset sales. *In re Grumman Olson Industries, Inc*., and *Schwinn Cycling & Fitness, Inc. v. Benonis* involved products liability actions where the product was manufactured and sold prior to the bankruptcy, but the injury occurred after the bankruptcy concluded. *In re Grumman Olson Indus., Inc*., 467 B.R. 694, 698 (S.D.N.Y. 2012); *Schwinn Cycling & Fitness, Inc. v. Benonis*, 217 B.R. 790, 793 (N.D. Ill. 1997). In both cases, the plaintiff named the purchaser of assets in a § 363 sale as a defendant under a theory of successor liability. 467 B.R. at 699; 217 B.R. at 792-94. The bankruptcy court's order confirming the sale in each case had declared that

the sale was "free and clear of all claims" and that the purchaser would not be liable under a successorship theory for claims against the debtor. 467 B.R. at 699; 217 B.R. at 792-93. Both courts concluded that a bankruptcy court's order could not be enforced to extinguish a claim "where no injury occurred to the claimant until after the bankruptcy closed, such that the claimant was not provided with notice of, or an opportunity to participate in, the bankruptcy proceedings that gave rise to that order." *Grumman Olson,* 467 B.R. at 702; *see also Schwinn*, 217 B.R. at 797.

The court in *Grumman Olson* acknowledged that, on its face, the sale order would have extinguished the theory of successor liability pled by the plaintiff. 467 B.R. at 708. But it found that "Enforcing the Sale Order against the [plaintiffs] to take away their right to seek redress under a state law theory of successor liability when they did not have notice or an opportunity to participate in the proceedings that resulted in that order would deprive them of due process." *Id*.

The claim at issue differs from the claims in *Grumman Olson* and *Schwinn* in that the injury occurred prior to the discharge in bankruptcy rather than after it. The Eighth Circuit addressed the issue of due process in a situation similar to the one at hand. *Sanchez v. Nw. Airlines, Inc.*, 659 F.3d 671 (8th Cir. 2011). In *Sanchez*, the plaintiff brought suit against his employer for discrimination against him on the basis of his disability in violation of the Americans with Disabilities Act. *Id*. at 672. The employer argued that the claim had been discharged in its Chapter 11 bankruptcy. *Id*. at 673. The plaintiff's claim accrued after the company had filed for bankruptcy, prior to confirmation of its Chapter 11 plan, but after the deadline for regular creditors to submit proofs of claim. *Id*. at 673-74. The court found that although the plaintiff received notice of the bankruptcy, the notice did not afford him an opportunity to make an appearance, since his claim accrued after the bar date. *Id*. at 675-76. Thus, due process prevented the bankruptcy court from discharging his claim. *Id*.; *see also In re Savage Indus., Inc*., 43 F.3d 714, 720-21 (1st Cir. 1994) (holding that claims arising during Chapter 11 proceeding survived because claimants did not receive notice).

In this case, Bailey's claim accrued on the date of his suspension with intent to discharge, September 10, 2015. This was prior to the plan confirmation date of October 9, 2015, but well after the bar date of June 27, 2015. Confirmation Order. The parties have not addressed whether Bailey received notice of the bar date. Nevertheless, any notice he may have received would not have "afford[ed] a reasonable time for [him] to make [his] appearance," *Mullane*, 339 U.S. at 314, since the deadline for submitting claims had already passed.

Rockwell argues that even though Bailey's claim arose after the regular claims bar date, Bailey could still have filed an administrative claim. Resp. Mot. for Sum. Dec. at 3 n.7. The deadline for filing an administrative claim was November 25, 2015, two months after Bailey's

suspension with intent to discharge.[4] Bailey disputes that his claim qualified as an administrative claim. The Bankruptcy Code provides that

> After notice and a hearing, there shall be allowed administrative expenses … including the *actual, necessary costs and expenses of preserving the estate including ... wages and benefits awarded pursuant to a judicial proceeding* or a proceeding of the National Labor Relations Board *as back pay* attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title.

11 U.S.C. § 503(b) (emphasis added). While Bailey is seeking back wages, he has not yet received an "award" of back pay. Further, the Code refers only to wages and benefits awarded "pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board." *Id*. The term "judicial proceeding" is not defined in the Code, but Congress's separate reference to the NLRB suggests that the term does not encompass administrative proceedings such as those before the NLRB. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotations omitted)). Thus, I find that Bailey could not have brought his discrimination claim as an administrative claim in the bankruptcy proceeding.

Because Bailey could not have brought his claim in the bankruptcy proceeding as either an administrative or an ordinary claim, he had no "opportunity to be heard" as required by due process. Accordingly, I find that Bailey's claim was not discharged by the bankruptcy proceeding and that he is not bound by the bankruptcy court's determination that Blackhawk is not a successor to Patriot Coal.

[4] Bailey did not receive MSHA's determination on his case until January 21, 2016. He thus argues that his claim accrued after the Administrative Claims Bar Date, since he could not have filed a claim with FMSHRC prior to receiving the determination from MSHA. 30 U.S.C. § 815(c)(3). However, courts to address the issue have held that in the analogous case of a Title VII suit, a right-to-sue letter is "merely a jurisdictional prerequisite, and does not create a claim." *McSherry v. Trans World Airlines*, 81 F.3d 739, 741 (8th Cir.1996). Rather, the claim "arises, for purposes of discharge in bankruptcy, at the time of the events giving rise to the claim, not at the time plaintiff is first able to file suit on the claim." *O'Loghlin v. Cty. of Orange*, 229 F.3d 871, 874 (9th Cir. 2000).

B. Successor Liability

Rockwell argues that even if the Court decides to apply the Commission's test for successor liability, it should find that Rockwell is not a successor to Bailey's former employer, Gateway Eagle.

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). In analyzing whether it is appropriate to impose liability on a successor, the Commission applies a nine-factor test derived from Title VII case law. *Corbin*, 9 FMSHRC at 397-98; *Munsey*, 2 FMSHRC at 3465-66. The relevant factors are:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Munsey, 2 FMSHRC at 3465-66 (alteration in original) (quoting *EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d 1086, 1094 (6th Cir. 1974)).

Rockwell argues that it had no notice of Bailey's charge and that it therefore should not be held liable as a successor. Resp. Mot. for Sum. Dec. at 15-18. A number of courts have agreed that the issue of notice is dispositive with regard to the imposition of successor liability. *See, e.g., Rabidue v. Osceola Ref. Co.,* 805 F.2d 611, 616 (6th Cir. 1986), *overruled on other grounds by Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993) (finding that where "the successor had no notice of contingent charges of discrimination at or before the time of acquisition, the case was removed from the rationale of *MacMillan* and successor liability would not attach"); *Scott v. Sopris Imports Ltd*., 962 F. Supp. 1356, 1360 (D. Colo. 1997). Rockwell notes that Bailey did not file his discrimination complaint with MSHA until November 23, 2015. Rockwell first received notice of the MSHA complaint in a letter from MSHA on November 24, 2015, over a month after confirmation of the Patriot sale. Resp. Mot. for Sum. Dec. at 17. Bailey argues, however, that the notice requirement was satisfied when he filed a UMWA grievance opposing his termination. Comp. Resp. in Opp. at 7. The grievance was resolved on September 15, 2015, prior to the bankruptcy confirmation. Resp. Mot. for Sum. Dec., Ex. O.

The purpose of the notice requirement is to "ensure fairness by guaranteeing that a successor had an opportunity to protect against liability by negotiating a lower price or indemnity clause." *Steinbach v. Hubbard*, 51 F.3d 843, 847 (9th Cir. 1995) (citing *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 185 (1973)); *see also Musikiwamba v. ESSI, Inc.*, 760 F.2d 740,

750 (7th Cir. 1985). Accordingly, the relevant time period for notice is before the transfer of the business. In many cases, courts have looked to the filing of a lawsuit to show notice. *See, e.g., EEOC v. N. Star Hosp., Inc.,* 777 F.3d 898, 902 (7th Cir. 2015); *Brzozowki v. Corr. Physician Servs., Inc*., 360 F.3d 173, 178 (3rd Cir. 2004); *Musikiwamba*, 760 F.2d at 751-52; *EEOC v. Nichols Gas & Oil, Inc*., 688 F. Supp. 2d 193, 196 (W.D.N.Y. 2010). However, some courts have held that a successor may have notice of a claim even though no formal claim has yet been filed. *See, e.g., Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 405-06 (S.D.N.Y. 2012) (finding that individual defendant had notice of claim for unpaid wages based on conversation providing him with knowledge of predecessor's unlawful action); *Walker v. Faith Tech., Inc*., 344 F. Supp. 2d 1261, 1268 (D. Kan. 2004) (finding that successor had notice of claim because plaintiff complained about discrimination to his project manager, who told official in both old and new companies about the complaints); *cf. Scott v. Sopris Imps. Ltd*., 962 F. Supp. 1356, 1359-60 (D. Colo. 1997) (evaluating whether successor had "constructive notice of an imminent, or even possible claim"). In *Golden State Bottling*, the Supreme Court upheld a finding that the notice prong had been satisfied where a managerial employee of the predecessor company had knowledge of the potential liability, participated in the sale negotiations, and took a similar management position with the successor. 414 U.S. at 173. The Court noted that those facts "support[ed] an inference that [the manager] informed his prospective employer of the litigation before completion of the sale." *Id*.

I find that here, Bailey has raised a genuine issue of material fact as to whether Rockwell had notice of his discrimination charge. Bailey asserts that Rockwell had notice of his claim based on his grievance of his discharge. Comp. Resp. in Opp. at 7. While the record includes a copy of the denial of his grievance, it is unclear whether Rockwell knew of the grievance and whether the grievance provided notice of Bailey's allegations of discriminatory discharge. Resp. Mot. for Sum. Dec., Ex. O. Nevertheless, I find that Bailey has raised a question of fact with regard to this issue. Further, I am unpersuaded by Rockwell's argument that the bankruptcy court's "free and clear" order prevented it from having notice of any claim. *See* Resp. Mot. for Sum. Dec. at 15-17. Such a rule would defeat any successor liability claim after a free and clear sale, and as discussed above, a successor liability claim can in some cases survive a bankruptcy proceeding.

Addressing the second element of the *Munsey* test, Rockwell admits that the predecessor, Gateway Eagle, would have been unable to provide relief to Bailey. Resp. Mot. for Sum. Dec. at 21. Gateway Eagle's parent company, Patriot Coal, lacked sufficient funds to meet its obligations, and Gateway Eagle no longer has any employees, making reinstatement impossible. *Id*. In *Munsey*, the Commission implied that the inability of the predecessor to provide relief counseled in favor of imposing liability on the successor corporation. *See Munsey*, 2 FMSHRC at 3466. However, Rockwell argues that Gateway Eagle's inability to provide relief should weigh *against* a finding of successor liability, because ordering the successor to provide relief would "work a damaging windfall in the plaintiff's favor by the mere serendipity of working for a company that failed and was sold." Resp. Mot. for Sum. Dec. at 19.

Rockwell's approach finds support in the case *Musikiwamba v. ESSI, Inc*., in which the Seventh Circuit states that "Unless extraordinary circumstances exist, an injured employee should not be made worse off by a change in the business. But neither should an injured

employee be made better off." 760 F.2d at 750. However, most courts do not take this approach, instead holding that a predecessor's inability to pay weighs in favor of imposing successor liability. *See, e.g.*, *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 153 (3d Cir. 2014); *Prince v. Kids Ark Learning Ctr., LLC*, 622 F.3d 992, 995 (8th Cir. 2010); *Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236, 239 (6th Cir. 1987). Commission case law is consistent and follows the reasoning that the inability of a predecessor to provide relief weighs in favor of successor liability. *See Corbin*, 9 FMSHRC at 398. Accordingly, I take that approach here.

The remaining seven factors of the *Munsey* test "provide a framework for analyzing the crucial question of whether there was a continuity of business operations and work force between the successor and its predecessor." *Corbin*, 9 FMSHRC at 398. Rockwell concedes that its operation of the mine involves the same plant, equipment, and method of production as its predecessor, as well as much of the same workforce. Resp. Mot. for Sum. Dec. at 22. It argues that despite this, there has not been a "substantial continuity of business operations" at the mine because Blackhawk has implemented a new business model under which the former Gateway mine is operated in conjunction with another mining complex. *Id*. at 23. I note, however, that the record has not been developed on this point. At present the record concerning successorship is limited to the affidavits of two employees at the mine, which contain little detail regarding the management structure, workforce, and production methods at the mine. I thus find that there are issues of material fact remaining, and that I cannot decide this question on summary decision.

Rockwell also suggests that Gateway Eagle's bankruptcy compels as a matter of law a finding that Rockwell has not continued the business of Gateway Eagle, because it was that business that led to the bankruptcy. *Id*. at 22. Rockwell has offered no case law in support of that argument, however, and I am not persuaded by it. Because there remain questions of fact on the issue of successor liability, I cannot find that Rockwell was or was not a successor in this case and leave the matter for further development and decision.

C. 105(c)(3) Claim

Finally, Rockwell argues that Bailey's claim of discrimination is without merit and that it is entitled to summary decision on the merits.

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 complainant is not required to produce direct evidence of the operator's motive. *Sec'y of Labor 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.

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 (citing *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. *Id*. (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

Bailey alleges that he engaged in protected activity when he informed his supervisor of a dangerous condition in the mine and refused to work in that condition. He alleges that sometime in 2014, he raised concerns with Rex Osborne about operating thin-vein bolting machines in sections of the mine in which the roof was higher than the height intended for such machines. Compl. of Discrim. at 2. Later that year, he became concerned about his exposure to dusty conditions while operating his roof bolt machine in return air while the continuous miner machine was cutting coal. *Id.* He began refusing to operate the roof bolt machine in return air. *Id*. The Commission has determined that among the statutory rights protected by Section 105(c) is the right to refuse to work in dangerous conditions. *Pasula*, 2 FMSHRC at 2790-93.

Rockwell does not address Bailey's allegations of protected activity in its motion for summary decision. Construing the record in the light most favorable to Bailey, I will thus assume for purposes of summary decision that he engaged in protected activity.

ii. Adverse Action

The parties agree that Gateway Eagle suspended Bailey with intent to discharge him on September 10, 2015, and that he was ultimately discharged. *See* Resp. Mot. for Sum. Dec., Ex. K. Discharge is an adverse action specifically mentioned in Section 105(c).

iii. Discriminatory Motive

The parties dispute whether Gateway Eagle had a discriminatory motive in discharging Bailey. Bailey argues that he was discharged for refusing to operate the roof bolting machine in return air, while Rockwell argues that he was discharged for poor attendance.

The record includes ample evidence of Bailey's poor attendance record. According to a termination notice from Bailey's previous employer, he was discharged from a former position for missing work. *See* Resp. Mot. for Sum. Dec., Ex. D. At Gateway Eagle, Bailey received a warning letter in June 2014 for having three unexcused absences in 180 days. Resp. Mot. for Sum. Dec., Ex. E. He also received a counseling letter regarding attendance issues in August 2014. Resp. Mot. for Sum. Dec., Ex. F. Under the mine's collective bargaining agreement, a miner who accumulates three unexcused absences in 180 days should receive counseling on attendance. Resp. Mot. for Sum. Dec., Ex. P. If subsequent to counseling he again incurs three absences in 180 days, there is just cause for discharge. *Id*. Bailey received another warning in April 2015 that he had incurred three more unexcused absences in 180 days. Resp. Mot. for Sum. Dec., Ex. G. The letter notified him that he was suspended with intent to discharge. *Id*. Gateway Eagle resolved the suspension the same month by having Bailey sign a "Last Chance Agreement," in which he promised to maintain an absentee rate at or below the mine average and not to incur another unexcused absence within the next year. Resp. Mot. for Sum. Dec., Ex. H. Bailey received another warning in May 2015 for two instances of unexcused tardiness or leaving early. Resp. Mot. for Sum. Dec., Ex. I. On September 4, 2015, he incurred another absence, which the mine asserts was unexcused. Resp. Mot. for Sum. Dec., Ex. K. On September 10, 2015, he received a notice of suspension with intent to discharge based on the unexcused absence and having an absentee rate below the mine average. *Id*.

Bailey disputes much of Rockwell's account of his termination. First, he testified at his deposition that he was not terminated for attendance reasons from his previous job, but rather resigned due to an undesirable shift change. Comp. Resp. in Opp. at 4. Second, he claims that one of the absences cited as the basis for the Last Chance Agreement had previously been resolved to the satisfaction of Gateway Eagle management. *Id.* Bailey claims that he only entered into the agreement based on the promise by Gateway Eagle management that the agreement would be unenforceable so long as he provided documentation to explain the absence. *Id*. Further, he argues that the September 4 absence that was the alleged basis for his discharge was an excused absence for which he should not have been penalized. *Id*. at 5.

I find that issues of material fact remain regarding Gateway Eagle's motive in discharging Bailey. Accordingly, I find that summary decision is inappropriate.

IV. ORDER

Based on my review of the record and the applicable law, I find that there are disputes of material fact remaining with regard to the merits of Bailey's claim and the issue of successor liability, and that Rockwell is not entitled to summary decision as a matter of law. Accordingly, Rockwell's motion for summary decision is **DENIED**. Further, I find that Bailey's discrimination claim was not discharged by the Patriot Coal bankruptcy proceeding. Therefore, Rockwell's motion to dismiss is also **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

July 19, 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 SCHEDULING BRIEFING

Before: Judge Feldman

The initial decision on relief in this discrimination matter awarded back pay to Scott D. McGlothlin, but reduced McGlothlin's attorney fees by $31,745.66 — from $88,975.48 to $57,229.82. 38 FMSHRC 225, 268 (Feb. 2016) (ALJ). The Commission granted McGlothlin's petition for discretionary review challenging the reduction in attorney fees. Dominion Coal Corp. ("Dominion") did not oppose McGlothlin's petition. On March 30, 2016, the Commission reversed the initial decision on relief, approving the $88,975.48 in fees proposed by the parties in their November 11, 2015, settlement proposal. The Commission held:

> Where, as here, *the parties have agreed to stipulated attorneys' fees* and there are no allegations or evidence that such an amount would adversely affect the remedy afforded the discriminatee, the Judge erred in rejecting the settlement based upon the agreed upon amount of attorneys' fees.

38 FMSHRC 401, 402 (Mar. 2016) (emphasis added).

On June 20, 2016, McGlothlin's counsel filed a motion for award of attorney fees requesting an additional $41,525.00 for reported legal services rendered during the period July 1, 2015, through June 20, 2016. This period represents work performed to effectuate the parties' purported November 11 proposed settlement terms with respect to attorney fees, which is now apparently in dispute.[1] This case has now been remanded "for a determination of any further award of attorneys' fees." 38 FMSHRC __, slip op. at 2 (July 15, 2016).

[1] Dominion asserts that the terms of the November 11 settlement proposal do not provide for additional attorney fees beyond the $88,975.48 proposed by the parties. However, given McGlothlin's current posture regarding additional attorney fees, despite the parties' proposed settlement terms, Dominion now argues that McGlothlin's counsels' November 11 "fee petition was unreasonably excessive in the amount of $31,745.66." Dominion's Response, at 12 (July 1, 2016).

The parties have been given an opportunity to advise whether they desire to file briefs in response to the Commission's remand. Dominion advises that it wishes to file a brief to contest "the reasonableness of additional attorney fees" sought by McGlothlin's counsel. McGlothlin opposes the filing of any additional briefs.

IT IS ORDERED that Dominion's request to file additional briefing in this matter **IS GRANTED**. As the parties have already filed relevant briefs, Dominion's request will be limited solely to the issue of the reasonableness of the $41,525.00 in attorney fees sought. Dominion's brief should be filed on or before **July 29, 2016**, and should be limited to no more than 15 pages double-spaced. Any reply by McGlothlin should be filed no later than **August 5, 2016**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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July 19, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-1002 A.C. No. 46-09217-499782
v.	
GREENBRIER MINERALS, LLC, Respondent	Mine: Powellton No. 1 Mine

ORDER GRANTING MOTION FOR LEAVE TO FILE OUT OF TIME AND DENYING MOTION TO DISMISS

Before: Judge McCarthy

This case is before me upon a Motion for Leave to File Out of Time, wherein the Secretary requests permission to file its Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), beyond the 45 day-limit established by Commission Procedural Rule 28. See 30. C.F.R. § 2700.28.

This matter involves a single citation, Citation No. 9064978, issued to Respondent Greenbrier Minerals, Inc. on June 17, 2015. Respondent received the Mine Safety and Health Administration's (MSHA) Proposed Assessment on August 5, 2015, and timely contested the citation by marking the "check for contest box" on MSHA Form 1000-179 and returning the form to MSHA's Civil Compliance Office on or about August 21, 2015.

Pursuant to Commission Procedural Rule 28, the Secretary was required to file a Petition for the Assessment of Civil Penalty with the Commission by October 21, 2015. The Secretary represents that at the time Respondent's contest was received in MSHA'S Coal District 12 office, the employee responsible for processing penalty cases had been working in that capacity for less than a month, and Respondent's contest to Citation No. 9064978 was inadvertently overlooked. The Secretary became aware of the oversight on May 5, 2016, and contacted counsel for Respondent on May 11, 2016. The Secretary then filed his Motion for Leave to File Out of Time and the Petition for Assessment of Civil Penalty on May 17, 2016. Respondent filed a Response in Opposition and a Motion to Dismiss on May 27, 2016.

The Secretary argues that the "inadvertent oversight" of failing to process Respondent's contest is "understandable and excusable," and points out that the Commission has allowed late filing in cases where clerical errors have caused delays in the filing of penalty petitions. Sec'y's Mot. for Leave to File Out of Time 2; *see Jim Walter Res.*, 22 FMSHRC 930 (July 2000)

(ALJ); *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982); *Salt Lake Cty. Road Dep't*, 3 FMSHRC 1714 (July 1981).

Respondent points to Commission Procedural Rule 9(b), which allows extensions of filing deadlines in exigent circumstances, and contends that "the Secretary must meet the higher standard of demonstrating exigent circumstances to justify" the granting of its motion. Respondent argues that the replacement of the employee responsible for processing District 12's proposed penalty petitions is not an exigent circumstance. Resp't's Mot. to Dismiss 3. Respondent also argues that the Secretary's nine-month delay in filing its Petition for the Assessment of Civil Penalty prejudices its ability to defend itself. Respondent asserts generally that "as a substantial amount of time passes, as is the case here, memories fade, witnesses become unavailable, and evidence is lost." *Id*. at 4.

Section 105(a) of the Mine Act states that the Secretary is to provide the operator notice of a proposed penalty "within a reasonable time" after the issuance of a citation or order. 30 U.S.C. § 815(a). Under section 105(d), the Secretary "shall immediately advise the Commission . . . and the Commission shall provide an opportunity for hearing" after an operator files a notice of contest for a proposed penalty. 30 U.S.C. § 815(d). Commission Procedural Rule 28 requires that the Secretary file a petition for the assessment of penalty with the Commission within 45 days of receiving a timely contest of a proposed penalty assessment. 30 C.F.R. § 2700.28. The Commission has explained that the "enforcement of the time limits is a secondary consideration to the primary purpose of section 105(d), i.e. ensuring prompt enforcement of the Act's penalty scheme." The 45-day time limit, then, should not be viewed as a "procedural straight jacket." *Long Branch*, 34 FMSHRC 1984, 1990 (Aug. 2012).

The Commission's decision in *Salt Lake* established two competing interests that must be weighed when determining whether to dismiss petitions for the assessment of penalties on the basis of untimely filing. First, "if the Secretary does seek permission to file late, he must predicate his request upon adequate cause." *Salt Lake*, 3 FMSHRC at 1716. Adequate cause to support late filing "may be found to exist where the Secretary provides a non-frivolous explanation for the delay," and the excuse "may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith." *Long Branch*, 34 FMSHRC at 1991.[1]

Second, even where the Secretary shows adequate cause, "an operator may object to a late penalty proposal on the grounds of prejudice." *Salt Lake*, 3 FMSHRC at 1716. "Mere allegations of potential prejudice or inherent prejudice should be rejected." *Long Branch*, 34 FMSHRC at 1991; *see also Nealy v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275

[1] While I find that, in this matter, the Secretary has provided a non-frivolous explanation for the delay and provided sufficient evidence to show that the delay did not result from willfulness, intentional misconduct, or bad faith, I note the difficultly in determining what delay may result from "mere caprice." Merriam-Webster defines "caprice" as "a sudden, impulsive and seemingly unmotivated notion or action," or "a sudden usually unpredictable condition, change, or series of changes." This standard seems especially difficult to apply given that "the Commission presumes that the Secretary's agents generally act in good faith to uphold the timely enforcement of penalties assessed under the Act." *Long Branch*, 34 FMSHRC 1991, n.11.

(9th Cir. 1980) ("Where a plaintiff has come forth with an excuse for his delay that is anything but frivolous, the burden of production shifts to the defendant to show at least some actual prejudice."). The Commission has recognized that this analytic position is consistent with "allowing such an objection comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." *Salt Lake*, 3 FMSHRC at 1716. Thus, the *Salt Lake* test as clarified in *Long Branch* "rests firmly on the principle that consideration of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposes upon the substantive scheme of the statute, and, hence, the public interest itself." *Long Branch*, 34 FMSHRC at 1991 (citing *Salt Lake*, 3 FMSHRC at 1716).

Applying the *Salt Lake* standard as clarified in *Long Branch*, I find that the Secretary has shown adequate cause to support the late filing of the petition for assessment of civil penalty. The Commission has, in the past, accepted clerical errors as adequate cause to permit late filing. In *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), the Commission permitted late filing after a three-month delay due to a transfer of files from the MSHA Arlington to the Denver Solicitor's office. Similarly, the Commission allowed a two-week delay in *Medicine Bow Coal* due to "insufficient clerical help," 4 FMSHRC at 885, and at least one Commission judge has allowed late filing when, as in this case, penalty petitions have been inadvertently overlooked by MSHA clerical staff. *See Jim Walter Res. Inc.*, 22 FMSHRC at 932.

Under the second part of the *Salt Lake* test, as clarified in *Long Branch*, dismissal may still be required if the operator makes a showing of actual prejudice. Here, however, Respondent has made only general allegations of potential and inherent prejudice, and has not made any real or substantial showing of specific instances of actual prejudice that will result should the Secretary be permitted to proceed with filing its Petition for Assessment of Civil Penalty. *See Long Branch*, 34 FMSHRC at 1993; *see,e.g.*, *Webster Cty. Coal, LLC*, 34 FMSHRC 1946, 1952 (Aug. 2012) (upholding ALJ's determination that prejudice must be pleaded with specificity).

WHEREFORE, the Secretary's Motion for Leave to File Out of Time is **GRANTED**, and Respondent's Motion to Dismiss is **DENIED.**

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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July 21, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY S. BREWER, Complainant, v. MONONGALIA COUNTY COAL COMPANY, Respondent,	DISCRIMINATION PROCEEDING Docket No. PENN 2016-240-D MSHA Case No.: MORG-CD-2016-14 Mine: Monongalia County Mine Mine ID: 46-01968

ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. '801, *et. seq.,* and 29 C.F.R. '2700.40, the Secretary of Labor (ASecretary@) on June 3, 2016, filed a Complaint on behalf of miner Jeffrey S. Brewer ("Complainant"), alleging that Brewer was discriminated against in violation of his rights under the Mine Act. On July 8, 2016, Secretary filed a First Amended Complaint on behalf of Brewer, attaching Exhibit A, which was omitted from the original complaint, and adding in the penalty assessment, with corresponding Exhibit B. Respondent filed respective Answers and Defenses to the Complaints.

On July 5, 2016, Respondent filed a Motion to Dismiss Complaint based on the miner's and Secretary's untimely filing of discrimination complaints, and on July 15, 2016, Respondent filed a Motion to Dismiss First Amended Complaint for the same reasons. Respondent argues that the Mine Act contains a 60-day statute of limitations, after which a miner may not file a discrimination complaint, unless there are justifiable circumstances. In the instant case, the miner filed his discrimination complaint 89 days after the alleged discrimination occurred, and the Respondent argues that the miner knew of his rights under the Mine Act, but chose to pursue relief through a grievance procedure instead. Respondent also argues that the Secretary failed to timely file a discrimination complaint on behalf of Brewer, within the 120-day filing period.

The Secretary responded by arguing that Brewer was unaware of his rights under the Mine Act, as well as filing requirements contained in the Act. Furthermore, the delay was relatively short, and Respondent alleged no material prejudice. Additionally, the Secretary argues its failure to timely file occurred because of an unexpected resignation and reassignment of the

case in the Solicitor's office, which should not prejudice the Complainant. Therefore, the Secretary argues that the matter should not be dismissed.

As Judge Miller has noted,

> [t]he Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Sec'y of Labor on behalf of Chaparro v. Comunidad Argricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ).

Mona Kerlock v. Asarco, LLC, 36 FMSHRC 2404, 2405 (Aug. 27, 2014).

Commission Procedural Rule 67 sets forth the grounds for granting summary decision and requires that it shall be granted only if the entire record shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67. The Commission has explained that summary decision is an extraordinary procedure, and, in reviewing the record, the judge should do so in the light most favorable to the non-moving party. *Energy West Mining* Co., 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

I. Complainant's Failure to Timely File His Discrimination Complaint

The relevant facts in this matter are that Brewer was suspended with intent to discharge on October 16, 2015. Brewer grieved the matter, and on December 30, 2015, following an arbitration hearing, the suspension with intent to discharge was upheld. Brewer filed a discrimination complaint with MSHA on January 14, 2016—89 days after his initial suspension and 15 days after the arbitration decision. This was 29 days past the 60-day statutory filing period.

Any miner who believes he has been discriminated against due to protected activity has the right under the Act to file a discrimination complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. §815(c)(2). The Commission has held that "the time limits in sections 105(c)(2) and (3) 'are not jurisdictional' and that the failure to meet them should not result in dismissal, absent a showing of 'material legal prejudice.'" *Sec'y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994) (citing *Sec'y of Labor obo Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986)). Further, the legislative history

plainly states that discrimination filing periods are not meant to be jurisdictional.[1] A miner is not time barred from a discrimination claim when a miner has "justifiable circumstances" for a delay in filing. *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). Justifiable circumstances are evaluated on a case-by-case basis. *Id.* An example of a justifiable circumstance is when a "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." *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), citing legislative history, S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

In the Secretary's Motion, it states that Brewer did not understand what type of violation "could trigger the time limit under the Act and erroneously believed that the arbitrator's decision was an adverse discriminatory act." Sec'y Resp. to Resp't Mot. to Dismiss at 5. Further, Brewer mistakenly believed, with his union's guidance, that prior to filing a §105(c) complaint he had to first exhaust other remedies, including arbitration. *Id.* at 4. Therefore, Brewer first brought his complaint to his employer and arbitrated the issue. *Id.*

Respondent argues that Brewer was aware of his rights under the Mine Act and failed to timely file his discrimination complaint. Respondent also argues that Brewer clearly knew of his Mine Act rights because he previously filed a 105(c) complaint, 103(g) complaints with MSHA, and made safety complaints to mine management. Mem. of Law. in Supp. of Resp't First Mot. To Dismiss at 7. I find that any previous experience Complainant has filing 105(c) complaints does not necessarily relate to the circumstances of this case. Complainant's prior instance of filing a discrimination or 103(g) complaint did not by necessity grant him an understanding of the filing deadlines and exceptions under the Act. Furthermore, Respondent fails to provide any material prejudice caused by the untimely filing of the discrimination complaint.

Respondent relies primarily on *Hollis* to support its argument that Complainant did not timely file a discrimination complaint. *Hollis v. Consolidation Coal*, 6 FMSHRC 21 (Ja. 1984). However, *Hollis* is distinguishable from this case. In *Hollis*, an evidentiary hearing was held, and the ALJ found the miner's claim of ignorance concerning his rights under the Act were not credible. *Hollis v. Consolidation Coal Co.*, 4 FMSHRC 1974 (Nov. 12, 1982) (ALJ Melick). "Noting its limited role in reviewing a judge's credibility determinations, the Commission found

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[1] Referring to discrimination cases, the Senate Committee stated:

> It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 181, 95th Cong., 1st Sess. 24 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* 3401, 2436 (1978).

that the judge's conclusions were appropriate because the miner filed his complaint 133 days late, despite his assertions that he was knowledgeable about the Mine Act, that he was a militant chairman of the Safety Committee, and that he had written notice in his arbitration decision of remedies available under the Mine Act." *Sec'y on behalf of Scoles v. Harrison County Coal Co.*, 2016 WL 2956692 at *2 (May 2016)(ALJ) citing *Hollis*, 6 FMSHRC at 24-25.

In the instant case, there was no factual evidence brought forth demonstrating that Brewer knew of the time limitations or his rights under §105(c) of the Act. Brewer's delay in filing was also only 29 days. Moreover, recent case law has indicated that miners who alleged ignorance of their Mine Act rights and filed shortly after the 60-day filing period are not time barred from asserting their discrimination complaints when there is no evidence of material prejudice for Respondent. *See e.g. Daniel C. Howell v. Capitol Cement Corp*., 23 FMSHRC 901 (Aug. 6, 2001) (ALJ Bulluck) (4 month delay in filing permitted where miner claimed he lacked knowledge of discrimination procedure); *Sec'y of Labor obo Smith v. Jim Walters Resources, Inc.,* 21 FMSHRC 359 (March 23, 1999) (ALJ Melick) (10 month delay excused by filing within 61 days of first learning of section 105(c) and no claim of prejudice by Respondent); *Sec'y of Labor obo Rocoe Ray Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 1233 (Oct. 27, 1998) (ALJ Melick) (permitting complaint filed 21 days late); *Sec'y of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.,* 18 FMSHRC 278 (Feb. 15, 1996) (ALJ Manning) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act).

II. The Secretary's Failure to Timely File a Discrimination Complaint on behalf of Complainant

Respondent also argues the Secretary failed to timely file a discrimination complaint within 120 days of receiving Complainant's discrimination complaint. In *Sec'y on behalf of Howard v. Cave Spur Coal, LLC*, the court cited *Secretary, ex rel. Donald R. Hale v. 4-A Coal Company*, 8 FMSHRC 905 at 908 (June 1986), stating:

> '… we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- *i.e.*, within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. *Cf. David Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21, 23-25 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984) (table); *Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8, 12-14 (January 1984).'

Sec'y on behalf of Howard v. Cave Spur Coal, LLC, 25 FMSHRC 471,487 (Aug. 2003)(ALJ).

Therefore, in a case where the Secretary untimely files a discrimination complaint, "without a showing that the delay prejudiced the Respondents, dismissal is not warranted." *Id.* This is in line with the legislative history, which makes clear that a Complainant should not be

penalized for the Government's failure to timely file a discrimination complaint. S. Rep. 95-181 at 36.

The Secretary filed its first complaint 21 days after the 120 day time period expired. The Secretary attributes this short delay to the reassignment of this case to another attorney after the unexpected resignation of an attorney in the Solicitor's Office. Sec'y Resp. to Resp't Mot. to Dismiss at 9. This delay was for a short period of time after the filing time period, and Respondent failed to show that the delay caused any material prejudice. Further, the Complainant should not be penalized because of the Secretary's failure to timely file.

Consequently, the miner's justifications for filing his complaint 29 days late appear reasonable, and Respondent has not alleged that it has been prejudiced by the delay in filing. The Secretary's justifications for filing a complaint and amended complaint on behalf of Brewer 21 days late also appear reasonable and have not caused material prejudice for the Respondent. Accordingly, the Motions to Dismiss are **DENIED**.

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

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July 25, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-383-M A.C. No. 26-02661-404686 A
v.	Exodus Mine
BLAZE WHITE, employed by NEWMONT USA LIMITED, Respondent	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) ("Mine Act"). Blaze White ("White" or "Respondent") was a shift supervisor for Newmont USA Limited ("Newmont") when the citation and order at issue in this case were issued. White timely contested the proposed penalties filed by the Secretary of Labor and filed a motion to dismiss this proceeding due to the Secretary's delay in proposing penalties for the alleged violations. The Secretary opposes the motion. For the reasons set forth below, I deny White's motion at the present time.

The citation and order at issue in this case were issued following a fatal accident at the Exodus Mine. The chronology of events is as follows:

June 2, 2013 – A fatal accident occurred when a load-haul-dump vehicle fell about 40 feet into an open stope.

July 1, 2013 – MSHA issued a citation and order to Newmont under section 104(d)(1) of the Mine Act. Both state that the shift supervisor engaged in aggravated conduct.

August 2013 – MSHA interviewed miners and supervisors as part of its investigation of the accident.

September 19, 2013 – MSHA issued its final report on its investigation of the accident. MSHA's special investigations unit also began its investigation under section 110(c) of the Mine Act.

October 21, 2013 – MSHA's Western District Office forwarded the results of its special investigation to MSHA's Technical Compliance and Investigation Office (TCIO) for review.

June 18, 2014 – The Secretary served a petition for assessment of penalty on Newmont charging the operator with the two violations of MSHA's safety standards. Newmont filed its answer to the penalty petition on July 17, 2014.

November 16, 2015 – White voluntarily resigned from his position at the Exodus Mine and stopped working in the mining industry.

February 26, 2016 – TCIO referred the case to MSHA's Office of Assessments for a proposed penalty assessment.

March 3, 2016 – MSHA served its proposed penalty assessment in this case on White, which White contested on April 1, 2016.

May 17, 2016 – The Secretary served a petition for assessment of penalty on White charging him with violations under section 110(c). White filed his answer to the penalty petition and the motion to dismiss on June 16, 2016.

I. BRIEF SUMMARY OF ARGUMENT

Respondent maintains that the 783 day period of time between the accident and the date that the penalty was proposed against White is unreasonable, that no adequate cause justifies this delay, and that this delay has prejudiced White. In its response, the Secretary maintaines that the Mine Act does not authorize the Commission to dismiss a petition for assessment of penalties based on MSHA's alleged noncompliance with section 105(a) of the Mine Act. The Secretary also argues that the penalties were proposed within a reasonable time because he promptly proposed the penalties after the completion of the special investigation. Finally, the Secretary maintains that White was not prejudiced by the timing of the proposed civil penalties because he had ample opportunity to prepare his defenses.

In reply, Respondent takes issue with the Secretary's position that the "investigation" is not completed until TCIO forwards the case to the office of assessments. Respondent also maintains that the Secretary failed to establish that the penalties were proposed within a reasonable time. It also provides more argument to support its position that White has suffered actual prejudice as a result of the delay. The Secretary, in his surreply, disputes some of the facts

set forth in Respondent's reply[1] and argues that Respondent has not demonstrated that any witnesses that White may want to call will be unavailable to testify.

II. DISCUSSION

These same issues have been presented to Commission judges on many occasions. For example, I addressed these issues in my order in *Dino Trujillo*, 35 FMSHRC 1485 (May 2013). Rather than repeat what I set forth in that decision, I am incorporating my analysis of the legal issues in that order into this case by reference. In that case, the respondent calculated that the Secretary did not file the penalty petition until 1,057 days after the underlying order was issued to the mine operator. *Trujillo* at 1486. I determined that a delay of that length was not unreasonable per se and that the key question in section 110(c) cases is whether the respondent is able to show actual prejudice as a result of the delay. "Respondent's showing of prejudice must be 'real or substantial' and 'mere allegations of potential prejudice or inherent prejudice should be rejected.'" *Trujillo* at 1487 (quoting *Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012)). If a respondent is unable to show actual prejudice, it is "inappropriate" to dismiss a citation or order based on the Secretary's delay. *Twentymile Coal Co.*, 411 F.3d 256, 262 (D.C. Cir. 2005). This analysis is equally applicable here.

In the present case, Respondent states that certain witnesses no longer work for Newmont. Newmont has apparently tried to contact two witnesses without success. It states that "Newmont will continue attempting to contact the witnesses, but cannot be sure of success in receiving a statement or appearance at hearing of either." Resp. Reply 3. This case was assigned to me on June 20, 2016, and a hearing date has not been established. We are in the early stages of the proceeding. Respondent may be able to locate these potential witnesses before a trial date and they may be able to testify in some manner.

I agree with the analysis of these issues discussed by Commission Judge Pricilla Rae in her order denying a motion to dismiss in *Ralph W. Dushane*, 38 FMSHRC ____, Docket No. SE 2016-132-M (July 6, 2016). She denied the motion because the respondent "alleged only potential prejudice of the sort that inherently flows from delaying litigation." Slip op. 4. She stated, however, that she would "entertain a renewed motion to dismiss before or at trial" if the respondent determines that "witnesses cannot be located or memories have indeed faded to the extent that he can demonstrate actual prejudice[.]" Slip op. 4. I reach the same conclusion in this case.

I have considered the facts and argument presented by the parties in this case and I conclude that the motion should be denied. Although Respondent suggested that it may be

[1] The Secretary argues that White was sent a letter, dated September 13, 2013, from MSHA Western District Manager Wyatt Andrews which informed White that MSHA "is proposing to assess an individual penalty against you as an agent of Newmont . . . for knowingly violating" two safety standards as set forth in the subject citation and order. Sec'y Opposition, Ex. A. The letter did not disclose the amount of the proposed penalties but offered White the opportunity to request a conference on the proposed penalties. Respondent disputes that White received this letter. Resp. Reply 2.

prejudiced by the delay, actual prejudice has not yet been established. If Respondent is unable to locate key witnesses or if these witnesses are unable to testify or recall the events of June 2013, Respondent will be free to renew its motion to dismiss at that time.

Judge Rae included the following paragraph in her *Ralph W. Dushane* order. I wholeheartedly agree with her discussion and encourage the Secretary to take it to heart.

> I note that although the Commission has been extremely tolerant of the Secretary's habitual delays in filing 110(c) petitions, the Commission's most lenient decisions (such as *Long Branch*) came out several years ago when MSHA's case backlog was at historic levels. This has not been the case for more than a year. General references to MSHA's workload can no longer be accepted at face value as an excuse to spend in excess of three years processing a 110(c) case. Even if Respondent cannot show actual prejudice, I find such a lengthy delay raises questions about the reliability of any testimony that is presented, including the testimony of the investigator.

Slip op. 4. Given that by September 13, 2013, MSHA had determined that it would propose penalties against White, it is not clear why MSHA did not file its petition for assessment of civil penalty until May 17, 2016. The matter languished at TCIO between October 21, 2013 and February 26, 2016. This delay is incomprehensible to me and it does not serve the goal of advancing the safety and health of the nation's miners. TCIO's incompetence is wearing very thin.

III. ORDER

Respondent's motion to dismiss this case is **DENIED**.

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

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July 27, 2016

PENNYRILE ENERGY, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. KENT 2016-432-R Order No. 9048420; 06/15/2016 Mine: Riveredge Mine Mine ID: 15-19424

ORDER DENYING MOTION FOR EXPEDITED HEARING

Before: Judge Steele

This case is before me upon a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Order No. 9048420 was issued to Contestant on June 15, 2016, for an alleged violation of 30 C.F.R. § 48.25. On July 15, 2016, Contestant filed a Notice of Contest and a Motion for Expedited Hearing. The Secretary filed the Secretary's Answer to Notice of Contest on July 21, 2016. Contestant filed Pennyrile Energy's Reply to the Secretary's Opposition to Motion for Expedited Hearing on July 25, 2016.

The Commission's procedural rule concerning expedited hearings does not address when a motion for an expedited hearing should be granted or denied. 29 C.F.R. § 2700.52. Therefore, Administrative Law Judges retain "informed discretion" in determining whether an expedited hearing is proper, and they must schedule a hearing within a reasonable time. *Secretary of Labor (MSHA) v. Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 28 1992). An expedited hearing is appropriate when there are "extraordinary or unique circumstances resulting in continuing harm or hardship." *Southwest Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 4, 1994) (ALJ); *Mountain Cement Co.*, 23 FMSHRC 694 (June 25, 2001)(ALJ); *Consolidation Coal Company*, 16 FMSHRC 495 (February 1994) (ALJ).

Contestant argues that an expedited hearing is necessary because the order at issue is wrong as a matter of law and "capable of repetition." Mot. For Expedited Hr'g at 1-2. Specifically, Order No. 9048420 was issued because an underground miner, who was working on the surface area of a mine, did not have the training required by Section 115 of the Mine Act and 30 C.F.R. § 48.25. Notice of Contest Ex. A. Contestant argues that without a hearing to determine if underground miners are required to obtain this training, miners will continue to get cited, and thus, an expedited hearing is necessary. Mot. For Expedited Hr'g at 1-2.

Contestant fails to demonstrate extraordinary or unique circumstances that result in a continuing harm or hardship. Miner training is not a hardship that necessitates an expedited hearing. Additionally, the operator's disagreement as to MSHA's regulatory interpretation of 30 C.F.R. § 48.25 does not warrant an expedited hearing.

Accordingly, Contestant's Motion for Expedited Hearing is **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2016

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER REGARDING COMPLAINANT'S MOTION TO SET LOCATION OF DEPOSITIONS

As this Court, and more recently the Federal Mine Safety and Health Review Commission,[1] having individually denied Jerritt Canyon Gold, LLC's ("JCG")[2] request for interlocutory review, this matter now moves forward with discovery proceedings to determine, among other matters, if JCG is a successor-in-interest to Veris Gold USA, Inc. ("Veris Gold").

On June 21, 2016, Complainant Daniel Lowe filed a Motion to Set Location for Depositions ("Motion for Depositions").[3] Lowe notes that the "Whitebox Entities," through its

[1] *Varady v. Veris Gold USA, Inc.*, 38 FMSHRC __, slip op. (July 11, 2016); *Lowe v. Veris Gold USA, Inc.*, 38 FMSHRC __, slip op. (July 11, 2016).

[2] JCG, formerly known as WBVG LLC, is located at 545 30th Street, Elko, NV 89801. Its statutory agent is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

[3] At the behest of Matthew Varady, Lowe's Motion requests that depositions of the same entities he wishes to depose be taken together with the closely related discrimination complaint brought by Varady in Docket No. WEST 2014-307-DM, and that the request is made for efficiency and to expedite both proceedings. The Court agrees with the request. It notes that, aside from the particulars of the discriminatory acts committed by Veris Gold against Varady, and separately against Lowe, that the damages ultimately to be assessed in each case will be different, all other issues regarding discovery, the proper parties to the proceeding, and the role and relationships, if any, between Veris Golid, JCG, the Whitebox Entities, Whitebox Asset Management and Eric Sprott, are shared. Accordingly, because of Lowe's and Varady's identity of interests in terms of these discovery issues, this Order is to be construed to apply fully to the Varady discrimination complaint. A brief order memorializing this determination will be issued in the Varady matter.

Counsel, Fennemore Craig, P.C., has submitted that any such depositions should be held at the Minneapolis, Minnesota offices of Whitebox Entities. For the reasons that follow, the Court holds that any depositions which may need to be held shall be held in Elko, Nevada or via telephone. Lowe and Varady should understand that they bear the costs associated with such depositions.[4] The Court also explains that, as JCG has been added as a party by virtue of the Court's March 14, 2016 Order, Lowe may be able to learn sufficient information through interrogatories,[5] requests for admission, [6] and requests for the production of documents, to establish JCG's status as a successor. Such interrogatories, requests for admission and requests

[4] This is an appropriate moment to again remind both Lowe and Varady that the final outcome of this litigation is unknown. The Court can only rule on subjects before it, but it cannot predict, nor control, what other courts may decide. Due to the element of unpredictability, the Court again encourages the parties to discuss *reasonable and realistic* settlement terms. It is also worth noting that a settlement was reached *post-bankruptcy* in the case of *Morreale v. Veris Gold U.S.A., Inc., et al*, 38 FMSHRC __, slip op. (June 1, 2016) (ALJ), and *Sec'y o/b/o Garcia v. Veris Gold USA, Inc., et al.*, 38 FMSHRC __, slip op. (July 14, 2016) (ALJ).

[5] "It is common in the practice of civil litigation to underestimate the value of interrogatories as a method of discovery. Those who exalt the deposition as the most useful form of discovery often overlook the clear advantages interrogatories have to offer. Interrogatories are a comparatively inexpensive form of discovery. They are an effective means of identifying individuals with personal knowledge of facts relevant to the litigation who may then [still] be deposed. Interrogatories enable a party to flesh out the major facts supporting his or her opponent's case [and they] allow . . . a party to identify the existence of documents, their custodians and their general description. Interrogatory answers can provide all or part of the factual basis to support or oppose a motion for summary judgment . . . ." *Lee v. Flagstaff Industries Corp.*, 173 F.R.D. 651, 652 (D.Md. 1997).

[6] Requests for admissions in Commission proceedings are governed by Commission Rule 58(b), 29 C.F.R. § 2700.58(b) and, so far as practicable, by Federal Rule of Civil Procedure ("FRCP") 36. "Each matter of which an admission is requested shall be separately set forth. . . . An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that [it] has made reasonable inquiry and that the information known *or readily obtainable by the party* is insufficient to enable the party to admit or deny. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. . . . *Proper use of requests for admissions can expedite and streamline litigation by establishing matters not truly in dispute and avoiding the expenditure of time and effort required by other discovery devices*. . . . However, in order to achieve that desired result both parties must fulfill their obligations under the rule. '*Parties may not view requests for admissions as a mere procedural exercise requiring minimally acceptable conduct. They should focus on the goal of the Rules, full and efficient discovery, not evasion and word play*.' . . . *Parties responding to requests, as the rule specifically states, should exercise good faith by admitting or denying parts of requests, and qualifying responses, where appropriate, rather than noting blanket objections*." *Sec'y o/b/o Jenkins v. Durban Coal, Inc*., 22 FMSHRC 1150, 1151-52 (Sept. 2000) (ALJ) (emphasis added).

for production of documents may be directed at JCG (including under its prior name(s), such as WBVG LLC, to learn what information that entity has regarding its relationship to, and knowledge of, the principals, stockholders, and officers of JCG and the Whitebox Entities, Whitebox Asset Management and Eric Sprott. Using these discovery methods first may save Lowe the expenses associated with depositions.

The Court believes it is useful to step back and review the posture of this case. Veris Gold was found to have discriminated against Lowe in violation of section 105(c) of the Mine Act.[7] *Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337, 2347 (Oct. 2015) (ALJ). Through a bankruptcy proceeding, Veris Gold was sold. Now it must be determined if JCG and potentially other entities involved in the purchase of Veris Gold are successors to Veris Gold. Absent an acknowledgement that JCG and/or the other named entities admit to being successors, discovery must be undertaken to learn of the relationships, if any, between Veris Gold and those other entities, to determine if any or all of them are successors-in-interest. JCG and other potential parties each have an interest in challenging claims that they are successors, as a finding of successorship would mean that the liability for Veris Gold's acts of discrimination could be applied to them. If any of these entities are so determined by the Court to be successors-in-interest, the final phase of this Mine Act proceeding will be to determine those legitimate damages which may be assessed against such entities. Any entity found to be a successor would have an interest in addressing the appropriate damages.[8]

In *Munsey v. Smitty Baker Coal, Inc., et al.*, 2 FMSHRC 3463 (Dec. 1980), the Commission addressed the remedy due to a complainant and who must provide it when the complainant's employer had ceased operations and was purchased by another entity. In *Munsey*, Respondent Smitty Baker Coal had ceased its mining operations and P&P Coal Company had "purchased a lease and equipment from Smitty Baker Coal Company and opened the former Smitty Baker No. 2 Mine; and Ralph Baker [had] incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation." *Id.* at 3463. The Commission held that "Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P&P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company are jointly and

[7] One week before presiding in the Lowe case, this Court heard the section 105(c)(3) discrimination case brought by Varady against Veris Gold. In that case, this Court also found that Veris Gold discriminated against Varady in violation of section 105(c) of the Mine Act. *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037, 2060 (Sept. 2015) (ALJ). Although the specific acts of discrimination in the *Varady* and *Lowe* matters are distinct, in both matters liability has been established against Veris Gold. As noted, the directions in this Order apply equally to Varady's claim.

[8] Both Lowe and Varady have submitted multiple damage claims. The Court has made no ruling on those claims yet. At the appropriate time, rather than sifting through and comparing their multiple damage submissions, the Court will require one final itemized claim of damages sought by each complainant. The Court also notes and has informed the complainants that some of the claims made are not within recognized Mine Act discrimination damages. Therefore, the Respondents will have an interest in challenging some of those claims.

severally liable for the illegal discrimination against Glenn Munsey." *Id.*, *aff'd Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983).

On the subject of successorship, the Commission further held in *Munsey* that Mason Coal was liable for Baker's discrimination against the complainant. The Commission stated:

> [It] must afford such affirmative relief as will best restore Munsey to the position in which he would have been but for the illegal discrimination. We hold that on the facts of the case reinstatement by Ralph Baker at Mason Coal Company, with such seniority and benefits as Munsey would have had if the illegal discrimination had not occurred, is an appropriate remedy in order to fully compensate Munsey for the effects of the illegal discrimination he suffered.

Id. at 3464. The Commission noted that

> the protections of other [] [labor] statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' acts of discrimination. *E.g.*, *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973); *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *International Technical Products*, 249 NLRB No. 183, 104 LRRM 1294 (1980).

Id. at 3465.

With that in mind, the Commission held that in appropriate cases the successorship doctrine should also be applied in Mine Act cases. In determining whether a new business entity is a successor employer, the Commission held that nine factors should be considered:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Id. at 3465-66 (citing *EEOC v. MacMillan Bloedel Containers, Inc.* 503 F.2d 1086, 1094 (6th Cir. 1974)).

Applying these factors, as relevant to Lowe's (and Varady's) discovery, the questions each would likely have regarding JCG, would be: First, whether JCG "had notice of the charge of discrimination and possible liability at the time of its acquisition of the predecessor's business operations." *Munsey*, 2 FMSHRC at 3466. This would include whether the owners of Veris Gold and JCG discussed Lowe's (or Varady's) discrimination complaints during the negotiations

on the purchase of Veris Gold; whether any of the new owners knew of the Lowe (or Varady)[9] litigation. It is noted that a successor's knowledge of the litigation is sufficient; knowledge of liability is not necessary.[10] It is with regard to this factor that it is proper for Lowe to be able to learn of the connections, if any, between owners, operating officials, officers and management of Veris Gold and JCG and Eric Sprott, and the Whitebox Entities. If, through discovery or through statements already made by counsel, or through the bankruptcy process, there are links between Veris Gold and JCG, not only would this bear on the first factor but, in the event that this Court were to find that JCG is a successor and liable for Lowe's damages, such links may also give any bankruptcy or federal district court pause about the bankruptcy process that occurred in this instance, if asked by JCG to negate such liability under the rubric that the bankruptcy order immunized the successor from all liability. This Court has spoken previously to this point.[11]

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[9] As noted, but with an application of common sense for obvious differentiation between the cases, where Lowe's name is mentioned in connection with the issues of successorship and any links between JCG, Eric Sprott, and the Whitebox Entities, the reference applies equally to Varady's discrimination complaint.

[10] The Commission's view of a successor who tries to avoid liability for a predecessor's acts of discrimination is that it can "protect itself by either an indemnification clause or a lower purchase price in the takeover agreement." *Munsey*, 2 FMSHRC at 3466 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973)).

[11] As this Court noted in its April 8, 2016 Order on Complainant's Motion to Amend to Add Various Whitebox Entities as Parties, it observed that:

> [T]he Purchaser and Debtors happily agreed that none of the factors which would point toward a successorship were present, [it also added that it] would be surprised to learn that the bankruptcy courts engaged in any detailed review of those claims. Rather, [such bankruptcy courts] more likely accepted in good faith that those representations were made to them in good faith and grounded in fact, as opposed to being mere assertions. As mentioned in its Order of March 14, 2016, it is this Court's understanding that bankruptcy courts of necessity rely upon the representations of the parties and the monitor. Depending upon what is learned about the relationships between Veris Gold, Jarrett Canyon Gold, the Whitebox Entities, and the various individuals who may have commonality among those enterprises, the bankruptcy courts may have been misled. Further, a case such as this lays bare the problems identified by the law review commentaries when 11 U.S.C. § 363(f) proceedings supplant those brought under § 1141(c), despite the former's narrower language and the absence of the procedural protections which are available under the latter, all as cited in the Court's previous Order on Complainant's Motion to Amend, issued March 14, 2016. For example, [I]f if through discovery, it is shown that there are individuals who had financial or management interests in Veris, Jarrett Canyon Gold and/or

(continued…)

Second, among the factors to consider in determining if successorship applies, is the ability of the predecessor to provide relief. Lowe is entitled to learn whether Veris Gold has accounts which remain active and the amount of money in them. This is relevant to any monetary award which Lowe may be able to establish as due to him as a consequence of his illegal discharge. However, as Lowe seeks reinstatement, and Veris Gold is no longer in active mining operations, it cannot provide complete relief to him.[12]

The third factor, whether there has been a substantial continuity of business operations, as noted by the Commission, "has been termed the 'successorship keystone.'" *Munsey*, 2 FMSHRC at 3467. An aspect of this factor for Lowe to learn about is the existence and length of any hiatus between the closing of the business under Veris Gold and the reopening by JCG as an alleged successor. This should be simple to determine through interrogatories or requests for admission or the production of documents from JCG. Local newspaper accounts about the operation at the mill may also be used to inform about this issue.

The fourth factor, whether JCG uses the same plant as Veris Gold is plainly apparent, and Lowe should be able to formalize that fact through a request for an admission from JCG to determine whether JCG substantially replaced Veris Gold's operation at the Jerritt Canyon Mill.

The fifth factor, whether JCG uses the same or substantially the same work force as Veris Gold, should be determinable through interrogatories, if not by JCG's admission. Thus, Lowe is entitled to discover the list of employees working at Veris Gold at the time it ceased its operations and the list of employees JCG had when it took over the mining operations at the Jerritt Canyon Mill, including those employees hired by JCG in the immediate months after it took over the Veris Gold operation, for comparison with the predecessor's employment force. This information will enable Lowe to compare the number and identity of employees who worked for Veris Gold with those hired by JCG, a potentially useful comparison, both in raw numbers and by percentage.

The sixth factor, whether JCG uses the same or substantially the same supervisory personnel should also be determinable through interrogatories, if not by JCG's admission. The

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[11] (… continued)
the Whitebox Entities, such linkage could be troublesome and point to the appropriateness of holding others accountable as successors.
38 FMSHRC 866, 872 (Apr. 2016) (ALJ).

[12] An important distinction between the Lowe and Varady litigation is that Varady did not seek reinstatement. Lowe seeks reinstatement. At this post-liability stage, Varady cannot now change his mind and seek reinstatement. The remedy in the case of Lowe would include lost wages, accrued benefits and seniority along with an offer of reinstatement or a settlement amount in lieu of reinstatement. As occurred in the *Garcia* and *Morreale* discrimination litigations, the parties are free to negotiate a settlement as to fair compensation and the Court again strongly encourages this path as a sound way to reach a resolution of the Lowe and Varady matters. This will require reasonableness on both sides.

Court's comments about the fifth factor, above, apply in a similar fashion to learning about this factor.

The seventh factor, whether under JCG the same jobs exist under substantially the same working conditions, should also be determinable through interrogatories, if not by JCG's admissions.

The eighth factor whether JCG uses the same machinery, equipment and methods of production as Veris Gold, should also be determinable through interrogatories, if not by JCG's admissions.

The ninth factor, whether JCG produces the same product, is almost certainly determinable through a request for admission, though interrogatories would likewise be available to overcome any recalcitrance.

It may also be appropriate, if the facts support it, for JCG to simply acknowledge that, under Commission jurisprudence, it is a successor-in-interest to Veris Gold. This would be consonant with JCG's primary asserted defense—that the bankruptcy court's determination insulates it from liability from the discrimination against Lowe.

Even if such an admission is not made, it is important for the parties to appreciate, especially for Lowe, as he is not an attorney, that the assessment of whether the new owner is a successor entity *does not require* that all nine factors must be established by the Complainant. This has special relevance with regard to the first factor,[13] because even if the evidence is inconclusive, consideration of the other factors may warrant a finding that JCG is a successor entity.[14]

Once information regarding these nine factors has been acquired and assembled, Lowe will be in a position to move for summary judgment on the issue of JCG's status as a successor to Veris Gold. If there are legitimate material factual disputes impacting the ability to make a determination of JCG's status as a successor, a hearing may be necessary. In making such a

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[13] In *Morreale*, the complainant alleged "that the primary controller of JCG, Eric Sprott, also controlled Whitebox Investments, the DIP lender that approved the parties' February 20, 2015 settlement agreement." 38 FMSHRC 889, 889 (Apr. 2016) (ALJ).

[14] Again as in *Morreale*, and relevant to the first successorship factor, this Court agrees that Lowe is entitled through discovery to learn the answers to the following questions: 1) Did JCG management learn of the litigation between Lowe or Varady prior to JCG's purchase of the Jerritt Canyon Mill mine? 2) Did JCG management learn of any other pending 105(c) discrimination claims against Veris Gold USA prior to JCG's purchase of Veris Gold? 3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine? and 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control? *See* 38 FMSHRC 889, 890 (Apr. 2016) (ALJ).

determination the Court notes that the Commission has stated "the resolution of any question concerning successorship involves 'striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee.'" *Munsey*, 2 FMSHRC at 3468 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. at 181). As a matter of the Mine Act's aim of rectifying discrimination, the Commission noted that it "has been stated '[w]here the harm to the discriminatee and to the national policy that would flow from a finding of no successorship is great, a substantial amount of harm to the new employer must and will be tolerated.'" *Id.* (quoting *Brown v. The Evening News Association*, 473 F. Supp. 1242, 1246 (E.D. Mich. 1979), and *Golden State Bottling Co.*, 414 U.S. at 181).[15]

The Court notes that a fellow administrative law judge took the same approach—resolving the factual question of JCG's successorship status before proceeding to potential bankruptcy issues—as this Court in another discrimination complaint brought by a different former employee of Veris Gold. *See Morealle*, 38 FMSHRC 889 (Apr. 2016) (ALJ).[16]

Regarding discovery generally, as alluded to earlier, the Court is of the view that much, if not all, of the information Lowe will need to learn about Whitebox Entities' relationships, if any, to Veris Gold and JCG should be available through interrogatories and requests for admissions of

[15] The Court recognizes that *Munsey* arose under the predecessor act to the Mine Act, the 1969 Coal Act. As the Commission observed, "Congress declared in section 2(a) of the 1969 Coal Act that the first priority and concern of all in the coal mining industry must be the health and safety of the miner. Section 110(b) was intended to support and enhance the protection of miners." *Munsey*, 2 FMSHRC at 3469. This led the Commission to conclude that, to meet that objective, and to achieve a full remedy, it was important to hold a successor jointly and severally for illegal acts of discrimination of a predecessor. *Id.* The anti-discrimination provision of the Coal Act applies with equal force to the Mine Act.

[16] In one respect, the Court takes a different view than that expressed by the judge in *Morealle*. There, the judge ordered "further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine . . . to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris." *Morealle*, 38 FMSHRC at 890. This Court believes that, unlike JCG's likely successorship status, it is very unlikely that Eric Sprott and Whitebox Asset Management would be liable as successors in interest. Liability against Sprott and Whitebox Asset Management would seem to be barred absent a showing that the corporate veil of JCG should be pierced—a tall order to meet. However, as noted, learning about Sprott's and Whitebox Asset Managment's relationship to JCG and any relationships or commonality they had with Veris Gold would be informative in assessing the applicability of the first factor, whether JCG, as the potential successor company, had notice of the charge. Accordingly, it is important for Lowe to learn, through discovery, about JCG's, Eric Sprott's and Whitebox Asset Management's relationship to one another and to Veris Gold.

Veris Gold and JCG. The Commission's procedural rules speak to these subjects.[17] Fennemore Craig, P.C., (with locations in Arizona, Nevada, and Colorado, but not Minnesota) is representing Whitebox Entities and has submitted a letter, and later, a response to Complainant's Motion to set Location of Depositions, dated June 24, 2016, that any depositions of Whitebox Entities should be conducted at that entity's Minneapolis, Minnesota offices. The letter and a subsequent response to the Complainant's motion ask the Court to look FRCP 45(c) as to the proper location for a non-party deposition.[18] That provision is invoked for the purpose of requiring that any deposition of Whitebox Entities be held within 100 miles of Minneapolis, Minnesota.

However, the Response acknowledges that the Mine Safety Review Commission's procedural rules provide, at 29 C.F.R. §2700.57(a), for the testimony of any person, including a party, by deposition or written interrogatories. Further, 29 C.F.R. §2700.57(b), provides that "[i]f the parties are unable to agree, the time, place, and manner of taking depositions shall be

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[17] 29 C.F. R. § 2700.58 provides:

> (a) *Interrogatories*. Any party, without leave of the Judge, may serve written interrogatories *upon another party*. A party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25 days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to an interrogatory shall state the basis for the objection in its answer. (b) *Requests for admissions*. Any party, without leave of the Judge, *may serve on another party* a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission. (c) *Request for production, entry or inspection.* Any party, without leave of the Judge, *may serve on another party* a written request to produce and permit inspection, copying or photocopying of designated documents or objects, or to permit a party or his agent to enter upon designated property to inspect and gather information. A party served with such a request shall respond in writing within 25 days of service unless the party making the request agrees to a longer time. The Judge may order a shorter or longer period for responding. A party objecting to a request for production, entry or inspection shall state the basis for the objection in its response.

(Emphasis added).

[18] The Response on behalf of Whitebox Entities does not speak to the location for any depositions of Jerritt Canyon Gold, LLC, Sprott Entities or Sprott individuals. Whitebox Response, at 2. However, the same principles described above would be applied.

governed by order of the judge." Accordingly, the Court need not be guided by the FRCP on this question. However, FRCP Rule 30 offers an alternative to the Court having to resort to ordering that depositions be conducted in Elko, Nevada, by allowing "Remote Means" for a deposition:

> The parties may stipulate—or *the court may* on motion *order—that a deposition be taken by telephone or other remote means.* For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

Fed. R. Civ. P. 30 (emphasis added). *See, e.g.*, *Schoenherr v. Smith*, 2013 WL 2239304, (E.D. MichMay 21, 2013); *Gee v. Suntrust Mortgage, Inc.*, 2011 WL 5597124, at *2 (N.D. Cal. Nov. 15, 2011).

Should the other means of discovery prove insufficient, the Whitebox Entities and Lowe are directed to confer to see if they can stipulate to have the deposition be taken by telephone or other remote means and to so advise the Court of the outcome of their conference.

As expressed above, the Court is not sure that depositions are needed at this point in order for Lowe to learn, and as a potential consequence establish, JCG's status as a successor-in-interest, because interrogatories, requests for admissions, and requests for production of documents may be sufficient. However, learning about JCG's status as a successor may not be enough if, as noted above, Lowe is unable, through such discovery, to learn of the connections, if any, between owners, operating officials, officers and management of Veris Gold and JCG, and Eric Sprott, and the Whitebox Entities. It bears repeating that if it is learned that any individuals or entities were connected with Veris Gold and then through discovery or through statements already made by counsel or through the bankruptcy process, there are links between Veris Gold and JCG, not only would this bear on the first successorship factor but, in the event that this Court were to find that JCG is a successor and liable for Lowe's damages, such links may also give any bankruptcy or federal district court pause about the bankruptcy process that occurred in this instance, if asked by JCG to negate such liability as this Court may find.

The issue of JCG's participation in these proceedings

In separate letters, JCG, through the law firm representing it, Dorsey & Whitney LLP, and Attorneys Mark R. Kaster and Annette Jarvis, advised that it would not be participating in successorship and damages proceedings in the Varady and Lowe matters. Letter from Mark R. Kaster and Annette Jarvis, (Mar. 18, 2016); Letter from Mark R. Kaster and Annette Jarvis, (Mar. 28, 2016). The Court does not read those letters as blanket declinations because in the Varady letter it was framed as a decision to seek discretionary review of the decision adding JCG as a party and, in the Lowe letter, the declination was specifically described as a decision not to participate "at this time," opting for discretionary review there as well. **Accordingly, JCG's attorneys are therefore directed within seven (7) days of this Order to state whether they will be participating in the successorship and damages proceedings in the Varady and Lowe matters.** If JCG decides not to participate, the Court, upon taking notice of such evidence as Lowe may present on the successorship issue, would find JCG in default on the issue of

successorship and will then require Varady and Lowe to separately provide a final submission on the damages claim which the Court will then review and rule upon.

Concluding Remarks

The Bankruptcy Court's appointed monitor itself identifies a sufficient cast of players in the purchase of Veris Gold to warrant a full understanding of their relationships, pre and post Veris Gold's operations. On May 25, 2015, Ernst & Young, as the Bankruptcy Court's[19] appointed monitor, presented its "Sixteenth Report of the Monitor." The Report advises that the DIP lender's wholly owned subsidiary, WBVG, LLC is the DIP Purchaser. Sixteenth Report of the Monitor, at ¶15. The DIP Purchaser has disclosed that, at the closing, the DIP Lender will sell a majority of the membership interest in the DIP Purchaser to 2176423 Ontario Ltd., a company wholly owned by Eric Sprott, or one of his affiliate entities. Mr. Sprott is a holder of a pre-petition royalty interest against the Petitioners and one of his wholly owned entities holds over 20% of the Petitioners' equity. *Id.* at ¶16. The Report relates that on May 8, 2015, the monitor received an "expression of interest" ("EOI") identified only as the "EOI Party" seeking to acquire the Jerritt Canyon Mining Operations. That EOI and later a "Revised EOI" was presented to the DIP. A third EOI was also presented, but it too was not supported by the DIP. The monitor acknowledged that "[w]hile the DIP Lender's lack of support for the various EOIs might be perceived *as a potential conflict of interest*, the Monitor remains of the view that the Credit Bid Transaction is the appropriate course of action at this late stage of the proceedings." *Id.* at ¶39 (emphasis added).

[19] In this instance, that "Court" refers to the Supreme Court of British Columbia.

The Court is fully aware of JCG's continual invocation of the Bankruptcy Court's statements that JCG takes on none of the baggage created by Veris Gold's acts of discrimination. However, as this Court has stated more than once, it believes there were significant procedural and substantive problems with that bankruptcy process and that discrimination is akin to a tort and as such is not the type of activity that bankruptcy law was intended to insulate corporations from escaping. Lowe and Varady have the right to identify, through discovery, whether JCG is a successor entity under Commission precedent and may employ requests for admission, interrogatories, and depositions to determine that. The Complainants also have a right, per the discussion above, to learn the names and interests of those officers and shareholders comprising WBox 2014-1 Ltd, WBVG LLC, Jerritt Canyon Gold LLC, Whitebox Advisors LLC, the Whitebox Entities and Veris Gold.[20]

SO ORDERED.

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

[20] The response from the Whitebox Entities informs that there is no such entity as "Whitebox Asset Mgmt," but MSHA Mine Data Retrieval System lists such an entity, along with Eric Sprott.

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